Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36527
Docket No. MW-35491
03-3-99-3-377

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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 routine Engineering Services Crane Subdepartment work (operate excavator to remove spoiled ballast from the roadbed) at various locations on the former Chicago, Milwaukee, St. Paul and Pacific property beginning August 25 through October 20, 1997 (System Files C-46-97-C080-12/8-00228-017, C-43-97-C080-09/8-00228-023, C44-97-C080-10/8-00228-024, C-62-97-C080-15/8-00228-026, C-63-97-C080-16/8-00228-027, C-55-97-C080-14/8-00228-028 and C-45-97-C080-11/800228-025 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 out said work as required by Rule 1.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Mr. W. Konetzke shall now be compensated for one hundred seventy-four (174) hours' pay at his applicable time and one-half rate of pay."

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.

On the property, each of seven claims was independently progressed. There is a clear record that the separate claims were progressed at different times and the Carrier correctly notes that the claims were given different dates for extension of time limits. On the various dates of claim, the Organization presents argument that the work performed by an outside contractor had been performed by the employees. It argues that the work was Scope protected. It further argues that in each of the instances at bar, the Carrier violated Appendix I of the Agreement in failing to provide prior notification before contracting the work to an outside contractor.

The Carrier argues that the seven claims were improperly combined before this Board. It argues that the combined cases are fundamentally different in fact and circumstance. Moreover, the Carrier never agreed to the consolidation of claims. The Carrier representative to the Board argues strongly that this consolidation is not only fatal to the progression of this claim, but also that the claim has been amended. It began as a single claim for one date and has been presented herein as encompassing dates prior and subsequent thereto.

On the merits, the Carrier denies any violation and makes numerous arguments, emphasizing that "it is the obligation of the Organization to prove the work involved is exclusively reserved" to its members. It maintains no Agreement violation in that even though the Organization has occasionally done the work. As for notice, the Carrier argues that the "idea of a notice is to advise when exclusive work is restricted from

contracting" (emphasis in original). The Carrier maintains that this is an issue previously decided on this property (Third Division Award 30115).

The Board studied this voluminous record. We note that by letter dated March 29, 1999, the Carrier confirmed conference of August 7, 1998 and December 1, 1998 covering ten claims involving four different Claimants. In the Carrier's letter of March 29, 1999, it provided an eight page detailed response with more than 85 pages of supporting documentation. Our study of the claims at bar is that they are all interrelated. The combined claims include the same Claimant, same basic dispute and cover the same alleged Rules violation. Although the Carrier argues now that these are distinct claims and amended, the Board finds otherwise. While dates, locations and the specificity of the work may differ, the similarity of these claims is clear. The Board holds that they have not been improperly filed and it will not dismiss the claim as it stands before us.

Therefore, on the merits, the Carrier failed to provide evidence of record that the work herein disputed is of a nature that the Claimant would not have performed it. The Carrier's exclusivity argument has no merit. Nor does its reliance on Third Division Award 30115, which denied the Organization's claim due to the fact that the work contested did not belong to the employees "by either Agreement, Rule, custom, practice or tradition" have merit. Here, the Carrier admits that the work disputed has been performed by the employees, but emphasizes "exclusivity."

The Board has forcefully stated countless times that when the Carrier fails to provide advance notice to the General Chairman of contracting out, it will constitute a clear violation. The Board has stated numerous times that the defense of exclusivity lacks merit. As stated in Third Division Award 35571 between these same parties:

> "As in past cases, once again, the Carrier tries to defend its utter failure/refusal to provide the advance written notice required by Appendix O of the controlling Agreement by trotting out the shopworn contention that such notice and opportunity for consultation are required only if the work contracted out is "exclusively" reserved for performance by the Organization. For reasons fully explained in a series of Awards between these same parties dating back to at least 1993 on this same issue, the Board once again roundly rejects that thoroughly discredited and erroneous contention."

In full consideration of the entire record and all of the evidence at bar, the Board concurs with the above cited Award. It is not relevant in this instant case that the Claimant was not available to perform the work, as proper consultation might have avoided lost work opportunity. The Claimant is to be compensated at his straight time rate of pay for all hours performed by the outside contractor.

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 23rd day of April 2003.