

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43833
Docket No. MW-44703
19-3-NRAB-00003-180179**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when the 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, commencing on July 6 2016 and continuing through and including July 27, 2016, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (bridge repairs) at or near Mile Post 318.5 on the Artesia Sub [System File C 16 07 06 (048)/K0416-6890 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, A. Young, D. Johnson, J. Dempsey, L. Baldrige and R. Conner, II shall each ‘... be compensated ten (10) hours at the regular rate of pay for sixteen (16) day(s) which totals \$4289.60. for our claimants. 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.

This Claim arose when the Carrier assigned an outside contractor, Simmons Railroad Group, to perform bridge repairs at or near Mile Post 318.5 on the Artesia Subdivision from July 6 through 13 and July 20 through 27, 2016. According to the Organization, six men were re-decking the bridge and changing out some legs. The original claim was accompanied by a handwritten Initial Questionnaire/ Information Form for Claims or Grievances, to which was attached an additional sheet with handwritten statements from two of the Claimants, attesting to the fact that they had witnessed the contractors performing the work in dispute. According to the Carrier's records, Simmons Railroad Group worked at the location in question, but not for the entire period set forth in the Claim. Carrier records indicate that Simmons worked July 6-8, July 11-13, July 20-22, and July 25-27.

According to the Organization, bridge repairs are 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. Simmons Railroad Group 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, and that is sufficient to justify contracting out under the Side Letter of Agreement. The Carrier also issued a supplemental notice dated June 10, 2016, that was directed specifically at the Artesia Curve Rail Relay project, on the Artesia Subdivision. The notice specifically listed "bridge repair and rehab" under the "Type of Work" that it was planning on contracting out. The project was projected to take about a week, starting June 27, 2016, and utilizing some 50 contractors working ten hours a day (on a ten on/four off schedule). The parties conferenced the Notices 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.

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 acknowledges that the contractor worked on certain dates but not on others alleged by the Organization. As this Board has noted in previous awards,

where there is a dispute in facts that cannot be resolved on the basis of information in the record, the Board must find the factual dispute to be irreconcilable and dismiss the claim. The information in the record is not sufficient for the Board to draw any conclusions about the actual dates worked. Accordingly, the Board will dismiss the Claim as it relates to the dates in dispute (*i.e.*, July 9-10, July 14-19, and July 23-24, 2016).

The Carrier argues that the remaining 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 basic bridge repairs meet that standard.

The Carrier maintains that its history of contracting out work on the property has created a mixed practice, in which work is assigned both to its own forces and to contractors. If this is true, then the Carrier may continue its practice without violating the Agreement. But there is no real proof of a mixed practice. The record includes Annual Notices of Intent dating back to 2009, and there is no denying that the Carrier engages in a substantial amount of contracting. The Annual Notices, however, are too generic in nature for the Board to conclude that otherwise Scope-covered work has been regularly assigned to outside contractors to the point that it has lost its character as Scope-covered work. The parties agreed at the arbitration hearing that the docket of cases presented to the Board was the first one to include subcontracting claims in thirteen years. The fact that the parties have been able to work out their differences in the past does not mean that the Organization has given up its rights under the Agreement.

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 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 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 Side Letter identifies three circumstances under which the Carrier may contract out bargaining unit work: (1) special skills not possessed by MoW employees; (2) special equipment not owned by the Carrier or otherwise available for operation by its forces; and (3) time requirements such that the work cannot be completed on time using only the Carrier’s forces.¹

The Side Letter of Agreement also requires written notice be provided to the Organization in advance of the contracting transaction. The purpose of notice is to give the Organization a heads up that the Carrier plans to contract out what would otherwise be bargaining unit work in enough time for the Organization and the Carrier to meet and discuss ways to minimize contracting if the Organization has any questions or objections. To that end, the language of the Agreement states: “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.” (Emphasis added.)

The question of what constitutes adequate notice is not a new one for the Board. The Board has held previously that the notice must include sufficient information for the Organization to make an informed decision about whether it wants to object and to be able to prepare to engage in meaningful discussions with the Carrier about alternatives to the proposed contracting. Without that, the parties would not be able to engage in the “good faith effort” envisioned in the Side Letter.

In this case, the Carrier’s December 15, 2015, Annual Notice of Intent to contract for the next calendar year was supplemented by a notice dated June 10, 2016,

¹ The Side Letter also permits the Carrier to use outside contractors in an emergency on an expedited basis. The Board is not addressing that provision in this Award because it is not relevant to the Claim under consideration.

that addressed the “Artesia Curve Rail Relay” project. The notice set forth the type of work, the type of equipment, the length of the project, its projected start date, and its location, the Artesia Subdivision.” The basis given for the proposed contracting was stated as “The Carrier does not have the equipment or available manpower to perform these projects in a timely manner”—reasons (2) and (3) under the Side Letter. The Organization contends that the notice did not sufficiently identify the basis for the proposed contracting. The Board does not agree. The notice indicates that approximately fifty contractors were expected to work on the project, 10 hours a day (on a 10 on/4 off schedule). The size of the project alone is sufficient for the Organization to understand that the Carrier probably does not have the manpower to complete the work in the time frame allotted. Given the number of contractors involved, it is likely that the Carrier does not own enough equipment either. The notice might not have been as detailed as the Organization would like, but it was sufficient for the Organization to evaluate whether it wanted to object to the proposed contracting and to participate in a meet and discuss session with the Carrier. Moreover, the Organization could ask for further detail during conferencing. The Board concludes that notice was adequate under the Side Letter of Agreement.

The final issue for the Board to decide is whether the contracting out was permissible under any of the standards set forth in the Side Letter. As briefly noted above, the notice itself suggested that the project was a large one that could not be completed using only the Carrier’s MoW forces and equipment. The nature of track maintenance work is such that carriers have to focus on implementing and completing large maintenance, renovation and construction projects during fair weather. This means that its staffing requirements will vary widely throughout the year, with more manpower needed in the spring, summer and fall and less in the wintertime. It is not economically feasible for a carrier to maintain year round a workforce large enough to perform all the work that needs to be done in peak production periods. Inevitably, outside contractors will be needed to supplement the Carrier’s own forces. The same is true of equipment needs—they vary with staffing needs. The Board concludes that the basis given by the Carrier in the June 10, 2016, notice for the proposed contracting—that it did not have the manpower or the equipment to complete the projects in a timely fashion—met the requirements set forth in the Side Letter of Agreement, paragraphs (2) and (3).

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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.