NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 31527
Docket No. MW-31362
96-3-93-3-222

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Kansas City Southern Railway Company

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

(1) The Agreement was violated when, on September 19, 20 and 23 through 27, 1991, the Carrier assigned outside forces (David Arrington) to burn brush and tie butts (which had been previously cut and piled along the right of way) between Mile Posts T-108 and T-109 and mow the right of way through city limits of Winnsboro, Texas between Mile Posts T-116 and T-120 [Carrier's File 013.31-320(490)].

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Section Foreman R. Oney and Laborers M. D. Bradshaw and A. J. Ray shall each be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours [sixteen (16) hours straight time and four (4) hours overtime on each of the cited dates] expended by the outside forces."

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.

The Organization bases its claim upon the allegation that Carrier contracted with one "David Arrington to burn brush...and mow the right of way through the city limits of Winnsboro, Texas" on specific dates in September 1991.

In Carrier's first response to the claim filed, it stated in its letter of January 9, 1992, that:

> "... Records do not reveal a contractor by the name of David Arrington of Winnsboro, Texas, performing any service for this Carrier on the dates claimed or at the Mile Post locations given in claim."

Thus Carrier did challenge the authenticity of the Organization's claim. At this juncture, it became necessary for the Organization to establish the bona fides of its claim. This it did not do, leaving this Board with an irreconcilable dispute in facts and no other alternative than to dismiss the claim.

AWARD

Claim dismissed.

ORDER

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 25th day of July 1996.

LABOR MEMBER'S DISSENT
TO
AWARD 31527, DOCKET MW-31362
(Referee Hicks)

The Organization is impelled to dissent to the Majority's findings because it is apparent that such findings are clearly erroneous which renders this award without precedential value. During the handling of this case on the property, the Carrier never denied that the work was performed during the dates claimed. The only defense raised by the Carrier was that it had no record of a contractor by the name cited by the Organization performing work on the claim dates. The Organization's identification of the contractor became immaterial because the Carrier never disputed that the work was performed as claimed. Within its submission to this Board, the Carrier raised for the first time that no work was performed at the location cited and on the dates claimed. That of course is too late for this Board to consider as it was not timely raised while the case was being handled on the property. The issue in this case was an outside contractor performing brush cutting work, which this Board has consistently held to be scope covered work. Awards 29513 and 29479. For this Board to consider new argument as a basis for denying the claim renders this award palpably erroneous and worthless as precedent. The outcome of this award was not based on the record developed during the handling of

this dispute on the property, is of no probative value and therefore I dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member