Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7495
SECOND DIVISION Docket No. 7218
2-SPT-CM-'78

The Second Division consisted of the regular members and in addition Referee Walter C. Wallace when award was rendered.

Parties to Dispute: (System Federation No. 114, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Southern Pacific Transportation Company

Dispute: Claim of Employes:

1 - (a) That the Southern Pacific Transportation Company, herein after referred to as the Carrier, on July 31, 1975 and August 1, 2, and 3, 1975, knowingly violated Rules 33(a) and 104, of the MP&C Department Agreement in using other than carmen on July 31, 1975 to work on cars:

WCTR 100658	WCTR 100889
WCTR 100560	WCTR 100584
WCTR 100630	WCTR 100707
WCTR 100518	WCTR 100724
WCTR 100741	WCTR 100699
WCTR 100595	WCTR 100713
WCTR 100542	WCTR 100657
WCTR 100624	WCTR 100703

and on August 1, 2, and 3, 1975 violated Rules 33 (a) and 104 of the MP&C Department Agreement in using other than carmen to work on cars August 1, 1975, the same sixteen freight cars, as previously identified, were again spotted on the South Corral Track. Also, on August 2 and 3, 1975, the Carrier knowingly violated Rules 33(a) and 104 of the MP&C Department Agreement in using other than carmen to work on six freight cars:

WCTR 100630	WCTR 100707
WCTR 100741	WCTR 100514
WCTR 100542	WCTR 100886

(b) That Freight Carman M. K. Fox (furloughed carman helper), upgraded, hereinafter referred to as the Claimant, be compensated in the amount of two hours, forty minutes (2'40") at the punitive rate for each one (1) of the forty-eight (48) freight cars repaired by other than carmen during dates of July 31, 1975, and August 1, 2, and 3, 1975, account of said Agreement rules violations.

Findings:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

The essential facts involved here are not in dispute. Freight cars owned by the White City Terminal Union Railroad (WCTU) all recently purchases from Pacific Car and Foundry were to be equipped with a coupler cushion device manufactured by Freight Master. All of these companies are independent of and unrelated to the carrier. A number of these couplers were found defective and required repair on carrier's property under the warranty agreement between the purchaser and seller and manufacturer. The work was so carried out. The claimant is a Carman who claims the work under the applicable agreement citing Rules 33(a) and 104, the latter being the rule dealing with classification of work for Carmen.

The Board has had numerous opportunities to consider the question raised here: when work is performed under a contractual warranty on carrier's property covering work the manufacturer is obligated to carry out, can the affected craft assert that it has rights to such work, regardless of the fact the freight cars were bought, sold and manufactured by those unrelated to the carrier? We believe the organization's claim should be denied. The organization argues there is no exception to the cited rules which would permit this procedure. We do not believe the agreement should be viewed so narrowly. The awards of this Board are persuasive to the effect that work under these circumstances is not within the scope of the agreement. Award 3660 (Bailor). In a more recent case Award 7236 (Roadley) this Board dealt with a case where the defective cars belonged to the carrier and the work was performed on carrier's property stating:

> "There is no question that the work performed was to correct a defect recognized as such by the manufacturer, and not a modification or repair as those terms are generally used, and it is our view that the carrier had the right to seek and expect recourse under the warranty. The Board is cognizant of the diligence of all organizations in policing their labor-management contracts so as to preserve the integrity of their scope rules, but, in the instant case, the Board finds that the contentions of the organization are tantamount to an encroachment upon the prerogatives of management."

In that case the warranty work related to carrier's own freight cars and we believe the results are applicable here a fortiori where the carrier does not own or lease the cars. See Third Division Award 17002 (McGovern) to this effect.

We have reviewed all the awards cited by the organization and they deal, for the most part, with sustained claims where the Carman's scope rule was violated. With one exception possibly, those awards do not involve work covered by warranty agreements as we have here. The one exception is the Third Division Award 11027 (Hall) and there the work involved work claimed by roofers in the Bridge and Building Division of a different carrier. The claim was sustained and the opinion emphasized the fact they dealt with a 15 year bonded room and that was not a valid reason for contracting out the work, daying:

> "... there is no competent proof in the Record that would indicate that this bond would have been available to the Carrier if the work had been done by its own employees."

Here, of course, there is no claim the warranty runs to the carrier. The carrier is not privy to any of those contractual relations and the above award is distinguishable.

The organization makes a few further contentions which we will consider. It is claimed before this Board that carrier did not introduce proof of the contractual warranty as part of the record in the property. Our review indicates that is correct. But we find there was ample discussion of the warranty agreement on the property and representatives of the organization even had dealings with representatives of Freight Master. It is too late to make anything of that argument before this Board when it was not advanced on the property.

The organization also argues that Freight Master "was agreeable, even eager, to have the carrier's employees perform the disputed work". The argument goes on to assert that this fact was neither denied nor refuted by carrier. The organization misses an important point here. The carrier is not accused of depriving the carmen of the work. It is, rather, accused of not carrying out contractual obligations to insure that carmen did the work. Insofar as this opinion concludes the carrier had no such obligation under these circumstances, the carrier cannot be faulted if it did not act as an agent to secure the work for them.

More important still, the suggestions or thoughts expressed by representatives of Freight Master have no binding effect upon carrier. Freight Master is not an agent of carrier and its comments are in the nature of proposals for compromise or settlement. On this basis they are neither persuasive nor probative under the long standing views of this Board.

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For all the reasons stated here we conclude the contract was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of April, 1978.