

CORRECTED

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31606
Docket No. MW-30842
96-3-92-3-675**

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

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employees**
(**Kansas City Southern Railway Company**)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside contractor (C.W. & W.) to clean out the drainage ditches between Mile Posts T-97.5 and T-98.3 on February 11, 12, 13, 14 and 15, 1991 [Carrier's File 013.31-320(454)].

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Agreement when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work and failed to make a 'good-faith' effort to reduce the incidence of subcontracting and to use its own forces to the extent practicable.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Ditcher Operator A. J. Moore and Helper R. A. Forgione shall each be allowed ten (10) hours' pay for each date cited in Part (1) above, at their respective straight time rates, for the time expended by the outside forces in the performance of said work."

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.

A. Moore and R. Forgione (Claimants) hold seniority in Carrier's Track Sub-department. Claimants were regularly assigned and working in their respective classifications when this dispute arose. The Organization filed a claim on behalf of Messrs. Moore and Forgione, alleging that Carrier had violated the Agreement when it contracted with C.W.& W Contracting to perform work which members of the Organization had "traditionally and historically" performed.

According to the General Chairman, on February 11 through 15, 1991, C.W.& W used two (2) men with a track hoe and "small 'dozer" to clean drainage ditches between Mile Post T-97.5 to T-98.3. The General Chairman asserted that the work could have been performed by Claimants, had the Carrier "used its owned equipment."

Carrier denied the claim, maintaining that the work in dispute had not been assigned "exclusively" to members of the Organization, but had been both "historically and traditionally been performed by other employees in the Maintenance of Way Departments, as well as non-company personnel and equipment." Carrier further maintained that the Organization did not provide "any evidence" that the work had been performed on the dates alleged, let alone "any evidence" that its members had customarily performed the work at issue.

As the moving party, it was incumbent upon the Organization to prove, through a preponderance of record evidence that: (1) Carrier contracted with an outside concern to perform the work of cleaning drainage ditches on the dates in dispute; and, (2) The clearing of drainage ditches is work which accrues exclusively to members of the Organization. Bare assertions are not evidence, especially when material facts supporting the claim are challenged as to factual accuracy and such challenges go unanswered.

From the outset, Carrier maintained that there were "no records" of drainage ditch work performed between Mile Post T-97.5 and T-98.3 on claim dates and that it had no knowledge of such work by any outside contractor on February 11 through 15, 1991. If the Organization had appropriate evidence to support its assertions, that evidence was not made part of the record. Therefore, we have no alternative but to dismiss the claim for failure to make a prima facie case.

AWARD

Claim denied.

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.