CORRECTED

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 29677
Docket No. MW-29940
93-3-91-3-325

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former
(Missouri Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to remove old crossing plank and ties and replacing same in a crossing just south of the south switch at Cochran, Kansas on February 28, 1990 (Carrier's File 900240 MPR).

(2) The Agreement was further violated when the Carrier failed and refused to furnish the General Chairman with advance written notice of its intention to contract out said work as required by Article IV and the December 11, 1989 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operator K. D. Eichelberger shall be allowed eight (8) hours at the straight time rate of pay and any overtime worked by the contractor on February 28, 1990."

FINDINGS:

The Third 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.

Without first giving notice to the Organization, the Carrier engaged outside forces on February 28, 1989, to remove old crossing planks and ties.

The Organization alleges that this work has customarily and traditionally been assigned to and performed by members of the Organization and that Carrier, without giving advance notice as required by the Agreement, allowed the work to be performed by the outside forces. The Carrier, on the other hand, contends that this is work which has historically been performed by other than Maintenance of Way employees, and is not work which is exclusively reserved to them under the Agreement.

Article IV of the National Agreement is pertinent to a resolution of this dispute, and reads as follows:

> "ARTICLE IV - CONTRACTING OUT
>
> In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.
>
> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction the designated representative of the company shall promptly meet with him for that purpose. Said Company and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting but if no understanding is reached the Company may nevertheless proceed with said contracting and the Organization may file and progress claims in connection therewith.
>
> Nothing in this Article IV shall affect the existing rights of either party in connection

> with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith."

While the Carrier argues first that it would not in any event be required to furnish advance notice because the Organization has not demonstrated its exclusive rights to the work in question, this contention has been consistently rejected by the Board in a long line of cases. In Third Division Award 28622, the Board stated:

> "After consideration of this matter, it is our view that Third Division Award 28619, is dispositive of the instant case. Pursuant to Rule 52(a) the parties have agreed that work customarily performed by employees can be contracted out in certain enumerated circumstances provided that the required advance notice is provided. Whether or not Carrier ultimately prevails on the merits of the dispute, it is our conclusion that it may not make a predetermination on the subject by ignoring the notice requirement when there is a valid or colorable disagreement as to whether the employees customarily performed the work at issue. That was our conclusion in Award 28619, as well as Third Division Awards 26174, and 23578."

It is likewise well-settled that the exclusivity test, while appropriate for certain other disputes, is not applicable to contracting out cases (see, for example, Third Division Award 24280).

The record in this case demonstrates a mixed practice on this property with respect to the work in question. It has apparently been performed by members subject to the Agreement in the past but has also apparently been contracted out by the Carrier in the past. Thus, while the work could, based on the record before us, be contracted out under the provisions of Article IV, the Carrier is required to give notice before doing so.

The only remaining issue is the question of damages. The record is undisputed that the Claimant was fully employed on the date in question and suffered no monetary loss. Accordingly, no monetary damages will be awarded.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever cae
Nancy J. Dever - Secretary to the Board

Dated at Chicago, Illinois, this 29th day of June 1993.