driver of the interstate shipment, pleaded guilty and testified against Jewell in cooperation with the government. Gentry testified that he and Jewell met Wilburn at Wilburn's trailer to discuss theft of the appliances. At that time, Gentry explained the load's bills of lading. Gentry testified he assumed Jewell knew the load was "hot" or stolen; "[t]hat was the general understanding." After the meeting, Jewell was "supposed to set up something and do something with the load...."

Another government witness, James Smithson, also pleaded guilty to a charge stemming from his involvement in the theft. Smithson testified that he was led to Jewell's house at the end of a back road where the truck was unloaded in the middle of the night. Jewell was present when the goods were being unloaded. The appliances were then stored in the woods near Jewell's house. Lee Wilburn pleaded guilty, corroborated earlier testimony, and testified that Jewell paid him $3,000 for the appliances. The appliances had a wholesale value of $32,843.

Government witness Calvin Bassham pleaded guilty to possession of stolen goods. He testified that Jewell phoned him and asked if he was interested in buying some appliances for approximately $200 apiece. Bassham did so, but had to pay in cash by noon on the day he picked up the appliances. Bassham paid Jewell a total of $4,000 for some of the appliances, several of which appeared to be damaged.

Jewell's motion for a judgment of acquittal at the close of the government's case was denied. Jewell put forth no defense and was convicted. On appeal, he argues that the district court erred in failing to enter a judgment of acquittal on the grounds of insufficient evidence.

A district court has very limited latitude in ruling on a motion for judgment of acquittal.

> A motion for judgment of acquittal should be granted only where the evidence, viewed in the light most favorable to the government, is such that a reasonably minded jury must have a reasonable doubt as to the existence of any of the essential elements of the crime charged. "The evidence need not exclude every reasonable hypothesis except guilt; the essential elements of the crime may be proven by circumstantial, as well as direct evidence."

United States v. Mundt, 846 F.2d 1157, 1158 (8th Cir.1988) (quoting *United States v. Nabors*, 762 F.2d 642, 653 (8th Cir.1985) (citations omitted)).

Proof of knowledge, like proof of intent, is rarely established by direct evidence, but may be proved by all pertinent circumstances. *United States v. Hardesty*, 645 F.2d 612, 614 (8th Cir.1981) (per curiam); *United States v. Jacobson*, 536 F.2d 793, 796 (8th Cir.), *cert. denied*, 429 U.S. 864, 97 S.Ct. 171, 50 L.Ed.2d 144 (1976). Jewell argues that the evidence did not establish that he knew a crime involving stolen goods was to be committed or that he intended to aid the commission of a crime. We believe the jury could reasonably have determined that Jewell knowingly aided and abetted the theft of an interstate shipment. He was present when the bills of lading were examined and his business partners assumed he understood the nature of the venture. The delivery of the goods was hidden. Moreover, the purchase of the appliances at a ridiculously low price and the subsequent sale of the appliances at below market value is sufficient to support an inference that Jewell knew the appliances were stolen. *See United States v. Wilson*, 523 F.2d 828, 831 (8th Cir.1975), *cert. denied*, 434 U.S. 843, 98 S.Ct. 158, 54 L.Ed.2d 117 (1977).

The district court correctly observed its narrowly constricted power of review in dealing with the motion for judgment of acquittal. The circumstantial evidence, viewed in the light most favorable to the government, was sufficient to send the case to the jury and support the conviction. Accordingly, Jewell's conviction is affirmed.

RECOLD, S.A. DE C.V., a Mexican corporation, Appellant,

v.

MONFORT OF COLORADO, INC., a Delaware corporation, Appellee.

No. 89-1146.

United States Court of Appeals, Eighth Circuit.

Submitted Oct. 13, 1989.

Decided Jan. 9, 1990.

After company which purchased refrigeration units from distributor brought state court action against distributor and manufacturer, manufacturer petitioned federal district court to compel arbitration of company's claims. The United States District Court for the District of Nebraska, William G. Cambridge, J., denied manufacturer's motions, and manufacturer appealed. The Court of Appeals, Larson, Senior District Judge, sitting by designation, held that under Colorado law, statute extending seller's warranty to person who might reasonably be expected to use, consume, or be affected by goods did not extend arbitration clause contained in contract between manufacturer and distributor of refrigeration equipment to company which purchased refrigeration units from distributor on theory arbitration clause was limitation of remedies.

Affirmed.

1. Arbitration ⇐1.1

While Supreme Court has announced policy in favor of arbitration to resolve both national and international disputes, arbitration remains dispute resolution mechanism which is not imposed absent both parties' consent.

2. Contracts ⇐187(1)

Company which purchased refrigeration units from distributor was not common-law third-party beneficiary of contract between manufacturer and distributor that was entered into three years before company purchased any refrigeration equipment, so company was not bound by arbitration clause contained in manufacturer-distributor contract.

3. Federal Courts ⇐403

In addressing issue of whether party has entered into agreement to arbitrate under Federal Arbitration Act, courts are to apply general state law principles, giving due regard to federal policy favoring arbitration. 9 U.S.C.A. § 1 et seq.

4. Arbitration ⇐7.3

Under Colorado law, statute extending seller's warranty to person who might reasonably be expected to use, consume, or be affected by goods did not extend arbitration clause contained in contract between manufacturer and distributor of refrigeration equipment to company which purchased refrigeration units from distributor on theory arbitration clause was limitation of remedies. C.R.S. 4-2-318.

Bartholomey L. McLeay, Omaha, Neb., for appellant.

Dirk T. Biermann, Denver, Colo., for appellee.

Before ARNOLD and MAGILL, Circuit Judges, and LARSON,* Senior District Judge.

LARSON, Senior District Judge.

Recold, a Mexican corporation which manufactures refrigeration equipment, appeals from the district court's[1] denial of Recold's motions to compel arbitration and to stay proceedings instituted against Recold in Colorado state court. Recold argues a remote purchaser of its refrigeration units, Monfort of Colorado, should be bound by an arbitration provision in the contract between Recold and the company Monfort bought the units from, Central Ice

* The HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

1. The Honorable William G. Cambridge, United States District Judge for the District of Nebraska.

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Machine Company. Because we agree with the district court that there is no basis for enforcing the Recold-Central Ice arbitration clause against Monfort, we affirm.

I. HISTORY OF THE RECOLD/MONFORT DISPUTE

Recold entered into a contract with Central Ice Machine Company, a Nebraska corporation, on June 15, 1983. The agreement generally provided that Central Ice would purchase custom built refrigeration equipment from Recold. The agreement contained a provision which stated:

> All disputes arising in connection with this Agreement shall be settled in accordance with the Rules of the American Arbitration Association by one or more arbitrators appointed in accordance with the Rules. The place of arbitration shall be El Paso, Texas U.S.A.

The agreement was to remain in effect for 10 years unless terminated due to nonperformance, nonpayment, or the bankruptcy of either party.

Monfort, a Delaware corporation with its principal offices in Greeley, Colorado, began purchasing refrigeration equipment from Central Ice in January, 1986, for use in Monfort's Colorado meat packing plant. Monfort claims that after 70 of the units had been installed, they began expelling zinc flakes into the plant.[2] When attempts to resolve the problem through negotiation failed, Monfort instituted suit against Central Ice and Recold,[3] alleging breach of express and implied warranties, negligence, and product liability. Monfort's complaint requested damages for the cost of replacing the defective units, as well as consequential damages.

On November 9, 1987, Recold moved to stay Monfort's Colorado action pending arbitration.[4] While its request was under consideration by the Colorado state court, Recold also filed a petition in Nebraska federal district court to compel arbitration of Monfort's claims. Recold's petition requested the court to stay the Colorado action and mandate arbitration on the theory that Monfort was a third party beneficiary of the contract between Recold and Central Ice, and thus was bound by the arbitration provision in that contract. After two hearings, the magistrate recommended Recold's request be denied.

Shortly thereafter, the state court issued its decision on Recold's motion for a stay, ruling that Monfort was not an intended beneficiary of the contract between Central Ice and Recold and hence was not bound by their agreement to arbitrate disputes. Recold's mandamus petition was denied by the Colorado Supreme Court, and its subsequent motion for reconsideration was denied by the state district court. In ruling on Recold's motion for reconsideration, the state court specifically rejected Recold's argument that the arbitration provision constituted a valid "limitation of remedies" under Colorado Rev.Stat. § 4-2-318 (1973).

Meanwhile, Recold also filed objections to the magistrate's report, which were considered and ruled upon by the district court herein. While refusing to give preclusive effect to the Colorado court's orders, the district court agreed with the state court's analysis, holding that Monfort, a non-signatory to the Central Ice/Recold contract, was not an intended third party beneficiary of that contract and was not bound by its arbitration clause. On appeal, Recold's primary argument is that Monfort, as a *statutory* beneficiary of a seller's warranty under Colorado UCC § 4-2-318, is subject to any limitations of remedy for breach of warranty included in the Recold/Central Ice contract. One of those limitations, according to Recold, is the arbitration provision at issue in this case.

2. The refrigeration coils were galvanized with a process utilizing zinc. Monfort claims it was required to remove the zinc flakes from the meat stored in the refrigeration units prior to sale, resulting in damages in the form of shrinkage and labor costs.

3. Monfort also sued York International Corporation, a Delaware corporation which owned 49% of Recold's stock prior to November, 1987. After that date, Recold became a wholly-owned subsidiary of York.

4. Because Recold is a foreign corporation, service of the complaint was formally made through Letters Rogatory issued by the Colorado court and authenticated by the Mexican Consulate. York, which had previously been served, had also moved the court, *inter alia*, to stay the action pending arbitration.

II. THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Recold's right to petition for enforcement of the arbitration provision in its contract with Central Ice stems from Chapter 2 of the Federal Arbitration Act. This Chapter pertains to enforcement of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, reprinted after 9 U.S.C. § 201. Both Mexico and the United States are parties to the Convention. As a Mexican corporation which is a signatory to an international contract containing an arbitration provision, Recold may file a petition requesting arbitration pursuant to section 206 of the Act. Section 206 allows United States courts to direct that arbitration be held in accordance with an agreement governed by the Convention. *See* 9 U.S.C. § 206.

While Article II of the Convention requires recognition only of "an agreement in writing," defined as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams," Recold cites section 202 of the Act, which states that an arbitration agreement "arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202.[5] Recold contends Monfort's "agreement" to arbitrate "arises out of a legal relationship" created by statute, i.e., Colo. Rev.Stat. § 4-2-318, which the Convention requires this Court to enforce.

[1] While the Supreme Court has announced a policy in favor of arbitration to resolve both national and international disputes, *see Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-39, 105 S.Ct. 3346, 3359-60, 87 L.Ed.2d 444 (1985), arbitration remains a dispute resolution mechanism which is not imposed absent both parties' consent. *See Volt Information Sciences, Inc. v. Board of Trustees*, — U.S. —, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United States v. Panhandle Eastern Corp.*, 672 F.Supp. 149, 153 (D.Del. 1987). "The 'liberal federal policy favoring arbitration agreements' ... is at bottom a policy guaranteeing the enforcement of private contractual agreements." *Mitsubishi Motors*, 473 U.S. at 625, 105 S.Ct. at 3353. Congress' principal purpose in enacting the Arbitration Act was "ensuring that private arbitration agreements are enforced according to their terms," *Volt*, 109 S.Ct at 1255, not creating such agreements where none exist.

[2, 3] No traditional "private contractual agreement" is at issue in this case. Recold concedes that Monfort is not a signatory to any agreement which contains an arbitration provision, and we agree with the district court that Monfort is not a common law third party beneficiary of the Recold/Central Ice contract, which was entered into three years prior to any purchases of refrigeration equipment by Monfort. *See generally Gallagher v. Continental Insurance Co.*, 502 F.2d 827, 833 (10th Cir.1974). Recold nonetheless maintains an "agreement" to arbitrate arises by operation of Colorado UCC law.[6] We are thus

5. 9 U.S.C. § 2 provides that a written agreement to arbitrate disputes shall be valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Section 2 pertains to maritime transactions as well as to transactions involving commerce generally. *See id.*; 9 U.S.C. § 1.

6. In addressing the issue of whether a party has entered into an agreement to arbitrate under the Arbitration Act, courts are to apply general state law principles, giving due regard to the federal policy favoring arbitration. *Volt Information Sciences, Inc. v. Board of Trustees*, — U.S. —, 109 S.Ct. 1248, 1254, 103 L.Ed.2d 488

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required to examine in some detail Colorado's UCC provisions.

III. ARBITRATION AS A "LIMITATION OF REMEDIES" UNDER COLORADO UCC § 2-318

[4] Recold's argument relies on section 2-318 of the UCC, a section which is generally intended to remove the defense of lack of privity between the plaintiff and the defendant in certain warranty actions. *See generally* 3 R. Anderson, *Uniform Commercial Code* § 2-318:4 (1983). Colorado is one of the minority of jurisdictions which has adopted the most liberal alternative of U.C.C. § 2-318. *See id.* §§ 2-318:2 & 3. Colorado's section 4-2-318 provides:

> A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section.

Colo.Rev.Stat. § 4-2-318 (1973). The parties in this case agree that Monfort is a party "who may reasonably be expected to use, consume, or be affected by" Recold's refrigeration equipment. Thus, under Colorado law, Monfort may maintain a cause of action against Recold for breach of warranty.

The rights of warranty beneficiaries under Colorado law may, however, be subject to certain limitations. The Official Comments to section 318, expressly adopted as the law of Colorado in *Wenner Petroleum Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 748 P.2d 356, 357 (Colo.App.1987), explain that the last sentence of section 2-318 does *not* preclude a seller from limiting remedies in the manner provided for in sections 2-718 and 2-719 of the Code when the remote purchaser is a sophisticated merchant. 748 P.2d at 357. In such a case, the limitations on remedies for breach of warranty are "equally operative against beneficiaries of warranties." *Id.* (citing Official Comment to Colo.Rev.Stat. § 4-2-318 (1973)).

Recold attempts to extend the *Wenner* Court's holding to include the arbitration provision in this case, arguing that an agreement to arbitrate all disputes is an agreement to limit available remedies to an arbitration award. While Recold has cited cases which refer to arbitration as a "remedy," none are directly applicable to the question presented here. Review of other sections of Colorado's UCC lend support to the conclusion that arbitration is *not* one of the "limitations" contemplated by Colorado law as applying to remote purchasers.

First, we note that the Colorado state district court has expressly ruled "arbitration is not a 'remedy' within the meaning of C.R.S. 4-1-201(34) and 4-2-318." Order, No. 86 CV 733 (Colo.Dist.Ct. March 24, 1989). While the district court's interpretation is not binding because the decision is not "sufficiently firm" for purposes of applying the collateral estoppel doctrine, *Carpenter v. Young*, 773 P.2d 561, 568 (Colo. 1989), it is in accord with the definition of "remedy" contained in section 4-1-201(34). Section 4-1-201(34) defines "remedy" as "any remedial right to which an aggrieved party is entitled *with or without resort to a tribunal.*" Colo.Rev.Stat. § 4-1-201(34) (1973) (emphasis supplied). Moreover, sections 2-718 and 2-719, to which section 318 specifically refers, discuss "remedies" such as damages, repair, replacement, or return of goods. *Id.* §§ 4-2-718, 4-2-719. No mention is made of arbitration or of any other dispute resolution procedure. We thus find no indication that the Colorado legislature intended to include "arbitration" as a limitation which could be imposed on remote purchasers by operation of section 4-2-318.

In fact, Recold has presented no case which has held under *any* version of the UCC that a remote purchaser statutory beneficiary of a warranty may be required to arbitrate disputes because of a clause in a contract between the manufacturer and a distributor. We agree with the magistrate that Recold misunderstands the thrust of UCC § 2-318 in arguing Monfort's warranty claims arise from Recold's contract with Central Ice. The Code does not require Monfort to sue under the Recold/Central Ice contract, but rather gives Monfort warranty rights against Recold independent of any contract.

(1989). *See I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396, 399-400 (8th Cir.1986).

IV. CONCLUSION

The Arbitration Act "does not require parties to arbitrate when they have not agreed to do so." *Volt Information Sciences v. Board of Trustees* — U.S. —, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989). Because we find no such "agreement" arises between Monfort and Recold by operation of Colorado law, the district court's order denying Recold's petition to compel arbitration and Recold's motion for a preliminary injunction is in all respects affirmed.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, Appellant,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, Appellee.

No. 88-2142.

United States Court of Appeals, Eighth Circuit.

Submitted Jan. 9, 1989.

Decided Jan. 10, 1990.

Union sought to enjoin railroad from using employees of wholly owned subsidiary to repair and maintain locomotives used by railroad to generate electricity for railroad. The United States District Court for the Western District of Missouri, D. Brook Bartlett, J., denied request for declaratory and injunctive relief. Union appealed. The Court of Appeals, Wollman, Circuit Judge, held that controversy between union and railroad was minor dispute subject to arbitration.

Affirmed.

1. Labor Relations ⇐414

"Major dispute" exists under Railway Labor Act, if one party seeks to change rates of pay, rules, or working conditions in manner not contemplated by collective-bargaining agreement. Railway Labor Act, §§ 1-208, as amended, 45 U.S.C.A. §§ 151-188.

See publication Words and Phrases for other judicial constructions and definitions.

2. Labor Relations ⇐414

Minor changes in working conditions may be implemented while settlement is sought through arbitration under Railway Labor Act. Railway Labor Act, §§ 1-208, as amended, 45 U.S.C.A. §§ 151-188.

3. Labor Relations ⇐414

To determine whether dispute is within agreement of parties and is minor or major under Railway Labor Act, court must determine terms of "agreement," which includes collective-bargaining agreement and past practices. Railway Labor Act, §§ 1-208, as amended, 45 U.S.C.A. §§ 151-188.

See publication Words and Phrases for other judicial constructions and definitions.

4. Labor Relations ⇐414

Serving notice of bargaining proposal was not conclusive proof that controversy was major under Railway Labor Act. Railway Labor Act, §§ 1-208, 6, as amended, 45 U.S.C.A. §§ 151-188, 156.

5. Labor Relations ⇐414

Controversy whether agreement permitted railroad to use nonunion employees of wholly owned subsidiary to maintain and repair locomotives used by railroad to generate electricity could be resolved by interpreting scope clause of agreement between union and railroad and, therefore, was "minor dispute" under Railway Labor Act, even though railroad's argument that elec. tric power purchase agreement permitted it to perform maintenance work on locomotives could be wrong. Railway Labor Act,

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