

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44728
Docket No. MW-45640
22-3-NRAB-00003-190499**

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, commencing on February 19, 2018 to March 2, 2018, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (install ties) between Mile Posts 92 and 94 on the Meridian Subdivision [System File 18 02 19 (13)/K0418-7620 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. Downs, J. Smith, J. Sumrall and M. Harper shall now each ‘... be compensated eight (8) hours per day at the regular rate of pay for ten (10) days which totals \$2434.40 for the Foreman, \$2268.00 for the Machine Operator, and \$2144.80 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 letter dated December 15, 2017, 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 2018. Carrier Exhibit A at 20.

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 ZA contractors replaced ties between mileposts 92 and 94 on the main line beginning February 19, 2018 through March 2, 2018 on the Meridian Subdivision. Attachment No. 1 to Employees’ Exhibit A-1.

According to the Carrier’s June 6, 2018 letter (Carrier Exhibit A at 17-18):

“(c) A review of Carrier records does not reflect that ZA Contractors performed the work alleged in the claim. ...”

The above constitutes an irreconcilable set of facts requiring that the claim be denied. Third Division Awards 43837 and 43834. See also, Third Division Award 44709:

“Fifth, where there are disputed issues of fact concerning whether the work was performed as claimed by the Organization (e.g., with respect to location, dates, identity of contractor, number of individuals working) which arise because employee statements do not correspond with the Carrier’s records as claimed by the Carrier, because the burden is on the Organization to demonstrate the asserted violation, those disputed facts are resolved against the Organization.”

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.