Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 43147
Docket No. MW-42676
18-3-NRAB-00003-140199

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company former Burlington
(Northern 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 (Industrial Lubricant) to perform Maintenance of Way and Structures Department work (fill wayside greasers) in the Lincoln Yards at the B3 and B4 track and CP45 on March 26, 2012 (System File C-12-C100-321/10-12-0486 BNR).**

2) **The Agreement was violated when the Carrier assigned outside forces (Industrial Lubricant) to perform Maintenance of Way and Structures Department work (fill and maintain TOR units) at Mile Posts 4.6, 8.1 and 24.65 on the Creston Line on March 27, 2012 (System File C-12-C100-322/10-12-0487 BNR).**

3) **The Agreement was violated when the Carrier assigned outside forces (Industrial Lubricant) to perform Maintenance of Way and Structures Department work (transfer TOR product from ground to truck) at Forest City, Missouri on March 28, 2012 (System File C-12-C100-323/10-12-0488 BNR).**

4) **The Agreement was violated when the Carrier assigned outside forces (Industrial Lubricant) to perform Maintenance of Way and Structures Department work (fill wayside units on the Sioux City Sub, Mile Post 1.03 and on Creston Sub, Mile Post 34.5 and then**

pull TOR unit on the Saint Joseph Sub, Mile Post 159.00) on March 29, 2012 (System File C-12-C100-324/10-12-0489 BNR).

5) **The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notice of its intent to contract out said work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 55 and Appendix Y.**

6) **As a consequence of the violations referred to in Parts (1) and/or (5) above, Claimants S. Hughes and C. Rogers shall each be compensated for eight (8) hours' straight time and for two and one-half (2.5) hours' overtime at their respective rates of pay.**

7) **As a consequence of the violations referred to in Parts (2) and/or (5) above, Claimants S. Hughes and C. Rogers shall each be compensated for six and one-half (6.5) hours' at their straight time rates of pay.**

8) **As a consequence of the violations referred to in Parts (3) and/or (5) above, Claimants S. Hughes and C. Rogers shall each be compensated for eight (8) hours' at their applicable straight time rates of pay.**

9) **As a consequence of the violations referred to in Parts (4) and/or (5) above, Claimants S. Hughes and C. Rogers shall each be compensated for eight (8) hours' straight time and for three and one-half (3.5) hours' overtime at their respective rates of pay."**

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 S. Hughes and C. Rogers have established and hold seniority as track maintainers and were regularly assigned and working as such during the time giving rise to this dispute.

The dispute is comprised of four claims that were initiated and progressed separately on the property. They involve the same Claimants, same rules and "virtually identical" fact patterns.

According to the Organization, on March 26, 27, 28 and 29, 2012, the Carrier assigned an outside contractor, Industrial Lubricant, to perform Maintenance of Way and Structures Department work as set forth in the claims without prior notification to the General Chairman. The work was routine rail maintenance work that should have been performed by Carrier employes.

The Organization asserts that no appropriate notice was given to the General Chairman.

The Carrier denied the claim primarily because the Organization did not meet its initial burden of proof.

In Third Division Award 32351, Referee Zusman explained the Organization's initial burden in contracting-out cases:

> **"The burden of proof for the instant claims belongs to the employees. They must initially demonstrate that the work herein contested belongs to the employees and is encompassed by the scope of the Agreement...Even the statements of the employees do not attest to the**

> **instant work belonging to the craft or performed thereby. Accordingly, the claim must be denied."**

And even though BNSF repeatedly requested proof, the Organization failed to provide any evidence to support its erroneous position. The only "evidence" that the Organization offered in support of its case are two statements.

These statements are initially suspect as to their accuracy and veracity. First, the one authored by Mr. Robert Arnold was originally given to BNSF on May 17, 2007 – almost five years before the initial date of the occurrence. And Mr. Arnold was merely a Claimant in his respective case that he penned the letter for.

Next, the second letter's author was not able to even state rudimentary facts, such as what gang he was a part of when he supposedly witnessed this alleged work. Further, this second statement is nothing more than an unsubstantiated repetition of the Organization's claim.

The first statement is a hand-written statement given to the Organization on August 28, 2006 with a notation for another claim. According to Arnold, he and another employe worked with Industrial Lubricant installing and repairing oilers in March, April and May, 2006 (Carrier's Exhibit 5).

The second statement is an email dated November 5, 2012 from Scott Smith as follows:

> **"In response to your question about the Industrial Lubricant technician working on the Hiline Sub: I have taken Tom Miller, the technician for Industrial Lubricant, out several times to work on both gage face greasers and top of rail greasers. I have worked with him installing carpet on several gage face greasers. I have also signed his work orders each time. He has been to Essex and worked extensively on our tanks that fill the wayside greasers. Industrial lube has worked on the Hiline for quite some time, and Tom Miller is now the "local" representative that works on all of the lubricators on both the Hiline and the Kootenai. He recently went to Texas to pick up a hyrail truck that will be used for filling wayside greasers."**

Sorry it took me so long to respond, and enjoy your Retirement!
Scott (Carrier's Exh. 5)

It is axiomatic that the Organization has the burden of proof to show that the underlying facts supporting its position that there was a contractual violation actually occurred. Here, the evidence provided by the Organization is simply insufficient. A statement from five or six years before the alleged claim arose is not persuasive. The second email is so vague as to be insufficient to show an actual violation.

Given the Organization's failure to meet this initial burden of proof, the claim must be denied.

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 30th day of May 2018.