

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 37001  
Docket No. MW-36520  
04-3-00-3-764**

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

**PARTIES TO DISPUTE: (**  
**(Brotherhood of Maintenance of Way Employees**  
**(Grand Trunk Western Railroad Company, Inc.**

**STATEMENT OF CLAIM:**

**"Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (painting) on the BOC Building at BOC Yard in Hamtramck, Michigan on October 19, 22, 25, 26 and 27, 1999 instead of B&B employees R. E. Crandall and D. Cochran (Carrier's File 8365-1-700).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the work described in Part (1) above, as required by the Scope Rule.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. E. Crandall and D. Cochran shall now each be compensated for eight (8) hours' pay per day for each of the aforesaid dates at their respective straight time rates of pay."**

**FINDINGS:**

**The Third 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.

This dispute concerns the performance of exterior painting work at a building leased by the Carrier from the State of Michigan. There is no dispute that the Carrier failed to give advance notice of its intent to contract out the painting work in issue, because it claimed that this was not scope-covered work inasmuch as the employees have no contractual right to work at this facility based on its lack of ownership.

The record on the property establishes that BMW-represented employees have been utilized by the Carrier on a number of occasions to perform maintenance and repair work at the BOC building, including painting of offices and parking lot lines, fixing windows and doors, repairing the roof, plumbing, hanging pictures and bulletin boards. The Carrier's Senior Engineer asserted that contractors had been used to install water lines, a security fence, roof coating and to maintain the heating and cooling system, and that the work performed by BMW-represented employees was minor and incidental compared to that performed by contractors. The Organization noted that there is no evidence that the Carrier ever used contractors to perform painting work at the BOC building. The Organization requested a copy of the lease to ascertain both ownership and responsibility to perform maintenance on the premises. The Carrier provided only pages one and 11 of the lease, establishing the existence of the lease, but no other information, contending that the contents were confidential. The Organization continued to assert that the Carrier retained responsibility for the maintenance of the building despite the lease, contending that no documentation proved otherwise and relying upon the admitted use of BMW-represented employees to perform much of that work.

The Organization contends that BMW-represented employees have historically and customarily performed maintenance work at the BOC building despite the fact that it is leased premises used by the Carrier in its operations, and that such painting work falls within the parameters of the scope of the Agreement,

requiring notice from the Carrier prior to contracting out the work, and an opportunity to meet to reach agreement. The Organization argues that the notice violation alone requires a sustaining Award, citing Third Division Awards 19426, 20895, 20945, 20950, 21079, 29121, 29312, 29677, 30066, 30746, 30977, 31777, 32320, 32321, 35337; Public Law Board No. 2960, Award 136. The Organization further contends that the Carrier failed to prove its affirmative defense of lack of ownership and responsibility for the work because it did not furnish relevant portions of the lease despite the Organization's request, and did not raise any excuse for the subcontracting until after the claim was filed, requiring that the claim be allowed, relying upon Third Division Awards 28486, 28622, 29016, 29472, 30661, 30746, 30970, 30985, 31622 and 32160. The Organization asserts that a monetary remedy is appropriate for this type of contracting violation, relying upon Third Division Awards 35773, 35774, and 35850.

The Carrier argues that the Organization failed to meet its initial burden of proving that the work in issue was scope-covered, requiring denial of the claim, inasmuch as its notice obligation is based upon such coverage, relying upon Third Division Awards 30675 and 35438. It notes that the evidence establishes that the BOC building is leased from the State of Michigan and, therefore, BMW-represented employees have no contractual right to work on it. It relies upon Third Division Award 32994 with respect to its furnishing only a part of the lease to establish ownership sufficient to support its defense. The Carrier asserts that it established at least a mixed practice of using both contractors and BMW-represented employees to perform repair and maintenance work on this building, and that the failure of the Organization to prove exclusivity under the general Scope Rule negates any violation of the Agreement by contracting in compliance with past practice and the existing rights provision contained within the Scope Rule, citing Third Division Awards 29685, 32912 and 35838. Finally, the Carrier asserts that any monetary remedy would be excessive because the Claimants were fully employed, relying upon Third Division Award 35850.

The focus of the Board in this case must be on whether the Organization met its initial burden of establishing that the painting work at the BOC building was arguably scope-covered, thereby shifting the burden to the Carrier to prove why it failed to give notice of the contracting and its affirmative defense of lack of ownership. A careful review of the record convinces the Board that the Organization provided substantial evidence to establish that BMW-represented employees have been used to perform painting work at the BOC building in the

past, as well as other repair and maintenance work, and that the Carrier admitted as much when it asserted a mixed practice. In a contracting dispute of this nature, the Organization need not establish exclusivity to bring the work within scope coverage, but only that BMW-represented employees have customarily and historically performed work of this nature at this facility. See Third Division Awards 31752 and 35835. It met this burden.

Thus, the Carrier's admitted failure to give advance notice of the contracting to the Organization, or to provide it with an opportunity to meet and discuss its plans for the performance of the work, violated the Agreement. Further, the Board concludes that the Carrier failed to prove its affirmative defense upon which it based all of its actions in this case, namely, that it was not responsible for the performance of the work in issue because it merely leased the premises from the State of Michigan. The record establishes the lease arrangement, but nothing else. The Carrier clearly had control over who was to perform the painting work in issue as well as past maintenance and repair work done at the BOC building. There is no contention that it was the State that actually contracted the instant work. The record evidence is clear that the Carrier controls the performance of the maintenance work at this facility. Its failure to provide sufficient information from its lease to establish otherwise, unlike the situation in Third Division Award 32994, leaves the record devoid of evidence to support its affirmative defense. The record reveals that prior painting work at this facility was performed by BMW-represented employees, not contractors.

Accordingly, the Board finds that the Carrier violated the Scope clause of the Agreement by failing to give the Organization notice of the contracting and an opportunity to discuss the possibility of BMW-represented employees performing the painting work as they had done in the past. With respect to the appropriate remedy, we conclude that the rationale utilized by the Board in Third Division Awards 35773 and 35774 on this property is equally applicable herein and requires a finding of a lost work opportunity meriting compensation for the Claimants.

### AWARD

Claim sustained.

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**ORDER**

***This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.***

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

**Dated at Chicago, Illinois, this 18th day of May 2004.**