

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43825
Docket No. MW-44089
19-3-NRAB-00003-170225**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(Kansas City Southern Railway Company
Formerly SouthRail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Steel City Contracting) to perform Maintenance of Way work (replacement of rail in road crossings) between Mile Posts 136 and 218 on the Artesia Sub near Scooba, Mississippi, and failed to assign the work to Messers. J. Comer, J. Mayo, J. Dempsey and M. Moss (System File C 14 05 12/K0414-4941 MSR).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto regarding the aforesaid work and when it failed to assert good-faith efforts to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Comer, J. Mayo, J. Dempsey and M. Moss shall ‘... be allowed ten (10) hours per day regular rate of pay for seven (7) days totaling \$1934.10 for the Foreman, and \$1071.50 for the Laborers plus late payment penalties based on a daily periodic rate of .0271% (Annual Percentage Rate of 9.9%) calculated by multiplying the balance of the claim by the daily**

periodic rate and then by the corresponding number of days over sixty (60) that this claim remains unpaid.’ (Emphasis in original).”

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.

The Carrier and the Organization operate on the Carrier’s properties under three separate collective bargaining agreements. This case arises under the MidSouth Rail Agreement (MSR).

This Claim arose when the Carrier allegedly assigned an outside contractor, Steel City Contracting, to replace rail in crossings at various locations on the Artesia Subdivision from May 12 to 20, 2014. According to the Organization, four contractors were replacing rail in road crossings, using one foreman and three laborers, working ten hours per day for seven days. The Carrier’s records, as set forth in its initial response, dated August 13, 2014, and again in its December 10, 2014, response to the Organization’s appeal from the original declination, “the contractor(s) cited *performed no work on the following claims: . . . K0414-4941/C 14 05 12 Comer, J.R., et al — May 12-20, 2014 (as noted in claim) — Replace Rail in Road Crossings — Mile Post 136-218 — Scooba, MS — Contractor: Steel City.*” (Emphasis in original.)

The Organization contends that the Carrier violated the parties’ Agreement in several ways. First, the work of replacing rail in road crossings is customary

Maintenance of Way work and is reserved to MoW forces by the Scope Rule, Appendix 1. Contracting out of such work is subject to the terms of the Side Letter dated February 10, 1986. The Carrier violated the Agreement when it failed to comply with the advance notification and conference provisions. In addition, it failed to show any reasonable justification for assigning this work to outside forces and failed to raise any valid defense for its violation.

According to the Carrier, the Organization has failed to meet its burden of proof. There is a long history of contracting out on the Carrier's property, and there is a mixed practice of using Carrier forces and outside forces across the system. That fact alone warrants denying the claim. In addition, the Carrier followed the contracting procedures agreed by the parties in the February 10, 1986, Letter of Understanding. It sent its Annual Notice of Intent to contract out work on its properties for the following year on December 17, 2013, and Steel City Contracting was one of the contractors listed. The Annual Notice advises the Organization that the Carrier has neither the necessary equipment nor the manpower available to complete the work referred to in the notice in a timely fashion and that its own forces would be fully engaged in other projects. More importantly, however, there is no evidence here that the work occurred as alleged in the Claim—the Carrier's records found that no work was performed by Steel City for the alleged dates and mile posts cited.

The threshold issue in this case is the dispute between the parties as to whether the work occurred as alleged or not. The Carrier records do not show Steel City Contracting having performed the work in dispute on the dates or in the locations set forth in the Claim. The written statements in the record from the Organization are dated more than two months after the work was supposed to have occurred, which leaves open the distinct possibility that the information contained in them is not accurate.

This Board has noted before that the record in a case may be such that it is not in a position to resolve factual disputes between the parties. When that happens, the dispute in facts is deemed irreconcilable, and the Board is required to dismiss the case. This is a case where the evidence in the record is insufficient for the Board to draw any conclusions about which party's evidence is more credible. The facts are irreconcilable, and the Board must rule accordingly.

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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 4th day of September 2019.