

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43711  
Docket No. MW-42609  
19-3-NRAB-00003-140294**

**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 (winterize switches) between Mile Posts 14.7 and 59.7 on the Orin Subdivision on September 17, 18, 19, 20, 21, 24, 25, 26, 27, 28 and October 1, 2012 (System File C-13-C100-115/10-13-0152 BNR).**
- (2) The Agreement was further violated when the Carrier failed to 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 B. Prickett and B. Rodriguez shall now each be compensated for eighty (80) hours at their respective straight time rates of pay and for twenty-five (25) hours 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 September 17, 18, 19, 20, 21, 24, 25, 26, 27, 28 and October 1, 2012, the Carrier improperly used a contractor to perform bargaining unit work—winterizing switches—between Mile Posts 14.7 and 59.7 on the Orin 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 do not have record of us performing these services in the specified location.”

The evidence from the Organization consists of a statement given to the Carrier more than a year later. While the statement is detailed, it is undated, so it is impossible to tell whether it was written close in time to the incident or at some later point, which significantly undermines its weight and credibility. 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**

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**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.**