

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44713  
Docket No. MW-45283  
22-3-NRAB-00003-190079**

**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 MidSouth Rail Corporation)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when, on May 30, 31 and June 1 and 2, 2017, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (distributing and installing ties) at/near/or in between Mile Posts 7 and 10 on the Gulfport Sub [System File 17 05 30 (060)/K0417-7339 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 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 10, 1986 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. Downs, L. Moran, M. Patton and L. Lucas shall each ‘... be compensated ten (10) hours at the regular rate of pay for four (4) day(s) which totals \$1134.00 for the Machine Operator, and \$1072.40 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.

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 13-15, 17-19.

By letter dated March 24, 2017, the Carrier gave supplemental notice to the Organization as follows (Carrier Exhibit A at 16):

“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.”

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 Side Letter of Agreement dated February 10, 1986. Third Division Award 44709 and awards cited:

“(1) Standing alone, annual notice given by the Carrier to the Organization of its intent to subcontract work which just lists contractors and types of work to be performed is insufficient notification to the Organization.”

The supplemental detailed information given to the Organization in the Carrier's March 24, 2017 letter (which was given more than 15 days prior to the work being performed) does not list the work involved in this claim. The supplemental notification refers to the work on the Vicksburg and Meridian Subdivisions while the claim in this dispute concerns work on the Gulfport Subdivision.

In Third Division Award 44709 and based upon the awards which we must defer to because they are not palpably erroneous as discussed in that award, we noted that:

- “(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.”

But as noted in Third Division Award 44709 the awards that we must defer to have established an exception to that requirement:

- “(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.”

While the Carrier’s March 24, 2017 supplemental notification does not mention work to be subcontracted on the Gulfport Subdivision where the work in this case was alleged to have been performed but only designates work to be performed on the Vicksburg and Meridian Subdivisions (Carrier Exhibit A at 16 quoted above), like in Third Division Award 43835, the size of the project alone and

the detail given under the awards to which we must defer as not palpably in error require a finding that there was sufficient notification to the Organization.

The Carrier's assertion in its September 14, 2017 letter that "[t]he Carrier cannot confirm that it was ZA Construction that performed the work noted in this claim" (Carrier Exhibit A at 10) is further reason to deny this claim.

The Organization submitted a statement from an employee affirmatively asserting that he witnessed "Z.A. ... [r]eplacing mainline ties 8 hrs a day [a]t, in-between, or near MP SD 7.0 - 10 on the Gulf Port Subdivision ... [f]rom date: 5-30-17 to 6-2-17." Carrier Exhibit A at 5. The Carrier states that it "cannot confirm that it was ZA Construction that performed the work noted in the claim." That assertion establishes an irreconcilable set of facts for this Board to conclude that the Organization failed to meet its burden to show that the work was performed. Third Division Award 44709:

"(5) Because these are contract disputes with the burden on the Organization, if there are disputed issues of fact which cannot be resolved in the record, those disputed facts are to be resolved against the Organization"

Based on the above, the claim must 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 6<sup>th</sup> day of May 2022.