Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35378
Docket No. MW-34089
01-3-97-3-536

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railway Company (former Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned employes of the Union Pacific Railroad Company (former Chicago and North Western Transportation Company) to cut weeds and brush on property owned and maintained by the Soo Line, between Mile Posts 151.0 and 117.5 (Faribault and Rosemount, Minnesota) on November 7, 8, 9, 10, 16, 18, 21 and 30, 1995 (System file C-35-95-C080-12/8-00263 CMP).

(2) As a consequence of the violation referred to in Part (1) above, the employes assigned to Brush-cutting Crew #G-14 under the supervision of Foreman R. Berg shall each be compensated at their respective time and one-half rates for an equal proportionate share of the one hundred thirty-four (134) hours expended by the Union Pacific Railroad Company employes in the performance of the work in question."

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.

It is undisputed that the Carrier did not provide the Organization with advance notice that the work in dispute would be performed by outside forces. It is further unrefuted on this record that the Carrier had full knowledge that Union Pacific forces would be performing the brush cutting. Although the Carrier raises a number of defenses to the instant claim, the primary basis for its denial is that the Organization failed to establish scope coverage by demonstrating exclusive past performance of the work in question. Thus, the Carrier maintains that notice was not required.

The Carrier's reliance on the exclusivity doctrine as a defense to the instant claim is misplaced. It is well settled by a veritable plethora of Third Division Awards elsewhere and recent Awards between the instant parties (e.g., Third Division Awards 31386, 31388, 32777, 32861, and 32863) that a demonstration of exclusive past performance is not necessary in contracting-out cases. The advance notice requirement is triggered simply be establishing that the employees have previously performed the work in question. In this dispute, the Organization fulfilled this burden of proof by providing signed statements as well as a number of past job bulletins reflecting assignments to brush cutting crews. Thus, the Organization established its entitlement to advance notice. The Carrier's failure to provide it completes the proof of violation of that portion of the Scope Rule.

The notice provisions have, for many years, reflected the parties' intent to provide the Organization with the opportunity to meet with the Carrier and discuss means by which contracting out work can be minimized. Indeed, this was one of the primary purposes of the December 11, 1981 Letter of Agreement these parties included in Appendix I of their Agreement. To that end, the trend of recent years has been to view clear notice violations as a loss of work opportunity for the Carrier forces because it deprives the Organization of the opportunity to meet with the Carrier and to pursue discussions that might result in retention of the work on the property. That trend has been recognized and adopted on this property by the same five Awards cited in the previous paragraph.

Accordingly, we must sustain the merits of the claim. The amount of damages, however, requires further discussion. The Organization claimed pay at the overtime rate and the Carrier disputed the propriety of this rate. It is noted that the five on-property Awards cited above, all of which involved contracting situations where no notice was provided, did not explicitly award damages at the overtime rate. Three of the Awards expressly claimed only the straight time rate. The other two Awards did not seek anything more specific than ". . . all wage loss suffered . . ." or ". . . their respective rates. . . ." It does not appear those two decisions awarded the overtime rate. Given this precedent, our award is limited to the straight time rate.

The precise number of hours involved is also not clear. As a minimum, we award a total of 86.4 hours to be divided equally between the three Claimants to be paid at their respective rates. The case is remanded to the parties to determine

whether the total number of hours to be divided between the Claimants is higher and may be as great as the 134 hours claimed. If so, we award that higher total.

AWARD

Claim sustained in accordance with the Findings.

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 20th day of March, 2001.