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

Award No. 44719
Docket No. MW-45482
22-3-NRAB-00003-190288

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 MidSouth Rail Corporation)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when, on October 29, 30, 31, November 1, 2 and 3, 2017, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (remove/cut trees) from Mile Posts 107 to 110 on the Meridian Sub [System File 17 10 29 (088)/K0417-7509 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 work referred to in Part (1) above 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 Letter of Agreement dated February 10, 1986 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. Downs, J. Sumrall and A. Agent shall each '... be compensated ten (10) hours per day at the regular rate of pay for six (6) days which totals $1701.00 for the 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.

There is no dispute that in the past the Carrier has subcontracted the work involved in this dispute and that, in the past, the covered employees have also performed the work. This is a mixed-practice case. The question in this case is sufficiency of notice under the governing Agreement language.

By letters dated December 13, 2016 and August 4, 2017, the Carrier sent annual notices of subcontracting to the Organization, both of which listed contractors and type of work to be performed on the Carrier's properties during 2017. Carrier Exhibit A at 25-30.

There is no supplemental notification to the Organization in this record further detailing the work alleged to have been performed.

Standing alone, the annual notification to the Organization is insufficient for the Carrier to meet its notification obligations because it is too broad and generic to serve the purpose of the required notice. Third Division Award 43834. See also, Third Division Award 44709:

> **"(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."**

The claim in this matter is limited to October 29, 30, 31, November 1, 2 and 3, 2017, referencing "System File 17 10 29 (088)/K0417-7509 MSR." Factual support for the claim for those dates comes from a statement attesting that cutting trees was performed by ZA Contractors at the mileposts listed in the claim on those dates. Attachment No. 1 to Employes' Exhibit A-1, Sheet 1.

According to the Carrier's February 8, 2018 letter (Carrier Exhibit A at 23):

> **"(e) ... [P]er Garrett Cross- Engineering Project Manager, ZA Construction performed the work on the following days with only two (2) contractors: October 30, 31, 2017 and November 1, 2017. ..."**

The Organization has therefore shown that the Carrier subcontracted work on some dates at the location specified in the claim without sufficient notice as required by Third Division Award 43834 to which we defer. The claim therefore has merit.

However, there is a factual dispute concerning whether the work was performed on October 29, 30, 31, November 1, 2 and 3, 2017 as asserted by the Organization or was limited to October 30, 31 and November 1, 2017 as asserted by the Carrier. Where there are such disputes, only the dates for which the parties are in agreement that the work was performed by the contractor can a violation be found and remedied. 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."**

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

Based on the above, the violation can only be found for the dates for which there are no disputes that the contractor performed the work – October 30, 31 and November 1, 2017.

As a remedy for the dates that are not disputed (October 30, 31 and November 1, 2017), see Third Division Award 44709:

> **"Sixth, with respect to remedies where violations have been found, again see Third Division 43834:**
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> > **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."**

As a remedy, the Claimants shall be entitled to compensation for the hours worked by the contractors on the dates when the contractors were acknowledged by both the Organization and the Carrier to be working – specifically, October 30, 31 and November 1, 2017.

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 6th day of May 2022.