

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44724
Docket No. MW-45593
22-3-NRAB-00003-190477**

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 on January 10, 2017 and continuing through January 18, 2017, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (distribute materials) at or near Mile Post 3.4 on the Artesia Sub [System File 17 01 10 (004)/K0417-7112 SRL].**
- (2) The Agreement was further violated when the Carrier failed to properly 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, Claimant J. Comer should be compensated ten (10) hours at the regular rate of pay for eight (8) days which totals two thousand two hundred sixty-eight dollars (\$2,268.00) 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.”

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 letter dated December 13, 2016, the Carrier sent annual notice of subcontracting to the Organization, listing contractors and type of work to be performed on the Carrier’s properties during 2017. Carrier Exhibit A at 8.

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.”

Factual support for the claim comes from statements asserting that “Continental Rail” was seen working and hauling material between milepost 3.4 and 278 on the dates cited in the claim. Attachment No. 1 to Employees’ Exhibit A-1.

According to the Carrier’s May 9, 2017 letter (Carrier Exhibit A at 6):

“(a) Carrier information does not indicate that Continental Rail performed the work alleged in the claim. ...”

The facts are therefore in dispute and we have no basis in this record to sort out precisely which contractor performed the work. However, the burden is on the Organization to make that demonstration. Where there is an irreconcilable set of facts, the Organization has not carried its burden. Third Division Award 43837 (“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.”). See also, Third Division Award 43834 (“As this Board has noted in previous awards, where there is a dispute in facts that cannot be resolved on the basis of information in the record, the Board must find the factual dispute to be irreconcilable and dismiss the claim.”). Finally, see Third Division Award 43833; 43832; 43831 (where disputed factual assertions were resolved against the Organization’s position).

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.