

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 31605  
Docket No. MW-30828  
96-3-92-3-650**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

(Brotherhood of Maintenance of Way Employees

**PARTIES TO DISPUTE: (**

(Kansas City Southern Railway Company

**STATEMENT OF CLAIM:**

"1) The Agreement was violated when Carrier assigned outside forces (JWT) to cut brush and trees and pile same for burning at road crossings located between Pittsburgh (Mile Post T-98.3) and Winnsboro (Mile Post T-117.7), Texas on December 3,4,5,6 and 7, 1990 [Carrier's File 013.31-320 448)].

2) The Agreement was violated when Carrier assigned outside forces (JWT) to cut brush and trees and pile same for burning at road crossings located between Winnsboro and Como, Texas on December 10, 11, 12, 13 and 14, 1990 [Carrier's File 013.31-320 449)].

3) 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.

4) As a consequence of the violations referred to in Parts (1) and/or (2) above, Section Foreman R. Oney and Laborers M. Bradshaw and G. Duffey, Jr. shall each be allowed pay at their respective straight time rates of pay for an equal proportionate share of the one hundred fifty (150) man-hours expended by the outside forces.

5) As a consequence of the violations referred to in Parts (1) and/or (2) above, Section Foreman R. Oney and Laborers M. Bradshaw and G. Duffey, Jr. shall each be allowed pay at their respective straight time rates of pay for an equal proportionate share of the one hundred fifty (150) man-hours 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.

Carrier denied the claim on a number of grounds, but we need comment only upon one. By letter of February 23, 1991, Administrative Manager Engineering Field Linda S. Corley advised the Organization as follows: "Also, in checking records, I do not find where any contractor worked between Pittsburgh, Texas and Winnsboro, Texas, on the dates you have claimed performing the work you have claimed". Even after this material fact was put in dispute by Carrier, the Organization provided no persuasive evidence that the outside forces had in fact performed the claimed work at the claimed locations on the claimed dates. Rather, the Organization simply appealed the denial with the bare assertion: "I have not found that any claimants or members have turned in claims that were frivolous."

Frivolity is not the issue. Proof of alleged facts is the issue. As the moving Party, the Organization bears the overall burden of persuasion and the initial obligation to prove every material fact necessary to make out a prima facie claim, especially after Carrier flatly challenges the accuracy of alleged operative facts giving rise to the claim. The Organization failed to meet that burden of proof on this record.

**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 29th day of August 1996.