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

Award No. 43830
Docket No. MW-44661
19-3-NRAB-00003-180146

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when, on May 14, 15 and 16, 2016, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (road repairs) near Mile Post 286 on the Artesia Sub [System File C 16 05 14 (026)/K0416-6823 SRL].

(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 25, 1988 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. Comer, D. Johnson, P. Wright, J. Dempsey and M. Moss shall each be compensated '... ten (10) hours at the time and one-half rate of pay for two (2) day(s) and ten (10) hours at the regular rate of pay for one (1) day (Monday May 16, 2016) which totals $1134.00 for the Machine Operator, and $1072.40 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.

The Carrier and the Organization operate on the Carrier's properties under three separate collective bargaining agreements. This case arises under the South Rail Agreement (SLR).

This Claim arose when the Carrier allegedly assigned an outside contractor, McHann Contractors, to perform road crossing repairs on May 14, 15, and 16, 2016, near Mile Post 286 on the Artesia Subdivision near Saltillo, Mississippi.

According to the Organization, repairing road crossings is work historically, traditionally and customarily assigned to the Carrier's Maintenance of Way forces and protected by the Scope Rule in the parties' Agreement. The parties entered into a side Letter of Agreement dated February 25, 1988, that sets forth the circumstances under which the Carrier may contract out bargaining unit work, none of which apply here. Moreover, the Letter of Agreement requires the Carrier to provide advance written notice of any proposed contracting out and to meet and discuss the matter

with the Organization. The Carrier did not provide adequate notice, which the Board has recognized in prior cases is sufficient to warrant sustaining the claim.

The Carrier contends that the Organization did not meet its burden of proof. KCS did provide notice to the Organization, when it sent its Annual Notice of Intent to contract work for calendar year 2016 by letter dated December 15, 2015. It has provided this type of notice for many years; the notice lists the contractors the Carrier plans to use for its system/production/capital projects and general maintenance and support work, with a description of the type of work it plans to have each contractor complete. McHann Contractors was listed in the notice. The Annual Notice advises the Organization that the Carrier has neither the necessary equipment nor the manpower available to complete the referred to in the notice in a timely manner, because its own forces would be fully engaged on other projects. The parties conferenced the Annual Notice here with no agreement being reached, and the Carrier proceeded to contract the work. Contracting has long been the history, practice and tradition on the property, with the result that there is a mixed practice that permits the Carrier to continue to contract the work. Finally, there is no proof that the work occurred as alleged: two separate reviews of Carrier records failed to show that McHann performed the work noted in the claim.

The parties having been unable to resolve the dispute through the grievance process, the matter was appealed to the Board for a final and binding decision.

The Carrier argues that the work claimed by the Organization is not Scope-covered work because the Organization cannot establish that it has been performed exclusively in the past by its Maintenance of Way forces. The Board has previously rejected that position in favor of a standard that looks to see if the work has historically, customarily and traditionally been assigned to MoW forces, and road crossing repair meets that standard.

Although the work is Scope-covered, it may still be contracted out pursuant to the side Letter of Agreement entered into by the parties effective February 25, 1988. It provides, in relevant part:

> **"It is the intent of the Agreement for the SRC to utilize maintenance of way employees under rules of the Agreement to perform**

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 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 under-takings not contemplated by the Agreement that are beyond the capacity of its Maintenance of Way Employees.**

In the event the SRC plans to contract out work because of one or more of the criteria described above, it shall notify the General Chairman in writing as far in advance of the date of the contracting transaction s 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 SRC has determined it is necessary to contract out such work according to the criteria set forth above.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of SRC 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 for contracting work, SRC, 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, SRC may nevertheless proceed with said contracting and the Organization may file and progress claims in connection therewith.**
>
> **Nothing herein contained shall be construed as restricting the right of SRC to have work customarily performed by employees included with the Scope of the Agreement from being performed by contract in emergencies that prevent the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible. . . .”**

The critical problem in this case is that there is a dispute between the parties as to whether the work occurred as alleged or not. The Carrier contends that two reviews of its records failed to establish that McHann performed the work in dispute on the dates in the Claim. The record from the Organization includes a copy of an Initial Questionnaire/Information Form for Claims or Grievances that is used by employees to begin the grievance process.[1] The form indicates that McHann repaired a road crossing at Mile Post 286 for three days, using five men a day. The record also includes an undated sheet that contains handwritten statements from two of the Claimants, Jared Comer and Dwight Johnson, attesting to the fact that they “witness[ed] McHann Contractor on KCS at the said milepost and days that I put on the Claim form I sent in to y’all.” However, Mr. Johnson is not listed on the Claim Form as a witness so it is hard to credit his statement.

This Board has noted before that the record in a case may be such that it is not in a position to resolve factual disputes between the parties. When that happens, the dispute in facts is deemed irreconcilable, and the Board is required to dismiss the case. This is a case where the evidence in the record is insufficient for the Board to draw any conclusions about which party’s evidence is more credible. The Board concluded that the facts are irreconcilable, and it must rule accordingly.

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

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[1] The Carrier’s record does not include a copy of the form, which is found in the Organization’s submission as Attachment No. 1 to Employes' Exhibit A-1, and the argument in its written submission is based solely on the supplemental handwritten statements. The Board assumes that the document was originally presented to the Carrier but was misplaced at some point during the proceedings below.

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.**
>
> **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.[2]**

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.[3]

AWARD

Claim dismissed.

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.

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

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