Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35936
Docket No. MW-34773
02-3-98-3-485

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Indiana Harbor Belt 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 (Lotz Excavating Company) to perform Maintenance of Way work (remove track, excavate the roadbed, replace track, dump ballast and resurface Track #21) at LaGrange, Illinois on April 7 through April 11, 1997 (Carrier's File MW-97-028).

(2) As a consequence of the violation referred to in Part (1) above, Messrs. J. Moreno, J. Franco, G. Reno, R. Carrejo, J. Olvera, A. Razo, J. Ortiz, R. Mascote, G. Solis, J. Nunez and F. Villarreal shall each be allowed forty (40) hours' pay at their respective straight time rates and seventeen and one-half (17.5) hours' pay at their respective time and one-half rates."

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.

Claimants J. A. Ortiz, G. H. Solis, J. Nunez and F. F. Villarreal established and held seniority as Vehicle Operators and each possessed a current Commercial Drivers License (CDL). Claimants J. Moreno, J. M. Franco, G. J. Reno, R. Carrejo, J. Olvera, R. Mascote and A. Razo established and held seniority as Machine Operators. At the time of the incident in question, the Claimants were regularly assigned to positions in their respective classes and were immediately available.

On April 7, 8, 9, 10 and 11, 1997, the Carrier assigned outside forces (Lotz Excavating Company) to remove track, excavate the roadbed, replace track, dump ballast and surface Track No. 21 at LaGrange, Illinois. The contractor's forces, none of whom possessed seniority or work rights under the Agreement, used two end loaders, two excavators, a dozer, a roller/compactor and four dump trucks to perform the subject work. The outside forces performed the subject work on each of five claim dates, working a total of 40 hours straight time and 13 hours overtime. The Carrier notified the General Chairman in writing of its plans to contract out the work involved here. The Carrier alleged that it did not have the proper equipment to complete this job. These facts do not appear to be in dispute.

The Organization takes the position that the Carrier violated the Agreement in this case. First, it claims that the subject work consisted of ordinary track maintenance and construction work, i.e., vertical clearance or upgrade of existing trackage and right-of-way. According to the Organization, the Carrier made no attempt to rent or lease equipment for its forces to perform the subject work. The Organization claims that the Carrier had an obligation to attempt to do so, allowing bargaining unit employees to complete the work. The Organization contends that the work done by Lotz Excavating Company is properly considered the regular work of the Organization and therefore, such work should have been completed by the Claimants. Because the Claimants were denied the right to complete the relevant work, the Organization claims that the Claimants should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. First, the Carrier contends that the work completed by the outside contractor involved only the necessary subgrade excavation so that the Organization's members could rebuild the tracks. Members of the Organization performed all track construction and completed the final grading. The Carrier takes the position that it acted in compliance with the "Good Faith" letter of December 11, 1981 which provides, in relevant part:

> "The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees."

According to the Carrier, the work performed by the outside contractor required specialty equipment and operators to perform the relevant work on this project. As to the compensation of the Claimants, the Carrier takes the position that there was no loss of work and therefore no compensation should be awarded. The Claimants were fully employed and therefore no compensation is necessary.

After a review of the evidence, the Board finds that the Organization has been able to sustain its burden of proof in this matter. The work involved appears to have been within the jurisdiction of the Organization. We reviewed Third Division Award 35771 and note that to be a very similar case. It involved the same parties as those in the instant matter. In that case, the Carrier assigned an outside contractor to excavate, fill grade and place sub-ballast on tracks. Like the instant case, the Organization argued that the Carrier violated the Agreement when it made no good-faith effort to rent or lease equipment. In that case, according to the Carrier, the sole reason for the contracting was that it did not posses the necessary equipment to do the work. The Board held:

> "On the property, the Carrier did not contend that the track work involved was outside the scope of the Agreement.... Its sole defenses on the merits were the general assertions that the Carrier did not have the equipment or the qualified operators to perform the work."

In addition, in Award 35771 it was unrefuted that the relevant equipment could have been leased from a nearby concern. In the instant case, we find that it appears to be clear that the work involved in this matter rightly belongs to the Organization. Further, we find that the equipment used by the contractor could have been operated by the Claimants. Based on these conclusions, we find that the disputed work was contracted in violation of the parties' Agreement.

Having determined that the Carrier violated the Agreement, an appropriate remedy must be fashioned. The record reflects that the contractor's forces worked a total of 40 hours straight time plus 13 hours overtime. According to the Carrier, the Claimants should not receive any compensation because they were fully employed during the relevant period. However, the Organization points out that being fully

employed does not preclude the Claimants from receiving compensation for the lost work opportunity.

As the Board indicated in Third Division Award 32128:

"The purpose of a remedy is to make the affected employees whole. Here, the covered affected employees lost work opportunities. Make whole relief requires that they be compensated for those lost work opportunities."

Based on the record in the instant case, it is clear that the contractors worked 40 hours straight time and an additional period of time at an overtime rate. However, the overtime period is unclear. In its claim, the Organization indicated that there were 17.5 hours of overtime, but at another point, indicates that there were only 13 hours of overtime. In light of this inconsistency, the Board is remanding the matter to the parties to determine the correct number of hours worked by the contractor so that the Claimants may be properly compensated for any hours of straight time and overtime to which they are entitled.

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 February, 2002.