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

Award No. 44709
Docket No. MW-44809
22-3-NRAB-00003-210495

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(The Kansas City Southern Railway Company
(former SouthRail Corporation)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when, on June 8 and 9, 2016, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (distribution of ties) at or near Mile Post TR 16 on the Artesia Sub (System File C 16 06 08 (035)/K0416-6850 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 and P. Wright shall now each '... be compensated eight (8) hours regular rate of pay for two (2) day(s) which totals $453.60 for the Machine Operator 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.

This is one of many subcontracting disputes between the Carrier and the Organization presently before this Board with this neutral member sitting with the Board. The common thread throughout is that these are mostly mixed-practice cases – i.e., there is no dispute that in the past the Carrier has subcontracted the work involved in these disputes and that, in the past, the covered employees have also performed the work. The question throughout these cases is sufficiency of notice under the governing Agreements.

Looking to the rationale found in awards between the parties resolving subcontracting disputes, the more recent line of cases utilizes the following analysis to determine sufficiency of notification by the Carrier to the Organization of the Carrier's intent to subcontract work under the requirements Side Letters of Agreement regarding subcontracting:

First, an annual notice given by the Carrier of its intent to subcontract work which just lists contractors and types of work to be performed is insufficient notification to the Organization. See Third Division Award 43834:

> **"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 Gang, 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."**

See also, Third Division Award 43980:

> **"The record of the on-property processing of the above-noted claim contains no supplemental notice, leaving only the generic December 15, 2015 annual notice that the Board finds insufficient. The lack of a notice with sufficient specificity, including a "clear description of the work to be performed," requires a sustaining Award without consideration of the Carrier's justification for contracting the work. Third Division Award 43834."**

Second, where the Carrier timely (15 days before commencement of the work) supplements an annual notice of intent to subcontract work and identifies "... the type of work, the type of equipment, the length of the project, its projected start date, and its location" along with stated reasons for subcontracting (i.e., special skills, special equipment and time requirements as specified in the governing Side Letter), the Carrier's notification obligations can be deemed to be satisfied. See Third Division Award 43835 where the disputed work as set forth in the claim was on the Artesia Subdivision and the Carrier issued a generic annual notice (which is insufficient by itself under Third Division Award 43834) but then followed that notice

with a specific supplemental notice dated June 10, 2016 identifying work to be subcontracted on the Artesia Subdivision:

> **"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, 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 June 10, 2016, notice indicated 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 have understood that the Carrier probably did not have the manpower to complete the work in the time frame allotted. Given the number of contractors involved, the Carrier may 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."**

Third, where a supplemental letter is issued by the Carrier and identifies a location of work to be performed, but that location and work is different from the work in dispute in the claim, the supplemental notice is problematic to cure the notice deficiency in an annual notice. See Third Division Award 43834:

> **"... The problem is that the locations identified were the Vicksburg and Meridian Subdivisions (May 13, 2016, notice) and the Artesia Subdivision (June 10, 2016 notice). The work in dispute occurred on the Louisville Subdivision, which is not identified in either of the supplemental notices."**

Fourth, although supplemental notices that do not identify the work in dispute are problematic, according to the prior awards, if the subcontracted work is sufficiently large, the Organization can be deemed to be on sufficient notice even if the work location in the claim is different from that described in the supplemental notice. See Third Division Award 43831 where the disputed work as identified in the claim was on the Artesia Subdivision; there was an annual notice of subcontracting dated December 15, 2015 (which, as discussed in Third Division Award 43834 was "too broad and generic to serve the purpose of the required notice"); and there was a supplemental notice dated May 13, 2016 which identified work on the Vicksburg and Meridian Subdivisions (but not on the Artesia Subdivision which was the work in dispute as set forth in the claim). The Board nevertheless denied the claim even though the supplemental notice did not identify the work in dispute quoting similar language set forth above from Third Division Award 43835 that the size of the project alone and the detail given was sufficient notification:

> **"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 May 13, 2016, that focused on the "MSLLC Ties and 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 – "MSLLC – Vicksburg and Meridian Subdivisions." 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." 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 some 75 contractors were expected to work seven weeks 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 be as detailed as the Organization would like, but it is sufficient for the Organization to evaluate whether it wants to object to the proposed contracting and to participate in a meet and discuss session with the Carrier. The Board concludes that notice was adequate."**

Fifth, where there are disputed issues of fact concerning whether the work was performed as claimed by the Organization (e.g., with respect to location, dates, identity of contractor, number of individuals working) which arise because employee statements do not correspond with the Carrier's records as claimed by the Carrier, because the burden is on the Organization to demonstrate the asserted violation, those disputed facts are resolved against the Organization. See Third Division Award 43837 [emphasis in original]:

> **"The Board must address first the threshold issue of the dispute in facts. As this Board has noted in previous awards, where there is a dispute in facts that cannot be resolved on the basis of the 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 whether McHann performed the work or not, and if it did, when. The Organization contends that the Carrier has not submitted any records to document that McHann did *not* work (such as a statement from a Roadmaster). Mere assertions, the Organization argues, are not evidence. That is correct. However, the Carrier makes the same argument about the statements from the Claimant and another MoW employee—they are assertions, not proof. This conundrum illustrates why the Board dismisses cases involving irreconcilable factual disputes. The problem with the statements submitted by the Organization is that they have limited credibility. The two statements are terse. The one from the Claimant reads: "I Jared Comer … witness [sic] McHann Construction on KCS at Saltillo MS and Tupelo MS between milepost 288 and 286 unloading rail with a Trackhoe with one man on 8/2 and 8/3/16." The statement is undated and there is no indication when it was prepared or submitted. The other statement reads: "I Dwight Johnson seen McHann on KCS on 8/2 and 8/3/16 unloading rail between milepost 288 and 280 with a Trackhoe in Tupelo MS and Saltillo MS." The statements appear to have been drafted and written by the same hand—literally. The handwriting is exactly the same, *including the signatures*. The content of the statements is suspiciously similar: the two statements do not exhibit the small differences in details that one ordinarily expects when two different people recount their memories of the same event. These problems significantly undermine the credibility of the statements. As for the Carrier's burden, it can be difficult to prove a negative: if the work did not occur**

> **as alleged, there is no record for it to show to the Organization. As for a statement from a Roadmaster, it might be possible to get one, but then the record is left with dueling statements and no way for the Board to evaluate the credibility of any witnesses. Given the dispute in facts, the Board will dismiss the claim."**

See also, Third Division Award 43834:

> **"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))."**

Further, see Third Division Award 43828:

> **"Regarding the actual work at issue, there is a dispute in the record as to certain facts. The Claim alleges that there were five contractor employees who worked for eight days. Carrier records indicate that a single contractor employee worked one day only, December 14, 2015. The statement submitted by two of the Claimants described work that was performed on December 14, 2015, although it claimed that the work was "ongoing." 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. Here, the record does not provide a basis for the Board to resolve the dispute regarding how many contractor employees worked and for how many days beyond the undisputed that a single contract employee worked on a single day. Accordingly the Claim must be dismissed as to any additional contractor employees and any additional days of work."**

Also see Third Division Award 43833; 43832; 43831 (where disputed factual assertions were resolved against the Organization's position).

Sixth, with respect to remedies where violations have been found, again see Third Division Award 43834:

> **"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."**

Seventh, while recognizing that it may sometimes be difficult to completely reconcile the many awards issued on these disputes in the past, for stability purposes and to prevent referee shopping, when disputes are decided between parties to a collective bargaining agreement, boards hearing subsequent claims between those same parties considering the similar disputes should not decide the new disputes de novo, but should defer to the prior dispositions unless the prior awards are "palpably in error". See Third Division Award 41846 (with this neutral participating [emphasis in original]):

> **"But this Neutral's inclination to have sustained the claim if it was a case of first impression is not the standard of review in this case. This issue between the parties has been previously decided on the merits by a Board of their choosing. Therefore, because the issue has been previously decided, the standard of review in this case is not whether PLB 7270, Award 2 was in error. Instead, the standard of review is whether PLB 7270, Award 2 was "palpably in error" (Emphasis added). See Third Division Award 34204 (with this Neutral participating):**
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> **"This is, for all purposes, the same dispute that was decided by the Board in Award 33507. We cannot say that Award 33507 is palpably**

> **in error. As such, and for purposes of stability, we cannot decide this case de novo, but we are required to defer to that prior Award. To do otherwise would be an invitation to chaos and would result in encouraging parties after receiving an adverse decision to attempt to place a similar future dispute before another referee in the hope of obtaining a different result."**

The analysis used in the prior awards between the parties cited above addressing subcontracting disputes like the those presently before this Board are not palpably in error. We therefore defer to the analysis in those cases to decide this case and the similar cases presently before this Board.

In sum, for this and the other subcontracting claims between the parties now pending before this Board and neutral member, the following rules shall be used for resolving notice questions:

(1) Standing alone, annual notice given by the Carrier to the Organization of its intent to subcontract work which just lists contractors and types of work to be performed is insufficient notification to the Organization.

(2) The Carrier's giving supplemental notification to the Organization of the type of work, the type of equipment, the length of the project, its projected start date, and its location along with stated reasons for subcontracting satisfies the Carrier's notification obligation.

(3) Where a supplemental notification is given by the Carrier to the Organization and identifies a location of work to be performed, but that location and work is different from the work in dispute in the claim, the supplemental notification does not cure the notice deficiency given by just an annual notice.

(4) However, if the subcontracted work is sufficiently large as described in a supplemental notification, the Organization is on sufficient notice even if the work location and specific work raised in the claim is different from that described in the supplemental notification.

(5) Because these are contract disputes with the burden on the Organization, if there are disputed issues of fact which cannot be resolved in the record, those disputed facts are to be resolved against the Organization.

(6) With respect to remedies for demonstrated violations, the Claimants shall be entitled to compensation for the hours worked by the contractors on the dates when the contractors were acknowledged to be working.

Turning to the facts of this case, the record reveals that on December 15, 2015, the Carrier sent the Organization an annual notice of subcontracting (which was a revision of a prior notice) which just listed names of contractors and type of work "to perform the indicated services as necessary on the MidSouth, Southrail and Gateway properties throughout 2016." See Attachment 1 to Organization Exhibit A-5. Under the above discussed rules, that annual notification was "... too broad and generic to serve the purpose of the required notice ...."

However, the record reveals that by letter dated April 28, 2016, the Carrier notified the Organization "... of the Carrier's intent to contract the work in this Notice of Intent to Contract Services" listing the type of work (tie installation), type of equipment (crew trucks, backhoes, spikers, spike pullers, front end loaders, grapple trucks and tools); that the work was going to be performed by approximately 15 contractors; the work would be for a duration of three weeks; the project was going to begin approximately May 16, 2016; the work time involved; and the work was going to be performed on the Artesia Subdivision. Carrier Exhibit A at 15. That described work is the work alleged by the Organization in the claim to have been subcontracted in this case by the Carrier without notification. The supplemental notice also stated that there were no furloughed employees on the Carrier; all other employees were engaged in other on-going projects; and the Carrier does not have the equipment or available manpower to perform the projects in a timely fashion. Id. We therefore find that the supplemental notice was timely given as required by the Side Letter of Agreement (written notice to be given by the Carrier within 15 days of the date of commencement of the work) and met the requirements of the governing awards discussed above.

Based on the record evidence, we do not find that the Organization has carried its burden to demonstrate that the Carrier violated the provisions of the governing Side Letter of Agreement and other subcontracting provisions as alleged.

This claim shall therefore be denied.

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 6th day of May 2022.