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

Award No. 44111
Docket No. MW-44773
20-3-NRAB-00003-180283

The Third Division consisted of the regular members and in addition Referee I.B. Helburn when award was rendered.

(Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 from August 24, 2016 through September 1, 2016, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (crib out foul ballast) at/near/or in between Milepost 9.3 to Mile Post 16.9 on the Vicksburg Sub [System File C 16 08 24 (65)/K0416-06937 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 violation referred to in Part (1) and/or (2) above, Claimants L. Hannibal, R. Washington, O. Hall, R. Colvin, J. Herring and R. Riley shall now each be '… compensated eight (8) hours at the regular rate of pay for seven (7) days which totals $1704.08 for the Foreman, and $1587.60 for the Machine Operators, and $1500.80 for the Laborers plus late payment

> **penalties based on a daily period 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 corresponding the 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.

By letter dated December 15, 2015, consistent with its established practice, the Carrier notified the General Chairman of the intent to contract out work in 2016 on the MidSouth, South Rail and Gateway properties. The notice listed numerous contractors and the type of work, often in general terms, that each contractor might perform. The notice referred to the Carrier's "long history of having contracted outside forces to perform services . . ." and also stated that it had neither "the necessary equipment nor manpower available to complete the work referred to above in a timely manner." Among the contractors listed was CW&W Construction to perform general track maintenance, general bridge maintenance, earthwork and excavation. The Carrier asserts that the December 15, 2015 notice was conferenced.

On May 13, 2016 the Carrier sent a supplemental notice to the General Chairman indicating that a contractor to be decided would begin work approximately on June 27, 2016 and lasting approximately seven (7) weeks. The work listed was "(i)nstall approx. 84,000 cross ties, switch ties installation, road crossing rehab, relay approx. 66,000 linear rail feet, tie and OTM pickup and distribution, undercutting, surfacing, bridge repair and rehab." The supplemental notice ended by noting that there were no furloughed employees on the MidSouth property, that "all other employees are engaged in other on-going projects" and that the Carrier did "not have the equipment or available

manpower to perform these projects in a timely manner." Work location was to be the Vicksburg and Meridian Subdivisions.

A handwritten statement by R. Colvin and O. Hall indicated that they had witnessed CW&W Construction doing the work noted in the claim above at the locations and on the dates listed. The employees listed in the claim have established and hold seniority in the Maintenance of Way and Structures Department and maintain seniority on the territory where the disputed work occurred. The claim was timely filed and properly processed on the property without resolution and thereafter progressed to this Board for final adjudication.

The Organization avers that the disputed work is scope work reserved to Maintenance of Way employees and historically assigned to and performed by these forces. The Carrier is not free to contract out this work, as contracting out may occur only if one or more of three conditions listed in the February 10, 1986 Side Letter of Agreement (SLOA) is met. A further violation of relevant agreements occurred when the Carrier failed to "properly notify the General Chairman for the purpose of entering into good faith discussions prior to the time work was contracted to the outside forces." Notification must include the work to be subcontracted and the reasons therefor in order to meet the requirements of the SLOA and the December 11, 1981 National Letter of Agreement (NLOA). The December 15, 2015 and May 13, 2016 notices relied on by the Carrier do not specifically identify the disputed work or the exceptions that would justify subcontracting, therefore foreclosing the opportunity for a good faith discussion that might have resulted in the work being assigned to Carrier forces. A sustaining award is required. The Carrier's failure "to make a good faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces" is "an independent standalone violation" requiring a sustaining award.

Carrier defenses must be rejected because the Carrier did not provide the required advance notice. The eyewitness statement and the Carrier's defense shows that the disputed work was performed. Reliance on the concept of exclusivity is misplaced as the work clearly is reserved to the Carrier's Maintenance of Way forces subject to exceptions. Moreover, the exclusivity concept is inconsistent with the NLOA dictate that carriers must act in good faith to reduce subcontracting and increase use of Maintenance of Way forces. Even if the Carrier could show a past practice, which it cannot, such a practice would not override the language of the LOA or Appendix 1 of the Agreement. And, the Carrier has not established an exception that would allow the subcontracting.

Finally, the Carrier has not "seriously disputed" the Organization's requested remedy. The Claimants were available to perform the contracted work. Even if they were fully employed, they are entitled to a monetary remedy, which is standard in such cases.

The Carrier asserts that the Organization has failed to provide substantial evidence to make a *prima facie* case and thus has failed to carry its burden of proof. The December 15, 2015 notice to the General Chairman was timely and identified general track maintenance as work to be contracted out. The May 13, 2016 supplemental notice, not required to provide exact dates, described the work to be contracted, the equipment to be used and the contractor. The disputed work involved a mixed practice and the Organization cannot show that the work was customarily and exclusively done by its forces. The matter was conferenced without agreement, leaving the Carrier free to contract the work because neither equipment nor manpower were available to complete the work in a timely manner. Neither the May 17, 1968 Agreement, Article IV nor the LOA were violated. These agreements support management's inherent right to use contractors.

Maintenance of Way forces were fully employed. The April 17, 2003 letter from National Carriers Conference Committee Chair Allen to the Organization's National President Fleming notes that Article IV applies only to work within the scope of the Agreement and that the Berge-Hopkins 1981 letter has been abandoned by both parties. Because all Claimants were fully employed at times relevant, no monetary remedy is due.

Provisions considered by this Board in adjudicating this dispute are set forth below, beginning with the Scope Rule found in the December 11, 1981 NLOA, which in pertinent part reads as follows:

> **"(a) These rules govern the hours of service, rates of pay and working conditions of all employees in the Maintenance of Way and structures department performing work described in Appendix 1, and other employees who may subsequently be employed in said Department, represented by the Brotherhood of Maintenance of Way Employees.**
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> *** * ***

(d) Work covered by this agreement shall not be removed from the application of the rules of this agreement except by mutual agreement between the parties signatory hereto.

*** * ***

Appendix 1 lists the following Maintenance of Way and Structures Department positions: Track Foreman/Bridge Foreman, Welder, Assistant Foreman, Heavy Machine Operators, Light Machine Operators and Trackmen/Bridgemen. The Appendix also includes the following language:

> **"Employees included within the Scope of this Agreement shall perform all work in connection with the construction, maintenance, repair, and dismantling of tracks, roadbeds, structures, facilities, and appurtenances related thereto, located on the right-of-way and used in the operation of the carrier in the performance of common carrier service."**

Kansas City Southern Railway Company and the Brotherhood of Maintenance of Way Employees are party to a May 17, 1968 National Agreement, with Article IV, Contracting Out, relevant to this dispute:

> **"In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved 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.**
>
> **If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization Representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.**
>
> **Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman**

or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement."

The February 10, 1986 SLOA, a codification of Article IV of the 1968 National Agreement, is in the form of a letter on MidSouth Rail Corporation letterhead to Organization General Chairman T. F. Vance from President and Chief Executive Officer E. L. Moyers. The letter itself reads as follows:

"This is to confirm our understanding regarding certain issues related to the labor agreement (Agreement) between the MidSouth Rail Corporation (MSRC) and the Brotherhood of Maintenance of Way Employees (BMWE).

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.

In the event the MSRC 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 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 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, 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.

Nothing herein contained shall be construed as restricting the right of MSRC to have work customarily performed by employees included with the Scope of 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. In such instances, MSRC shall promptly notify the General Chairman of the work to be contracted and the reasons therefor, same to be confirmed in writing within fifteen (15) days of the date of such work commences.

Please indicate your concurrence with the arrangements described above by signing this letter in the appropriate space below."

General Chairman Vance signed, thus indicating his concurrence.

Because the Organization's claim fails without further consideration if the disputed work is determined not to have been scope work, the question of scope work is primary. Appendix 1 of the 1981 NLOA includes foremen, machine operators and trackmen (laborers) among the Maintenance of Way and Structures Department positions and includes within scope work "construction, maintenance, repair, and dismantling of tracks, roadbeds . . ." There is no doubt that road crossing repair work is traditional Maintenance of Way work within the Scope Rule. The Organization does not have to show that Maintenance of Way forces have exclusively performed that work in the past. If such a showing were the case the contractual attempt to preserve bargaining unit work would be meaningless. Moreover, even if the disputed work is of the mixed practice variety—performed at times by Maintenance of Way employees and at other times by outside forces—the Carrier is not relieved of the obligation to provide appropriate notice of the intent to contract and to justify the contracting as consistent with one or more of the three exceptions set forth in the 1986 SLOA.

The SLOA states that the notice of intent to contract "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. . ." The annual notice dated December 15, 2015 does not meet the requirements of an effective notice. "(I)t 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 out and to prepare for meaningful discussions in any conference that might be requested." Third Division Award 43834. Moreover, the Board in Third Division Award 42419 wrote that the notice of intent to contract should include the starting and ending dates of the work, the number of contractor employees to be used and the hours involved. Blanket type notices with vague descriptions are inadequate. Third Division Award 29331.

The May 13, 2016 Supplemental Notice, in addition to the aforementioned work to be done, listed the type of equipment to be used as "spike pullers, spikers, rail laying equipment, pettibones, rail heaters, tie plugging machines, tampers, ballast regulators, grapple trucks, back hoes, dump trucks, trackhoes, rail welding trucks, crew trucks and tool, tie inserters, rail anchor machines." The work was to involve approximately seventy-five (75) contractors, to begin approximately on June 27, 2016 and to last approximately seven (7) weeks.

It is not necessary to consider whether the supplemental notice met the requirements for specificity. The Organization has provided an undated statement asserting the performance of the disputed work. The Carrier throughout the on-

property processing of the claim, including a final check of the relevant record following the claims conference, has asserted that it has no record of the rail crossing repair work being done on the date and at the location stated by the Organization. This is contrary to other contracting cases on the same docket when, following a final, post claims conference check, the Carrier confirmed that records showed the performance of disputed work. Thus, this Board is confronted with a factual dispute. "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." On-property Third division Award 43828. See also on-property Third division Awards 43826, 43827 and 43832. The Organization has not carried the burden of making a *prima facie* showing that the work alleged in the claim was performed.

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 11th day of August 2020.