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

Award No. 43829
Docket No. MW-44660
19-3-NRAB-00003-180137

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 MidSouth Rail Corp.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when, on May 25 and 26, 2016, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (road crossing repair) at/near/or in between Mile Post 35.2 on the Vicksburg Sub [System File C 16 05 25 (029)/K0416-6840 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 L. Hannibal, R. Washington, O. Hall, R. Colvin, J. Polk, H. Dora, B. Bullard and J. Herring shall each '... be compensated eight (8) hours at the regular rate of pay for two (2) day(s) which totals $486.88 for the Foreman, and $453.60 for the Machine Operators 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 have negotiated three collective bargaining agreements. This case arises under the MidSouth Rail Agreement (MSA).

On May 25 and 26, 2016, the Carrier assigned a contractor, CW&W, to perform road crossing repairs in and around Mile Post 35.2 on the Vicksburg Subdivision, near Delhi, Louisiana. According to the witness statements attached to the claim, two foremen and six machine operators worked eight hours a day for the two days "repairing road crossing on the main line." Carrier records confirm that CW&W worked as alleged, although the Carrier noted that there were seven contractor employees working on May 25, 2016, not eight.

The Organization contends that the Carrier violated the parties' Agreement in several ways. First, the work of repairing road crossings is customary Maintenance of Way work and is reserved to MoW forces by the Scope Rule, Appendix 1. Contracting out of such work is subject to the terms of the Side Letter dated February 10, 1986. The Carrier violated the Agreement when it failed to comply with the advance notification and conference provisions. In addition, it failed to show any reasonable

justification for assigning this work to outside forces and failed to raise any valid defense for its violation.

According to the Carrier, the Organization has failed to meet its burden of proof. There is a long history of contracting out on the Carrier's property, and there is a mixed practice of using Carrier forces and outside forces across the system. That fact alone warrants denying the claim. In addition, the Carrier followed the contracting procedures agreed by the parties in the February 10, 1986, Letter of Understanding. It sent its Annual Notice of Intent to contract out work on its properties for the following year on December 15, 2015, and CW&W was one of the contractors listed. The Annual Notice advises the Organization that the Carrier has neither the necessary equipment nor the manpower available to complete the work referred to in the notice in a timely fashion and that its own forces would be fully engaged in other projects. The parties conferenced the Annual Notice but came to no resolution. Consequently, the Carrier proceeded with its intent to contract the work. There was also a timely supplemental notice dated April 18, 2016, titled "LA 17 Delhi, LA, that referenced this work in particular. The supplemental notice made clear what equipment would be used by CW&W, which included equipment not owned by the Carrier, like asphalt steel wheel roller, asphalt milling machine and asphalt lay down equipment. The supplemental notice was also conferenced but no agreement was reached. Because of the operational demands, time and manpower constraints and lack of equipment—which meets the third condition for contracting set forth in the February 10, 1986, Letter of Understanding—the Carrier required the services of the contractor in conjunction with its own forces to get the work completed timely.

The Scope Rule cited by the Organization reserves certain work to Maintenance of Way employees. However, the February 10, 1986, Letter of Understanding makes it clear that such work may be contracted out under certain circumstances—there would be no need for the Letter if it could not. The Letter of Understanding states, in relevant part:

> **"It is the intent of the Agreement for the MSRC to utilize maintenance of way employees under rules of the Agreement to perform the work included within the scope of the Agreement; however, it is recognized that in certain specific instances the contracting out of such work may be**

necessary provided one or more of the following conditions are shown to exist:

> **"1) Special skills necessary to perform the work are not possessed by its Maintenance of Way employees.**
> **2) Special equipment necessary to perform the work is not owned by the Carrier or is not available to the Carrier for its use and operation thereof by its Maintenance of Way employees.**
>
> **3) Time requirements exist which present undertakings not contemplated by the Agreement that are beyond the capacity of its Maintenance of Way Employees."**

The Letter of Understanding also establishes procedures for when the Carrier would like to contract out work that would otherwise be performed by its own forces:

> **"In the event the MRSC plans to contract out work because of one or more of the criteria 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 MSRC has determined it is necessary to contract out such work according to the criteria set forth above.**
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> **If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of MSRC 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. It is understood that when condition 3 is cited as criteria for the contracting work, MSRC, to the extent possible under the particular circumstances, shall engage its Maintenance of Way Employees to perform all maintenance work in the Maintenance of Way and Structures Department and construction work in the Track Subdepartment, with due consideration given to the contracting out of**

> **construction work in the Bridge and Building Subdepartment to the extent necessary. If no agreement is reached, MSRC may nevertheless proceed with said contracting and the Organization may file and progress claims in connection therewith.[1]**

The Organization has the burden of establishing a *prima facie* case. Under the terms of the Agreement, that means establishing first that the work in dispute is covered. Repair and maintenance of road crossings is work of the type customarily and traditionally assigned to and performed by Maintenance of Way forces. The Carrier contends that the Organization has not submitted sufficient evidence of this fact, but where, as here, the work is at the core of what MoW forces do, it is not necessary for the Organization to bring in historic data of the sort that the Carrier suggests it needs to do.[2]

Once the work is established as covered by the Agreement, the terms of the Letter of Understanding come into force when the Carrier intends to contract out that work. First, the Letter lists three criteria under which "such work" may contracted out: (1) special skills, (2) special equipment, and (3) the work cannot be completed in a timely fashion using Carrier resources alone. Second, the Letter describes notification and conferencing procedures that the Carrier must follow before contracting out the work. Written notice must be provided to the Organization not less than fifteen days in advance of the contracting transaction. The notice must include "a description of the work to be performed and the basis on which the MSRC has determined it is necessary to contract out such work according to the criteria set forth above." If the Organization requests, the Carrier will meet with the Organization to discuss matters related to the contracting out, 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 reached, the Carrier may proceed with the contracting.

The Board now turns to the facts of this case. The work in dispute is traditional Maintenance of Way work, and the Carrier needs to comply with the terms of the Letter of Agreement before it may contract it out. Each December, the Carrier issues a generic Annual Notice of Intent to contract out work for the coming year, which it did

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[1] **There is also an exception for emergency circumstances, which is not included because it is not relevant to the resolution of this claim.**

[2] **Not to mention the fact that it is the Carrier that would have access to such data, not the Organization.**

here in December 2015 for 2016. More importantly, however, the Carrier sent the Organization a supplemental notice dated April 18, 2016, which applies specifically to the work in dispute: crossing rehabilitation at Mile Post 35.28 on the Vicksburg Subdivision. The notice stated that the Carrier "does not have the equipment or available manpower to perform these projects in a timely manner." While the statement is not entirely clear whether the Carrier is relying on the second criteria (special equipment) or the third (time constraints) or both, the Organization can pursue that in conference—it is exactly the purpose of the conference requirement. The notice specifies equipment used in asphalt paving (asphalt steel wheel roller, asphalt milling machine, and asphalt lay down machines) that the record indicates that the Carrier does not own, and which is essential to a crossing rehabilitation.

While the Organization made a *prima facie* case, the evidence is that the contracting at issue here fell within the specific conditions permitted for contracting out agreed by the parties in the February 10, 1986, Letter of Understanding. The evidence further establishes that the Carrier provided adequate notice as well.

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.