Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37144
Docket No. MW-36465
04-3-00-3-728

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 Employes
(
(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 (Illinois Constructors Corporation) to perform Maintenance of Way and Structures Department work (remove and install concrete) on the east end of the Harvard Depot beginning September 23 through October 1, 1999, instead of Messrs. G. Groskinsky, M. Waller, J. Kuter, L. Broederdorf and L. Peterson (System File 9KB-6586T/1213667 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 G. Groskinsky, M. Waller, J. Kuter, L. Broederdorf and L. Peterson shall now each be compensated at their respective straight time rates of pay for an equal proportionate share of the two hundred forty (240) 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 the performance of concrete work involved in replacing an existing walkway from the parking lot at the Harvard train depot with a wheel chair ramp in order to comply with the Americans with Disabilities Act (ADA). The claim asserts that the Carrier impermissibly contracted such work which was covered by the Scope Rule, and specifically reserved to BMWE-represented employees who performed it in the past, without prior notice to the Organization.

The record reflects that there is a lease covering the Harvard passenger station entered into between the Carrier and the City of Harvard, Illinois, on January 1, 1994 for a period of 20 years. Among other things the lease preserves its use as a railroad commuter station, lists the City's desire to "control and maintain access to said station" and its responsibility to maintain the premises in accordance with applicable laws, 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, and requires the city to submit plans to the Carrier prior to making any improvements to the premises. On the property the Carrier claimed that the contract was entered into by the City of Harvard for its benefit and in compliance with applicable federal law, the work was not done under the Carrier's control, and it was not maintenance and repair work but was new construction, not encompassed under Paragraph 30 of the lease. It also noted that when the station was rehabilitated in 1994, the Organization received notice of the fact that the

platform construction was to be contracted out, and it was. The Organization submitted a statement from BMWE-represented employees that they had done similar ADA-related work at other facilities in the past.

The Organization contends that such work 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 the terms of the lease do not establish that this work fell within the Lessee's responsibility rather than the Carrier's, noting that the contract was for an amount far in excess of $2500.00. 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 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 is leased to the City of Harvard, which controls all matters pertaining to the operation, maintenance and improvement of the property, is responsible to assure compliance with all federal laws including the ADA, 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, was intended to join the parking lot owned by the City with the leased premises not the platform, making the Scope Rule inapplicable to the assignment of this work, citing Third Division Awards 20644, 25011, 26103, 30965, 31234, 32810, and 32994. The Carrier also asserts that any monetary remedy would be excessive because the Claimants were fully employed, relying upon Third Division Awards 30144, 31171, 31288, 31284, and 31652.

The determinative issue in this case is whether the disputed concrete work involved with removing and replacing the concrete steps and walkway with a wheel chair ramp to connect the parking lot with the Harvard depot was contracted out under the Carrier's control, an issue not raised in any of the cases cited by the Organization. It is not disputed that, if there was no lease covering this premises, the work involved would be subject to the requirements of the Scope Rule. 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, the contracting is not a violation of the Scope Rule of the Agreement. See also Third Division Awards 26103, 30965, 32810, and 32994 which deal with contracting under a lease situation. In the instant case, paragraphs 2 and 7 of the lease reveal that assuring compliance with applicable laws, herein the ADA, and maintaining and controlling access to the station, fall within the City's area of responsibility and control. The Organization was unable to show that the $2500.00 threshold contained in paragraph 30 for structural type repairs to the building caused by ordinary wear and tear, for which the Carrier is responsible, governs the instant circumstance, because the construction of a new concrete ramp does not fall within such maintenance provision. Because the record establishes that the subject contract was entered into by the City, the Carrier retained no control over the work performed under it which was not exclusively for its benefit, and did not pay for its completion, the Board is of the opinion that the Carrier did not violate the Scope Rule of the Agreement in this case.

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.