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

Award No. 43834
Docket No. MW-44704
19-3-NRAB-00003-180182

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, from July 26, 2016 to August 16, 2016, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (distributing ties) in-between Mile Post 194 to Mile Post 177 on the Louisville Sub [System File C 16 07 26 (051)/K0416-6912 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 A. Clark, J. Leach, J. Glenn, R. Green, J. Dempsey, L. Blakley and T. Outlaw shall now '... be compensated ten (10) hours regular rate of pay for sixteen (16) day(s) which totals $4536.00 for the Machine Operators, and $4289.60 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.

This Claim arose when the Carrier allegedly assigned outside contractors, Alpha Railroad and Piling and CW&W, to distribute and mark ties from Mile Post 194 to Mile Post 177 on the Louisville Subdivision beginning July 26, 2016, and continuing until August 16, 2016. According to the Organization, seven contractor employees were utilizing two Brandt trucks, one Car Topper, one Remote Controlled KCS Power Unit, and one semi-truck with a lowboy trailer, while two were acting as laborers. The original claim was accompanied by a handwritten Initial Questionnaire/ Information Form for Claims or Grievances, to which was attached an additional sheet with a handwritten statement from one of the Claimants, attesting to the fact that he had witnessed the contractors performing the work in dispute. According to the Carrier's records, Alpha and CW&W worked at the location in question, but not for all of the dates set forth in the Claim. The records indicate that Alpha and CW&W worked July 26, July 28-30; August 1-2, 9-10, 11-12 and 16, 2016.

According to the Organization, distributing and marking ties 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 provided 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. Alpha and CW&W were 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 supplemental notices dated May 13, 2016, and June 10, 2016. The May 13, 2016, notice was for the "MSLLC Ties and Rail Relay" project on the Vicksburg and Meridian Subdivisions. The June 10, 2016, notice was directed specifically at the Artesia Curve Rail Relay project, on the Artesia Subdivision. The notices specifically listed the type of work that the Carrier was planning on contracting out, the type of equipment involved, the number of contractors, the start date and projected duration of the projects, and their locations. 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 27 and 31, 2016, and August 3-8 and 13-15, 2016)).

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 distributing ties meets 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 of Agreement 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 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 contends that its December 15, 2015, Annual Notice of Intent to contract for the next calendar year was supplemented by notices dated May 13, 2016, regarding the “MSLLC Ties and Rail Relay” project, and June 10, 2016, addressing the “Artesia Curve Rail Relay” project. The notices set forth the type of work, the type of equipment, the length of the projects, their projected start dates, and their locations. The problem is that the locations identified were the Vicksburg and Meridian Subdivisions (May 13, 2016, notice) and the Artesia Subdivision (June 10,

---

[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.**

2016 notice). The work in dispute occurred on the Louisville Subdivision, which is not identified in either of the supplemental notices.

So the only notice that the Carrier sent regarding the disputed work was the Annual Notice of Intent to contract out work for the coming calendar year, which was dated December 15, 2015. The Annual Notice does not meet the standards for effective notice under the Side Letter: it is too broad and generic to serve the purpose of the required notice, which is to give the Organization sufficient information to be able to evaluate whether it has any objections to the proposed contracting and to be able to prepare for meaningful discussions in any conference that might be requested. The Annual Notice indicates who the potential contractors are, with a general description of the type of work they will be assigned to do. "Type of Work" for CW&W Contractors is listed as "Quality Gange, In-track Welder Support Gang, Switch Tie Gang, Material Distribution, Crossing Rehabilitation, Surfacing, Tie Unloading." The type of work for Alpha Railroad & Piling is described as "Tie Unloading, Welding Plant Support." "Material Distribution" and "Tie Unloading" fit the description of the work that is in dispute. But the Annual Notice provides no information on where the proposed contracting out will take place or when it will occur. The nature of large capital projects is such that one must be realistic about how much detail can be expected in advance, but there must be a bare minimum to identify the proposed contracting out project or projects. The Annual Notice does not meet that standard regarding the work in dispute here.

In addition to "a clear description of the work to be performed," notice under the Side Letter of Agreement must also identify "the basis on which the SRC has determined it is necessary to contract out such work according to the criteria set forth above." Those three criteria are special skills, special equipment and time requirements. The third condition is distinct from the first two, because the parties added a provision in the Side Letter regarding contracting on that basis:

> **"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 . . ."**

The Organization seeks to preserve the work that falls within the scope of the Agreement. To that end, it has a special interest in ensuring that the Carrier's MoW

forces are not replaced by contractors except as strictly necessary. The above provision is an effort to minimize that possibility. The meet and discuss process becomes all the more important when the Carrier invokes "time requirements" as the reason for contracting out work that its own forces could perform.

Distributing ties does not require special skills or special equipment. Thus, the proposed contracting must have been based on "time requirements." There are two problems with the Carrier's Annual Notice in that regard. First, it does not identify the basis for contracting except in the broadest possible terms: "KCS has neither the necessary equipment nor manpower available to complete the work referred to in a timely manner." The Organization is left guessing which basis will apply to any one contracting project. The second problem is that without information about the location or other details of a specific contracting transaction, the Organization does not have the information it needs to meet its responsibilities to its members under the Side Letter.

The Board has held previously that inadequate notice is a sufficient basis for sustaining a claim, and it will follow those precedents in this case.

The Carrier contends that Claimants are not entitled to any monetary remedy because they were fully employed during the period when the contracting occurred. Prior Board awards evidence two distinct philosophies on this subject. One school of thought is that if Claimants have not lost any compensation, they should not be "rewarded" as a result of the Carrier's violation of the Agreement. The other school of thought is that monetary awards for Claimants are appropriate even if they were fully employed, because without monetary compensation, the Carrier suffers no consequences as a result of its misconduct, which may encourage it to continue violating the parties' Agreement in the future. This Board finds the latter philosophy persuasive and hereby adopts it. Claimants shall be entitled to compensation for the hours worked by the contractors, on the dates when they were acknowledged to be working.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 4th day of September 2019.