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

Award No. 42415
Docket No. MW-41921
16-3-NRAB-00003-120226

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference**
(CP Rail System (former Delaware and Hudson Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (replace floor covering and related work) at the Binghamton Engine House on December 7, 8, 9, 10, 11, 21, 22, 23, 24, 28, 30 and 31, 2009 (Carrier's File 8-00755 DHR).

(2) The Agreement was further violated when the Carrier failed to provide a proper advance notice of its intent to contract out the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as required by Rule 1 and 'Appendix H'.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Hewitt, T. Delamater, K. Chilson and R. Vanderpool shall now be compensated at their respective and applicable rates of pay for their respective proportional share of the straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work on December 7, 8, 9, 10, 11, 21, 22, 23, 24, 28, 30 and 31, 2009."

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.

On September 2, 2009, the Carrier issued a letter to the Organization stating it intended to contract out several projects at Binghamton Yard among which was the following project:

> **"Flooring replacement in the diesel shop**
>
> **All flooring in the office area to be replaced with CP Rail standard flooring material. This requires specialized equipment and skills in order to not void any warranties."**

On September 16, 2009, the Organization informed the Carrier that it objected to contracting out scope-covered work. The Organization requested conference and the following information: (1) date work was first planned and considered including internal memos; (2) estimated man hours to complete work; (3) specific equipment needed for project and Carrier's equipment; (4) equipment vendors contacted by the Carrier and responses and (5) copy of proposal for work to be performed.

Conference convened the next day (September 17). The Organization memorialized the discussion in a letter to the Carrier dated October 5, 2009. The Carrier characterized this project as specialized work requiring special skills for installation of this rubberized flooring. The Carrier did not articulate particulars of the specialty work other than noting it must satisfy the Carrier specifications and standards. In the Organization's view, the reason for contracting out is disingenuous since it cannot identify the equipment or articulate the skills required.

Following conference the Carrier proceeded to contract out the work and the Organization filed a claim alleging violations of Rule 1 and Appendix H among others. During on-property exchanges the Organization stated the force is qualified to perform this work as it has installed flooring for the Carrier and could be trained to install rubberized flooring. The Carrier's failure to specify or articulate the skills and equipment during conference shows its lack of good-faith effort under Rule 1 and Appendix H to reduce the incidence of contracting and increase the use of its force.

The Carrier responded that the force has not installed rubberized flooring as this is the first time the Carrier has purchased it. The manufacturer guarantees the warranty only if the flooring is installed by a qualified installer, e.g., manufacturer trained installer. The Organization's claim is excessive as the outside force had one (1) employee installing the flooring on the majority of claim dates.

On June 14 and 15, 2011, the parties convened conference to discuss this matter. As the dispute remains deadlocked on property, it is now before the Board for a final decision.

The Board has reviewed the record established by the parties in this proceeding as well as their submissions in support of their positions. The Board finds that the claimed work (replace floor covering) is subject to Rule 1.1 because it involves "work generally recognized as Maintenance of Way work, such as . . . construction, repair and maintenance of . . . buildings and other structures[.]"

The Board further finds that the Carrier issued notice to contract out and met, upon request, in conference. The reason for contracting out - specialized equipment and specialized skills - was discussed without resolution.

Instructive for the Board's consideration in this proceeding is Third Division Award 40250.

> **"The Union had the burden of proving a violation of the Agreement. It did not meet that burden. Although B&B forces have installed flooring in the past, the record shows that this particular type of rubberized flooring required a licensed contractor in order to validate the warranty. The Organization failed to show that its members licensed or qualified to perform this specialized work."**

Applying Third Division Award 40250 to the instant claim, this Board finds that the Organization has the burden to prove a violation of the Agreement and it did not meet that burden. The force has installed flooring but not the claimed work rubberized flooring because this installation is the first time the Carrier has installed such flooring.

Unrebutted is the Carrier's assertion the rubberized flooring must be installed by a contractor trained by the manufacturer otherwise the warranty is void. The unrebutted assertion is a material fact for evidentiary purposes. Given that material fact, the force does not have the specialized skill (manufacturer training) for installing the rubberized flooring.

In view of these findings, the Board concludes that Parts 1 and 2 of the claim are not proven. Therefore, the claim is 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 31st day of October 2016.