Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30941
Docket No. MW-28111
95-3-87-3-686

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 Carrier violated the Agreement when it assigned outside forces to perform track work in connection with grade crossing renewal projects at Highway 176 on April 19 and 20, 1986, at Touhy Avenue on April 26 and May 3, 1986 and at Puetz Road on May 10 and 11, 1986 (System File C#8-86/800-46-B-245).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) As a consequence of the aforesaid violations, Machine Operator D. C. Hoover shall be allowed forty-nine (49) hours of pay at $19.29 per hour ($945.21) and twenty-four (24) hours of pay at $18.54 per hour ($444.96) for a total of $1,390.17."

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 waived right of appearance at hearing thereon.

On April 19, 20 and 26, 1986, the Carrier utilized outside forces (Ray Strome Company) for the operation of a Hydra-Ho machine to assist the Carrier's forces in renewing crossings. On May 10, 1986, the Carrier similarly utilized outside forces (Phillips Asphalt Company) to operate an end loader. The operators of the equipment removed material and ballast in the renewal work. Assuming for the sake of discussion that the Organization's arguments are all contractually correct (i.e., that notice was required and not given and that the work fell within the purview of the Scope Rule), nevertheless, on the basis of the evidence before us, this claim must be denied.

First, the record shows that the Carrier does not own a Hydro-Ho and a Gradall was not available to do the work. While the Organization points out that the Carrier has similar equipment at other locations, the Carrier's assertion that the equipment alluded to by the Organization (a speed swing and front end loaders) were either too slow, did not meet the requirements for the expeditious type of weekend work that was involved, or should not be moved by trailer (which the Carrier also did not possess) have not been sufficiently and factually refuted. The record therefore does not sufficiently establish that the Carrier had the necessary equipment available to perform the work.

Second, a condition of the rental agreement with the contractor was the requirement that the Carrier utilize the rental company's operators. The record therefore does not show that the Carrier could have rented the equipment for use by its employees.

Third, the record shows that in the past the Carrier routinely contracted out similar work without objection from the Organization. Therefore, the lack of objection by the Organization for similar kinds of actions by the Carrier effectively lulled the Carrier into presuming that such contracting out was permissible. Under the circumstances, no affirmative relief could be awarded even assuming that the Carrier's assumption was contractually incorrect.

## AWARD

Claim denied.

O R D E R

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 29th day of June 1995.