

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 44726  
Docket No. MW-45595  
22-3-NRAB-00003-190488

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

**(Brotherhood of Maintenance of Way Employes 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, commencing on January 18, 2017 to January 30, 2017, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (replace road crossing and ties) between at or near Mile Post 219 and at or near Mile Post 221 on the Redwood Branch [System File 17 01 18 (007)/K0417-7137 MSR].**
- (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 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. Smith, J. Downs, J. Sumrall, W. Haire, A. Agent, D. Moorehead and H. Fountain shall now be compensated**

eight (8) hours at the regular rate of pay for nine (9) days which totals two thousand forty-one dollars and twenty cents (\$2,041.20) for the machine operators and one thousand nine hundred thirty dollars and thirty-two cents (\$1,930.32) for 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.”

**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 9.

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 “Mchann” contractors were seen refurbishing cross and ties on dates and location identified in the claim. Attachment No. 1 to Employees’ Exhibit A-1.

According to the Carrier’s May 9, 2017 letter (Carrier Exhibit A at 7):

**“(a) ... Carrier records does not confirm the presence of contractor McHann performing the work for each day noted in the claim. Carrier records demonstrate that on January 18, 24, 27, 2017 the contractor was working in conjunction with Gang 111 and Gang 266. ...”**

The Carrier therefore does not deny that McHann was working at the location cited in the claim but disputes some of the dates asserted by the Organization when work was performed. Specifically, the Organization asserts McHann was working on January 18 to January 30, 2017, but the Carrier asserts that McHann was present only three dates during that period – January 18, 24 and 27, 2017.

The Organization has therefore shown that the Carrier subcontracted work on some dates at the location specified in the claim without sufficient notice as required by Third Division Award 43834 to which we defer. The claim therefore has merit.

However, there is a factual dispute concerning whether the work was performed on the dates as asserted by the Organization (January 18 to January 30, 2017) or was limited to those dates as asserted by the Carrier (January 18, 24 and 27, 2017). Where there are such disputes, only the dates for which the parties are in agreement that the work was performed by the contractor can a violation be found and remedied. See Third Division Awards 43828, 44709, 447219.

As a remedy, the Claimants shall be entitled to compensation for the hours worked by the contractors on the dates when the contractors were acknowledged by both the Organization and the Carrier to be working – specifically, January 18, 24 and 27, 2017.

**AWARD**

Claim sustained in accordance with the Findings.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 6<sup>th</sup> day of May 2022.