NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 29866
Docket No. MW-29932
93-3-91-3-312

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned or otherwise permitted outside forces (Stubner Vacuum Company) to clean culverts, switches and material from switches in the Conway Yard, Conway, Pennsylvania beginning on January 17, 1990 and continuing (System Docket MW-1090).

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

(3) As a consequence of the violations in Parts (1) and/or (2) above, Claimants D. Campbell, M. C. Strasser and D. Burkett shall each be allowed ten (10) hours of pay at their applicable rates for each day the violation occurs."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

This claim concerns an allegation that the Maintenance of Way Agreement was violated when, on 11 dates in January 1990, Carrier employed an outside contractor to clean culverts and switches at Conway Yard, using a vacuum truck with an operator in the employ of the contractor. Carrier maintains that it has traditionally contracted out this type of cleaning activity and supports this contention by references to past claims brought by the Organization which were denied by its highest designated officer to handle claims and grievances and were never appealed further.

The Organization has offered nothing to overcome these assertions. Accordingly, the Board must conclude that a practice is in place of contracting out this specific activity. In this regard attention is directed to an earlier award involving similar arguments between these same parties. In Third Division Award 29558 the Board concluded:

> "In this instance, the Carrier relies on long-established practice of contracting out this particular work. There is no clear prohibition to the Carrier's use of the special equipment, particularly in view of the past practice in doing so."

The record dictates that the same result be reached here. The claim is without merit. It will be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.

LABOR MEMBER'S DISSENT
TO
AWARD 29866, DOCKET MW-29932
(Referee Fletcher)

When considering the problems facing this Board, this Member sincerely appreciates this Referee's straight forward approach. However, that approach should be based on the evidence developed during the handling on the property and the principles adopted by the Board over the years. Since this award was based on alleged evidence submitted by the Carrier in its submission to the Board and since the Majority ignored a very basic principle in claim and grievance handling, a dissent is required.

At Page 2 of the award, it was stated that "*** Carrier maintains that it has traditionally contracted out this type of cleaning activity and supports this contention by references to past claims brought by the Organization which were denied by its highest designated officer to handle claims and grievances and were never appealed further." While it is true that the Carrier did assert during the handling on the property that it had contracted out this type of work in the past, it did not present any evidence in support thereof. It was not until the Carrier presented its submission to the Board that it referenced two (2) prior claims by claim number in alleged support of its position. The Organization properly objected to the argument raised in connection therewith within its September 25, 1991 letter of objection. For whatever

reason, it was improperly considered. The NRAB has consistently held that it cannot consider material not exchanged by the parties during the handling on the property and I will not burden this record with a lengthy citation of those awards.

More disturbing is that the Majority would consider two (2) claims that were not progressed by the Organization off the property as being precedent. Third Division Award 28047 held:

> "Initially the Board notes that the Organization's failure to progress an earlier claim analogous to that herein does not constitute a precedent controlling the issue herein. Dropping a claim, which might occur for various reasons, does not per se result in any establishment of a principle for future disputes."

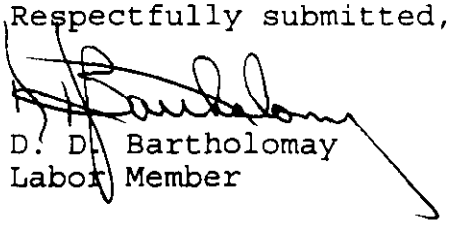
Third Division Awards 16018 and 20041 among others held to a like effect.

Even more disturbing is the Majority's pronouncement that the two (2) claims abandoned by the Organization on the property constitute "*** a practice is in place of contracting out this specific activity. ***" and then quote from Third Division Award 29558 which talks about "... long-established practice of contracting out this particular work. ***" Even assuming the two (2) abandoned claims could be considered as precedent, and considering this is an industry that has a history of over hundred (100) years,

how can two (2) instances of any action be considered a long-established practice.

This award is not based on the facts of the record as developed on the property and is therefore palpably erroneous. Therefore, I dissent.

Respectfully submitted,



D. D. Bartholomay
Labor Member