Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13771
Docket No. 13601
03-2-01-2-1

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen Division
( Transportation Communications International Union
(
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

(1) The Springfield Terminal Railway Company violated the terms of our current agreement, in particular Rule 2 when they arbitrarily allowed strangers to the agreement to repair freight cars in Rigby Yard, South Portland, ME.

(2) That, accordingly, the Springfield Terminal Railway Company be ordered to compensate Mark C. Derocher and A. W. Sears in the amount of six (6) hours pay, each, at the overtime rate."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The instant claim, filed on December 12, 1999, alleges a violation of the Classification of Work Rule by the Carrier's permitting other than Carmen to repair three freight cars in the Carrier's Rigby Yard on October 15, 1999. The work performed by the contractors is identified as straightening and welding broken side posts and sheets on three specific boxcars owned by GE Railcar, which the Organization contends is work reserved to Carmen by Agreement language.

Prior to initiating the claim, the Organization discussed the subcontracting of work at Rigby Yard with the Carrier representatives on October 25 and November 3, 1999, indicating in a letter dated November 7, 1999 that the Carrier had advised it that GE Railcar had leased a specific track in Rigby Yard for its employees to perform this work, and requesting a copy of the signed lease Agreement. Such Agreement was never furnished to the Organization, resulting in their filing this claim. During the on property handling of the case, the Carrier claimed that it had no knowledge of what work was being done, and stated that whatever was being done was neither on its behalf nor at its request as the freight cars in issue were owned by GE Railcar, who had determined to contract out the repairs to the cars deemed unfit for loading paper by the consignee. The Carrier asserted that it had no right to tell GE Railcar who to use to perform the work and that these were not cars with AAR defects. The Carrier did not repeat its assertion that there was any lease Agreement for the track usage. The Organization responded that the Carrier does control who enters its property and for what purpose.

In its final response filed seven months after the Organization's specific written appeal, the Carrier asserted that there was a long-standing practice of allowing car owners to make repairs to cars while on its property without objection from the Organization, citing chemical tanks as an example. The Organization filed its appeal to the Board the day following its receipt of the Carrier's response, and filed a written rebuttal two days later disputing any knowledge of such practice, pointing to the specialized nature of chemical tank trucks, and reiterating its position that it was within the Carrier's province to inform GE Railcar that work performed on its property would have to be done by its employees. The Carrier requests that this untimely correspondence by the Organization not be considered by the Board.

The Organization contends that this case is governed by Second Division Award 12295, which is squarely on point, and holds that work reserved to employees by agreement which is performed on the Carrier's property by other than employees violates the Scope Rule. The Organization argues that, even if the boxcars are owned

by GE Railcar, the Carrier clearly controls its ability to perform the repairs on its property, rather than elsewhere, and could have given GE Railcar the choice to use its employees on the property or contract out the work to be performed elsewhere. The Organization also relies upon Second Division Awards 12349, 12379, 13646 and 12013 in support of its argument that the Carrier violated the Scope Rule in this case.

The Carrier argues that the facts are basically undisputed and show that the Claimants were regularly assigned and working on the claim date, GE Railcar owned the boxcars and was responsible for their maintenance, the cars were rejected by the paper mill as being unfit for loading paper and not for any mechanical defect and the work performed on them was not reserved by Rule 2.1, it was GE Railcar who decided to contract the necessary repairs and the Carrier had no control over such decision or the work performed, citing Third Division Awards 23422, 20156, 20644 and 31013. It asserts that it made business sense to allow this servicing to be performed on its cleanout track in order to enable the cars to return to revenue service more quickly, relying upon Special Board of Adjustment No. 570, Award 989 and Second Division Award 13437. The Carrier argues that, even if the Board finds a violation, the evidence reveals that the work was limited to one hour per car and that payment at the straight time rate is appropriate, making the claim excessive.

Initially the Board notes that the Carrier's raising a past practice argument by assertion for the first time the day before the claim had to be filed with the Board in order to meet time limits, and over seven months after the Organization's response to the Carrier's final denial, precludes it from relying upon the untimely filing of the Organization's denial of such practice to establish it. We have considered both the Carrier's January 18, 2001 letter and the Organization's response dated January 26, 2001, with respect to any new arguments raised therein.

As noted by the Board in Second Division Award 13437, "repairs on privately owned cars done by personnel of the car owner's choice has been a source of dispute on more than one occasion." In that case the Board focused not on the fact that the repairs were performed on the Carrier's property, but that they were done on cars that were not under the control of Carrier, thereby concluding that the Classification of Work and/or Scope Rules did not apply to such work. See, Second Division Awards 7584, 11160, 13196 and 10979 cited therein. Second Division Award 13437 dealt with the same parties as Second Division Award 12295, albeit some seven years later. Thus, the Board did not conclude that the holding in Second Division Award 12295, which found a violation in the performance of the type of work reserved to Carmen by

Agreement on Carrier property by individuals chosen by the owner of the cars needing repairs, precluded the determination that the element of control of the work in issue could support a different result. The same must be said for the other older awards relied upon by the Organization.

A careful review of the record convinces the Board that, while the Carrier did retain an element of control in that it could have required GE Railcar to remove its boxcars from the Carrier property prior to contracting out the repairs, the Organization has failed to sustain its burden of proving that the Carrier had any control over or instigated the decision to have other than its employees perform the necessary repair work, participated in its expense, retained sufficient control over the work performed by GE Railcar's contractor, or benefited in any way from such contracting decision. Even accepting that the disputed work fell within the Organization's Classification of Work Rule, we conclude that the record does not support the finding that the Carrier contracted out the disputed work in this case in violation of such Rule. See, Third Division Award 31013.

## AWARD

Claim denied.

## ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 24th day of October 2003.