

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43564  
Docket No. MW-42831  
19-3-NRAB-00003-150028**

**The Third Division consisted of the regular members and in addition Referee Michael G. Whelan when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**  
**(BNSF Railway Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (install a track switch and spread ballast) at Mile Post 192.68 on the Hannibal Subdivision of the Springfield Division on July 16, 2013 (System File C-13-C100-350/10-13-0627 BNR).**
- (2) 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.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Adams, J. Whitehead, R. Jarvis, M. Semande, S. Mohr and E. Allen shall each now be compensated for eight (8) hours straight time and two (2) 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.**

**This dispute involves the Carrier's alleged assignment of outside forces from contractor Midwest Railroad Company to install a track switch and spread ballast at Milepost 192.68 on the Hannibal Subdivision on July 16, 2013.**

**The Organization argues that the work of right of way construction, maintenance and repair is reserved to Maintenance of Way employees under the Agreement and has been customarily, historically and traditionally been performed by Maintenance of Way forces. Further, the Organization argues that the Carrier failed to comply with the advance notice and meeting requirements of the Note to Rule 55 and Appendix Y. Based on these arguments, the Organization submits that the Claimants are entitled to the remedy requested in Paragraph (3) above.**

**The Carrier argues that the Organization did not prove that the alleged violation occurred or that Maintenance of Way forces had customarily performed this work on a system-wide basis to the exclusion of others, and that Appendix Y is not applicable. The Carrier also argues that the Organization has failed to prove actual damages.**

**In contracting cases, the Organization bears the initial burden to demonstrate a claim to the work under the Agreement, and to produce sufficient evidence to establish a violation of the Agreement. See Third Division Awards 36208. In order to attempt to meet its burden to provide sufficient evidence that the violation occurred, the Organization submitted a claim authored by Claimant J. Whitehead. In that claim letter, Claimant J. Whitehead included the date of the alleged violation and offered his account of what he witnessed, writing that "the Carrier contracted with Midwest Railroad. They used a group 2 end loader, three track hoes, a sectionman and a foreman. I was there and witnessed them installing the witch. They used the track hoes to install the switch and the end loader to spread ballast." Because the**

claim was submitted by a witness to the alleged contracting, the statements by Claimant J. Whitehead are more than simply allegations; they constitute sufficient evidence to establish a *prima facie* case. During further processing of the claim on property, the Carrier introduced an email from a representative of Mid-West Railroad Construction LLC, in which the contractor states that it “did not perform work for BNSF for the dates in question.” This evidence is sufficient to rebut the Organization’s *prima facie* case, and there is no other evidence in the record that addresses the issue of whether the contractor performed the work in question. Upon review of this evidence, it must be concluded that there is an irreconcilable dispute of fact. When there are irreconcilable disputes in essential facts, the Board must dismiss the claim. See Third Division Awards 31831, 32942, and Public Law Board 3460, Award 78.

**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 27th day of March 2019.