

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43715
Docket No. MW-42615
19-3-NRAB-00003-140311**

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 Agreement was violated when the Carrier assigned outside forces (R. J. Corman) to perform Maintenance of Way and Structures Department work (remove and install a swing nose frog and related work) on Mainline Track 2 at Mile Post 585.4 on the Blackhills Subdivision on January 27 and 28, 2013 (System File C-13-C100-228/10-13-0306 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 J. Deeth, M. Lind, A. Martin and V. Havorka shall now each be compensated for eight (8) hours straight time and six (6) hours and fifty-nine (59) minutes 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.

According to the Organization, on January 27 and 28, 2013, the Carrier improperly used a contractor to perform bargaining unit work—removing and installing a swing nose frog and related work—on Mainline Track 2 at Mile Post 585.4 on the Blackhills 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 dated March 19, 2013, the contractor responded: “I have no record showing any work performed, as described in the time claim submitted below.”

The evidence from the Organization consists of statements from the Claimants describing the work at issue. Only one of them is dated, and neither was given to the Carrier until almost a year later.

The Board is faced with apparently contradictory statements. In cases where there is an irreconcilable dispute in facts, numerous prior Boards have held that the appropriate course of action is to dismiss the case. The Organization argues that they do not constitute an “irreconcilable dispute in facts” and that it is possible for both sets of statements to be true: the fact that the contractor has “no record” of the work being performed does not mean that it did not happen as described in the Claimants’ statements. The Organization further contends that its more detailed statements establish a *prima facie* case that should outweigh the “generic” statement from the contractor. This case illustrates the dilemma faced by the Board in cases of irreconcilable facts: because the Board does not conduct an evidentiary hearing in the traditional sense, it can be difficult for it to determine the weight and credibility to give to evidence that is in the record. The Claimants’ statements do provide sufficient information to establish at least the rudiments of a *prima facie* case. But there is no

reason for the Board to dismiss the contractor's statement. There is no evidence that the contractor was dishonest in its response to the Carrier's query or any other reason not to take it at face value. The Organization dismissed the statement as "generic," but it is hard to be specific about an event that did not occur. As a result, the Board is unable to determine whose evidence to believe—and that is the essence of an irreconcilable dispute in facts. Consistent with authority developed by prior Boards, the Claim must be dismissed.

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 18th day of June 2019.