

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43707  
Docket No. MW-42595  
19-3-NRAB-00003-140289**

**The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 Carrier violated the Agreement when it assigned outside forces (R. J. Corman) to perform Maintenance of Way and Structures Department work (remove ballast) in and around switches at Mile Post 425.50 on the Butte Subdivision on December 18, 19 and 20, 2012 (System File C-13-C100-185/10-13-0257 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an 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 L. Gettert and J. Sisneros shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay and for one (1) hour at their respective time and one-half 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.

According to the Organization, on December 18, 19 and 20, 2012, the Carrier improperly used a contractor to perform bargaining unit work—removing excess ballast from around newly placed switches—in and around Mile Post 425.50 on the Butte Subdivision. In addition, the Organization contends, the Carrier violated the Agreement when it failed to provide advance notice of its intent to contract out the work or to make a good-faith effort to reduce the incidence of sub-contracting. However, the record includes a statement via e-mail from the contractor, R. J. Corman, that it did not perform the disputed work at the claimed location on the claimed dates: in response to a query from the Carrier about invoices and/or time sheets for the dates, the contractor responded: “I have no record of work being performed by RJ Corman, matching that outlined in the claim below.”

The evidence from the Organization consists of photographs and a statement given to the Carrier over a year later. The photographs are undated and without any context. The statement is also undated, so it is impossible to tell whether it was written close in time to the incident or at some later point. The Organization’s evidence is not sufficient to rebut the evidence from the contractor that it did not perform the work that was the subject of the Claim. The Board concludes that there is an irreconcilable dispute over the fundamental underlying fact of whether the events occurred as claimed or not. As numerous prior Boards have held, in such cases the Claim must be dismissed.

### AWARD

Claim dismissed.

**Form 1**  
**Page 3**

**Award No. 43707**  
**Docket No. MW-42595**  
**19-3-NRAB-00003-140289**

**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 18th day of June 2019.**