

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44716  
Docket No. MW-45402  
22-3-NRAB-00003-190237**

**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 the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (installing rail and ties) at/or between Mile Posts 237.6 and 172 on the Louisville Subdivision beginning on September 4, 2017 and continuing through October 6, 2017 [System File 17 09 04 (079)/K0417-7477 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 shall be compensated eight (8) hours at the regular rate of pay for twenty-five (25) days which totals \$6,086.00 for Mr. J. Comer and \$5,362.00 for Messrs. D. Johnson, V. Halbert, M. Jackson, G. Harris and G. Lee 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.”

**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 11-16.

There is no supplemental notification to the Organization in this record further detailing the work alleged to have been performed.

Standing alone, the annual notification to the Organization is insufficient for the Carrier to meet its notification obligations because it is too broad and generic to serve the purpose of the required notice. Third Division Award 43834. See also, Third Division Award 44709:

“(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.”

For factual substantiation of the claim, the Organization relies upon statements from two employees which state that ZA Construction was performing the work on the Louisville Sub between mileposts 237.6 and 172.0. Carrier Exhibit A at 5. However, the Carrier raises a factual dispute asserting “Carrier records do not indicate that contractor ZA Construction performed the work noted for the date and mile posts cited in the claim.” Carrier Exhibit A at 24.

The Board is therefore faced with an irreconcilable set of facts. Because the burden is on the Organization to demonstrate the violation, in such cases where there is an irreconcilable set of facts, the claim must be denied. 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 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 6<sup>th</sup> day of May 2022.