

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37143
Docket No. MW-36430
04-3-00-3-699

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
(Union Pacific Railroad Company (former Chicago and
(North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Ambrose Landscaping) to perform Maintenance of Way and Structures Department work (place dirt) on the north side of the West Chicago Depot platform at Mile Post 29.8 on the Geneva Subdivision on August 31, 1999, instead of Messrs. R. Wagner, E. M. Fleming, W. J. Borden, Jr. and J. D. Slivka (System File 9KB-6571T/1210853 CNW).**
- (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 above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Wagner, E. M. Fleming, W. J. Borden, Jr. and J. D. Slivka shall now each be compensated at their respective straight time rates of pay for an equal proportionate share of the nine (9) man-hours expended by the outside forces in the performance of the aforesaid work."**

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 a contractor's performance of work involving the placing of dirt on the north side of the platform at the West Chicago train depot. The claim asserted that such contracting, for which the Carrier paid \$1700.00, was covered by the Scope Rule and specifically reserved to BMW-employees. The record reflects that there is a lease covering the passenger station and land entered into between the Carrier and the City of West Chicago on March 8, 1997, for a period of 20 years, preserving the use of the station for railroad business, but granting the City of West Chicago control over the property. Among other things the lease provides that responsibility for the maintenance and repairs of the station, fixtures, and appurtenances rests with the City, including any single item of less than \$2500.00, while the Carrier retains the responsibility to make structural repairs to the building. On the property the Carrier claimed no knowledge of the specifics of the subcontract, asserting that it was not involved in any way with it, and that the contract was entered into by the City of West Chicago for its benefit and under its control.

The Organization contends that such work, which is a necessary and integral part of right-of-way maintenance, falls within the parameters of the Scope Rule of the Agreement which has been found to be a reservation of work Rule (Third Division Award 2701) requiring notice from the Carrier prior to contracting out the work, and an opportunity to meet to reach agreement. The Organization argues that the admitted lack of notice alone requires a sustaining award and reveals the

Carrier's bad faith, citing Third Division Awards 26770, 29121, 29312, 29677, 30066, 30746, 31777, 32320, 32321 and Public Law Board No. 2960, Award 136. The Organization further contends that the Carrier failed to prove its affirmative defense of lack of control over the work because there is no showing that the lease was in effect on the relevant date or that this work fell within the Lessee's responsibility rather than the Carrier's. It relies upon numerous Awards for the proposition that exclusivity has no application to a dispute involving contracting out. The Organization asserts that a monetary remedy is appropriate for this type of contracting violation despite the Claimant's employment on the claim date, because the facts establish a true loss of work opportunity, relying upon Third Division Awards 37022, 32878, and 32862 among others.

The Carrier argues that the Organization failed to meet its burden of proving that the work in issue was scope-covered, requiring denial of the claim. It notes that the evidence establishes that the Carrier uses the depot as a railroad commuter facility, but that the building and outside property is leased to the City of West Chicago, which controls all matters pertaining to the operation and maintenance of the property, and actually did the contracting protested herein without any input from the Carrier. The Carrier contends that the work in question was not for its benefit or under its control, as established by the lease and other documents, and there is no Scope Rule violation, citing Third Division Awards 32994, 32810, 31234, 30965, 26103, 25011, and 20644. The Carrier also asserts that any monetary remedy would be excessive because the Claimants were fully employed, relying upon Third Division Awards 31652, 31288, 31284, 31171, and 30166.

The determinative issue in this case is whether the disputed work of moving dirt to an area adjacent to the West Chicago station platform was contracted out under the Carrier's control, an issue not raised in any of the cases cited by the Organization. As noted in Third Division Award 31234, the Board has long held that where work is not performed at the Carrier's instigation, under its control, at its expense or exclusively for its benefit, contracting is not a violation of the Scope Rule of the Agreement. See also Third Division Awards 32994, 32810, 30965, and 26103 which deal with contracting under a lease situation. In the instant case, the terms of the lease, which were shared in full with the Organization during discussions on the property, reveal that the work in question fell within the City's area of responsibility and control, including the monetary value of the contract.

The record also establishes that the Carrier was not involved with the subject contracting, retained no control over the work performed under it, was not exclusively for its benefit, and did not pay for its completion. Under such circumstances, we conclude that the work did not fall within the Scope Rule of the Agreement in this case, and the Carrier was not obligated to give the Organization notice of the disputed contracting.

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 Third Division**

Dated at Chicago, Illinois, this 25th day of August 2004.