

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44711
Docket No. MW-45286
22-3-NRAB-00003-190086**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(The Kansas City Southern Railway Company
(former SouthRail Corporation)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when, commencing June 27 to July 18, 2017, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (distributing tie plates and spikes for a Carrier rail gang) at/or between Mile Posts 16 and 1 on the Counce Branch Artesia Sub [System File 17 06 27 (068)/K0417-7366 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 work referred to in Part (1) above and when it failed to assert good-faith efforts to reduce the incidence of subcontracting and increase the use of its 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, Claimants J. Comer, L. Baldridge, D. Johnson and B. Wheeler shall each ‘... be compensated ten (10) hours at the regular rate of pay per day for sixteen (16) days which totals \$4563.00 for the Machine Operators 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.

There is no dispute that in the past the Carrier has subcontracted the work involved in this dispute and that, in the past, the covered employees have also performed the work. This is a mixed-practice case. The question in this case is sufficiency of notice under the governing Agreement language.

By letters dated December 13, 2016 and August 4, 2017, the Carrier sent annual notices of subcontracting to the Organization, both of which listed contractors and type of work to be performed on the Carrier’s properties during 2017. Carrier Exhibit A at 12-14, 16-18. By letter dated March 24, 2017, the Carrier supplemented its notice to the Organization with the following (Carrier Exhibit A at 15):

“Without prejudice that the work described below is not covered by the Scope Rule of the current Agreements and pursuant to past practice of contracting, this is advance notice as described in the Letter of Understanding dated February 10, 1986 for the Mid South, of the Carrier's intent to contract the work set forth in this Notice of Intent to Contract Services. The work contemplated below is necessary as identified by items one, two and three of the agreement.

Project Name: MSLLC Ties and Rail Relay

Type of Work: Install approx. 60,000 cross ties, switch ties installation, road crossing rehab, relay approx. 65,000 linear feet rail, tie & OTM pickup & distribution, undercutting, surfacing, bridge repair and rehab

Type of Equipment: Spike pullers, spikers, rail laying equipment, pettibones, rail heaters, tie plugging machines, tampers, ballast regulators, grapple trucks, backhoes, dump trucks, trackhoes, rail welding trucks, crew trucks and tools, tie inserters, rail anchor machines

Contractors: Approximately seventy-five (75)

Duration: Approximately seven (7) weeks

To begin: Approximately April 18, 2017

Working time: 10 hrs per day 4+ days per week or 8 hrs per day 5+ days per week

Location: MSLLC - Vicksburg and Meridian Subdivisions

Contractor: TBD

KCS Employees: Yes

There are no furloughed employees on the Mid South and all other employees are engaged in other on-going projects. The Carrier does not have the equipment or available manpower to perform these projects in a timely manner.

While standing alone, the Carrier's annual notice of subcontracting which only gives contractor names and type of work to be performed is not sufficient to meet the notification requirements of the governing Side Letter of Agreement, the supplemented detailed information given to the Organization in the March 24, 2017 letter (which was given more than 15 days prior to the work being performed) satisfies the Carrier's notification requirements under the Side Letter. See Third Division Award 44709 and awards cited:

- “(2) The Carrier’s giving supplemental notification to the Organization of the type of work, the type of equipment, the length of the project, its projected start date, and its location along with stated reasons for subcontracting satisfies the Carrier’s notification obligation.”**

The fact that the work involved in this dispute was on the Artesia Subdivision as noted in the claim and the supplemental notification is for the Vicksburg and Meridian Subdivisions does not change the result. See Third Division Award 44709:

- “(3) Where a supplemental notification is given by the Carrier to the Organization and identifies a location of work to be performed, but that location and work is different from the work in dispute in the claim, the supplemental notification does not cure the notice deficiency given by just an annual notice.**
- (4) However, if the subcontracted work is sufficiently large as described in a supplemental notification, the Organization is on sufficient notice even if the work location and specific work raised in the claim is different from that described in the supplemental notification.”**

Specifically, as quoted in Third Division Award 44709:

“Fourth, although supplemental notices that do not identify the work in dispute are problematic, according to the prior awards, if the subcontracted work is sufficiently large, the Organization can be deemed to be on sufficient notice even if the work location in the claim is different from that described in the supplemental notice. See Third Division Award 43831 where the disputed work as identified in the claim was on the Artesia Subdivision; there was an annual notice of subcontracting dated December 15, 2015 (which, as discussed in Third Division Award 43834 was “too broad and generic to serve the purpose of the required notice”); and there was a supplemental notice dated May 13, 2016 which identified work on the Vicksburg and Meridian Subdivisions (but not on the Artesia Subdivision which was the work in dispute as set forth in the claim). The Board nevertheless denied the claim even though the supplemental notice did not identify the work in dispute quoting similar language set forth above from Third Division

Award 43835 that the size of the project alone and the detail given was sufficient notification:

“In this case, the Carrier’s December 15, 2015, Annual Notice of Intent to contract for the next calendar year was supplemented by a notice dated May 13, 2016, that focused on the “MSLLC Ties and Rail Relay” project. The notice set forth the type of work, the type of equipment, the length of the project, its projected start date, and its location –“MSLLC – Vicksburg and Meridian Subdivisions.” The basis given for the proposed contracting was stated as “The Carrier does not have the equipment or available manpower to perform these projects in a timely manner.” The Organization contends that the notice did not sufficiently identify the basis for the proposed contracting. The Board does not agree. The notice indicates that some 75 contractors were expected to work seven weeks on the project, 10 hours a day (on a 10 on/4 off schedule). The size of the project alone is sufficient for the Organization to understand that the Carrier probably does not have the manpower to complete the work in the time frame allotted. Given the number of contractors involved, it is likely that the Carrier does not own enough equipment either. The notice might not be as detailed as the Organization would like, but it is sufficient for the Organization to evaluate whether it wants to object to the proposed contracting and to participate in a meet and discuss session with the Carrier. The Board concludes that notice was adequate.”

Given the size of the project noticed in the March 24, 2017 letter to the Organization, that supplemental notification falls under the exception noted in (4) above.

Based on the above, the claim shall be denied.

AWARD

Claim denied.

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 6th day of May 2022.