Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 43828
Docket No. MW-44461
19-3-NRAB-00003-170585

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
(
(Kansas City Southern Railway Company
Former Gateway Western Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (track repair work) for eight (8) days at various locations on the Roodhouse, Godfrey and Springfield Subdivisions beginning on December 14, 2015 (System File C 15 12 14 (004)/K0416-6615 GAT).

(2) As a consequence of the violation referred to in Part (1) above, Claimants M. Guthrie, S. Ince, B. Johnson, J. Stout and E. Ehlert shall now each '... be compensated eight (8) hours regular rate of pay for eight (8) days which totals $2434.40 for the Foreman, $2268.00 for the Machine Operator, and $2144.80 for the Laborers(s) (sic) 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.

The Carrier and the Organization operate on the Carrier's properties under three separate collective bargaining agreements. This case arises under the Gateway Western Agreement (GAT).

This claim arose on December 14, 2015, when the Carrier assigned an outside contractor, Musselman and Hall (M&H), to perform work on the Roodhouse, Godfrey, and Springfield Subdivisions. The work allegedly continued for several days. Musselman and Hall owned a Sperry Defect Test Car that was being used to test for track defects. The Organization filed this claim, alleging that M&H employees were following the Test Car and repairing defects that had been identified, in lieu of Carrier forces making the repairs. According to the Organization, two Carrier employees were assigned to work with the Test Car to provide the necessary track protection; according to the Carrier, all five Claimants were assigned to the same project. The Organization filed a claim by letter dated January 21, 2016. The parties having been unable to resolve the matter through the grievance process, it was appealed to the Board for a final and binding conclusion.

The Organization contends that the work of repairing tracks is classic Maintenance of Way work and that it should have been offered to MoW forces before outside forces were assigned to do it. According to witnesses, M&H used five individuals—a foreman, a backhoe operator, and three laborers—over a period of eight days to follow the Test Car and perform track repairs. The fact that the

Claimants were fully employed is irrelevant, as they could have been assigned to do the work on daily or weekend overtime. In addition, the Organization contends that the Carrier failed to provide any advance written notice or an opportunity to meet and discuss the matter.

The Carrier responds that it did provide notice, both in its Annual Notice of Intent, by letter dated December 11, 2015, for calendar year 2015, and more specifically by letter dated June 29, 2015. According to the Carrier, the parties met in conference and were unable to resolve their differences, after which the Carrier was entitled to proceed. Moreover, the Organization has failed to meet its burden of proof. It has not shown that the work at hand has historically been reserved exclusively to MoW forces. There has been a long history, tradition and custom of contracting out on this property, with the result that there is a mixed practice, pursuant to which the Carrier may continue to contract the work in dispute. In addition, the Organization has failed to establish that the work in dispute occurred as alleged. The Organization claims that five contractor employees worked eight hours a day for eight days. Carrier records, however, show that only one contractor employee worked for a single day, December 14, 2015.

The Organization has the burden of proof in claims involving contract interpretation. The threshold issue in any contracting case is whether the work in dispute is bargaining unit work. Repairing track defects is traditional Maintenance of Way work and is covered by the Scope Rule in the parties' Agreement. The Carrier's argument that the Organization must show that the work has been exclusively performed by MoW employees is not persuasive—under that theory, if the work had ever been contracted out, even once, it would no longer be considered bargaining unit work, and that is surely not what the parties intended when they negotiated the Scope provision in the Agreement. However, Scope-covered work can be contracted out, pursuant to the provisions of Rule 39, Subcontracting. It states, in relevant part:

> **"(a) The Carrier may contract out maintenance of way work … without serving notice as provided in paragraph (b) below, as long as the Carrier maintains a sufficient number of maintenance of way positions, as described in the provision of subparagraph (1) below. However, in the event the work force falls below the required number of maintenance of way positions for a period of sixty (60) consecutive calendar days, the**

provisions in paragraphs (b) and (c) below will again become effective until such time as the number of maintenance of way positions is again equal to or greater than the required number.

. . . . .

(b) In the event the Carrier plans to contract out work not otherwise permitted by paragraph (a) above, it shall 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. Such notification shall clearly set forth a description of the work to be performed and the basis on which the Carrier has determined it is necessary to contract out such work.

(c) If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the Designated Carrier Officer shall promptly meet with him for that purpose and the parties shall make a good faith effort to reach an agreement setting forth the manner in which the work will be performed. If no agreement is reaches, the Carrier may nevertheless proceed with said contracting transaction and the Organization may file and progress claims in connection therewith.

(d) Nothing herein contained shall be construed as restricting the right of the Carrier to have work customarily performed by employees included within the Scope of the Agreement from being performed by contract in emergencies that prevent the movement of traffic when addition force or equipment is required to clear up such emergency conditions in the shortest time possible. . . .”

Paragraph (a) establishes the parties’ basic rights regarding contracting: the Carrier may contract out work, without notice, if certain staffing levels are maintained; if staffing falls below those levels, the Carrier is required to provide the Organization with timely advance notice in writing and an opportunity to meet and discuss the proposed contracting. Pursuant to paragraph (c), if the parties meet and are unable to reach agreement, the Carrier may proceed with the transaction.

In the original Claim, the Organization asserted that the staffing levels were below the mandatory levels set in Rule 39. The Carrier did not dispute this assertion, so the Board will accept it as proven.

This brings the contracting transaction in dispute within the purview of Rule 39, paragraphs (b) and (c). The evidence in the record establishes that the Carrier did provide notice, in the letter dated June 29, 2015. That notice referenced work on "Gateway Ties & Curve Relay," to be done between MP 237 and 365 on the Roodhouse and Mexico Subdivisions. According to the handwritten statement submitted with the claim, the work in dispute occurred beginning at MP 332 on the Mexico Subdivision, which is within the stated location. The notice also indicated the basis on which the Carrier was proposing to contract out the work. In addition, the record indicates that the Carrier does not own a Sperry Defect Test Car, so it must hire one, which it did from Musselman and Hall. According to the Carrier, the parties did meet in conference but were unable to resolve their differences. The Board concludes that the notice was sufficient under Rule 39(b).

Regarding the actual work at issue, there is a dispute in the record as to certain facts. The Claim alleges that there were five contractor employees who worked for eight days. Carrier records indicate that a single contractor employee worked one day only, December 14, 2015. The statement submitted by two of the Claimants described work that was performed on December 14, 2015, although it claimed that the work was "ongoing." If the Board cannot resolve the dispute on the basis of the record before it, it must declare the dispute irreconcilable and either dismiss or deny the claim. Here, the record does not provide a basis for the Board to resolve the dispute regarding how many contractor employees worked and for how many days beyond the undisputed that a single contract employee worked on a single day. Accordingly the Claim must be dismissed as to any additional contractor employees and any additional days of work.

As for the remaining contractor employee, the evidence in the record is insufficient to establish that he was performing bargaining unit work as opposed to work incidental to operation of the Sperry Test Car, which was owned by Musselman and Hall and which would have been appropriate for him to do as an employee of M&H. The Claimants were assigned to work on the same project. Ultimately, the Board concludes that the Organization has not met its burden of proof.

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 4th day of September 2019.