

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43837
Docket No. MW-44707
19-3-NRAB-00003-180185**

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: (

**(Kansas City Southern Railway Company
Former SouthRail Corp.**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when, on August 2 and 3, 2016, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (unloading rail) near, in-between or at Mile Post 288 and Mile Post 286 at Saltillo, Mississippi and Mile Post 284 to Mile Post 280 at Tupelo, Mississippi on the Artesia Sub [System File C 16 08 02 (053)/K0416-6914 SRL].**
- (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 as required by the Side Letter of Agreement dated February 25, 1988 and the December 11, 1981 National Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant J. Comer shall now ‘... be compensated eight (8) hours at the regular rate of pay for two (2) day (s (sic) which totals \$453.60 for the Machine Operator 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 South Rail Agreement (SLR).

This Claim arose when the Carrier allegedly assigned an outside contractor, McHann Contractors, to unload rail from a rail car on August 2 and 3, 2016, near or between Mile Post 288 and Mile Post 286 in Saltillo, Mississippi, and near or between Mile Post 284 to 280 in Tupelo, Mississippi. Both locations are in the Artesia Subdivision. According to the Organization, one contractor employee used a Track Hoe to unload the rail. The original claim was accompanied by a form, Initial Questionnaire/Information Form for Claims or Grievances, attached to which was a sheet with handwritten statements from the Claimant and another MoW employee, attesting to the fact that they had witnessed the contractor performing the work in dispute. According to the Carrier, however, its records do not show that McHann Contractors performed the work cited in the claim, although it is a contractor that the Carrier has used and it was identified in the December 15, 2015, Annual Notice of Intent to contract for calendar year 2016.

The parties having been unable to resolve the dispute through the grievance process, the matter was appealed to the Board for a final and binding decision.

The Board must address first the threshold issue of the dispute in facts. As this Board has noted in previous awards, where there is a dispute in facts that cannot be resolved on the basis of the information in the record, the Board must find the factual dispute to be irreconcilable and dismiss the claim. The information in the record is not sufficient for the Board to draw any conclusions about whether McHann performed the work or not, and if it did, when. The Organization contends that the Carrier has not submitted any records to document that McHann did *not* work (such as a statement from a Roadmaster). Mere assertions, the Organization argues, are not evidence. That is correct. However, the Carrier makes the same argument about the statements from the Claimant and another MoW employee—they are assertions, not proof. This conundrum illustrates why the Board dismisses cases involving irreconcilable factual disputes. The problem with the statements submitted by the Organization is that they have limited credibility. The two statements are terse. The one from the Claimant reads: “I Jared Comer ... witness [sic] McHann Construction on KCS at Saltillo MS and Tupelo MS between milepost 288 and 286 unloading rail with a Trackhoe with one man on 8/2 and 8/3/16.” The statement is undated and there is no indication when it was prepared or submitted. The other statement reads: “I Dwight Johnson seen McHann on KCS on 8/2 and 8/3/16 unloading rail between milepost 288 and 280 with a Trackhoe in Tupelo MS and Saltillo MS.” The statements appear to have been drafted and written by the same hand—literally. The handwriting is exactly the same, *including the signatures*. The content of the statements is suspiciously similar: the two statements do not exhibit the small differences in details that one ordinarily expects when two different people recount their memories of the same event. These problems significantly undermine the credibility of the statements. As for the Carrier’s burden, it can be difficult to prove a negative: if the work did not occur as alleged, there is no record for it to show to the Organization. As for a statement from a Roadmaster, it might be possible to get one, but then the record is left with dueling statements and no way for the Board to evaluate the credibility of any witnesses. Given the dispute in facts, the Board will dismiss the claim.

Form 1
Page 4

Award No. 43837
Docket No. MW-44707
19-3-NRAB-00003-180185

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.