

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44744
Docket No. MW-45107
22-3-NRAB-00003-210497**

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, from December 19, 2016 to February 16, 2017, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (installing ties) at/near/or in between Mile Posts 93 and 97 and on the Vicksburg Sub (System File C 16 12 19 (082)/K0417-7083 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 aforesaid work and when it failed to assert good-faith efforts to reduce the incidence of subcontracting and increase the use of 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. Sumrall, M. Evans, Jr., J. Smith, J. Joiner and R. Smith shall each ‘... be compensated eight (8) hours at the regular rate of pay for forty (40) day(s) which totals \$9072.00 for the Machine Operators, and \$8579.20 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.

The Carrier’s December 15, 2015 annual notice of subcontracting to the Organization lists McHann as a contractor to perform general track maintenance, earthwork and excavation in 2016. Carrier Exhibit A at 10. That annual notice of subcontracting has been found to be insufficient to meet the requirements of the governing Side Letter of Agreement. See Third Division Award 44709. And we note that there is no further written supplemental notice from the Carrier to the Organization identifying where the proposed contracting out will take place or when it will occur and there must be a bare minimum of those details to identify the proposed contracting out project or projects. 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.”

At first look, the above would appear to be sufficient to require a sustaining award. However, the claim asserts that “[t]he Agreement was violated when, from December 19, 2016 to February 16, 2017, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (installing ties) at/near/or in between Mile Posts 93 and 97 and on the Vicksburg Sub.” As facts to support the claim, the Organization submitted an employee statement on a form where the employee states the following (Carrier Exhibit A at 4 [underscored filled in]):

“I witnessed mchann contractors performing below mentioned work

Replacing ties on siding between mp Vm 93.6 and mp Vm 96.6

At, in-between, or near MP Vm 93.6 on the Vm 96.6 Subdivision,

From date 12-19-16 to 12-23-16

Number of Contractors present 6

Type of Machines used:

2 Backhoes, 2 Dump Trucks, working 8 hrs a day.”

In its April 19, 2017 declination of the claim, the Carrier asserted (Carrier Exhibit A at 7 [emphasis in original]):

“The Carrier records do not support that the contractor *McHann* performed the work alleged in the claim. The Carrier is also nonplussed with the Organization’s attachment (a written statement by employee) which is not supportive of the claim filed by the Organization as it references mile posts on the Meridian Subdivision (District 10) and not the Vicksburg Subdivision (District 9) as noted in this claim.”

The Carrier reiterates that position in its Submission to this Board (Carrier Submission at 3):

“... (1) carrier records did not reflect that the contractor had performed the work cited in the claim; (2) the employee’s statement did not comport with the claim as it cited mileposts on the Meridian Subdivision not the Vicksburg Subdivision”

The Organization has not refuted that denial of facts and from this record we cannot sort out the conflict. Where there is an irreconcilable conflict of facts, the Organization has not carried its required burden. Third Division Award 44709 and awards cited:

“(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.”

The critical facts supporting the claim have not been established by the Organization. The claim shall therefore 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 6th day of May 2022.