Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36225
Docket No. MW-35809
02-3-99-805

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Soo Line Railroad 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 outside forces (Ron Lenz Excavating) to perform Roadway Equipment and Machine Sub-department work (operated an excavator to remove spoiled ballast from crossings) at road crossings at 12th Street, 13th Street, and 68th Street on the Watertown Subdivision on August 3, 4, 6, 10, 11, 17, 18, and 19, 1998 (System File C-22-98-C080-04/8-00228-032 CMP).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract said work as required by Rule 1.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Mr. J. O. Jones shall be compensated for seventy and one-half (70 1/2) hours' pay at his time and one-half rate."

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.

The Carrier undertook the contracting as described in Part (1) of the claim. The Carrier failed to provide advance notice to the General Chairman. The Carrier argues that it was not required to provide advance notice, stating as follows:

> "[T]he Scope Rule allows the contracting out of work which is not exclusively reserved to the Organization. When such work is not exclusively reserved, the Carrier is not obligated to provide notice."

Not only is the Carrier's reasoning in gross error, but the same argument has been rejected in numerous Awards over many years.

The NOTE to the Scope Rule states:

> "In the event the Carrier plans to contract out work within the scope of this agreement, the Carrier shall notify the General Chairman 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."

The work here under review is indisputably of a nature covered by the Scope Rule. Nothing in the NOTE states or implies that in addition the work must be shown to be "exclusively reserved." Rather than review at length the fallacy of the Carrier's position, the Board simply draws attention to previous Third Division Awards involving the same parties and resolving the same issue:

Award 32863:	"The Organization is not required to demonstrate that the employees performed the work on an exclusive basis." This Award cites Awards 31388 and 31386 to the same effect.
Award 35378:	"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 Carrier failed to prove its "exclusivity" argument through citation of Third Division Award 30115, involving the same parties. That denial Award reached the following conclusion:

> "[T]he Organization has not demonstrated that the type of clean-up work here in dispute is reserved to Maintenance of Way employees by either Agreement Rule, custom, practice or tradition." (Emphasis added)

Award 30115 does not mention "exclusivity." Rather, the Award states the work simply did not "belong" to Maintenance of Way employees in any circumstances, which is quite a separate concept.

It follows that, as has been stated in many previous Awards, the failure to provide notice to the General Chairman requires a sustaining Award.

As to the appropriateness of a monetary remedy for a Claimant already under pay, this, too, has been supported by innumerable Awards in the face of a clear Rule violation. Following the reasoning in Award 35378, however, the appropriate rate of pay is at straight time rather than at the claimed time and one-half.

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 24th day of September 2002.