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

Award No. 44511
Docket No. 46106
21-3-NRAB-00003-200301

The Third Division consisted of the regular members and in addition Referee Barbara C. Deinhardt when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it allowed outside forces (Metropolitan Contract Carpet, Inc.) to perform Maintenance of Way work (remove and install carpet tiles) on September 14, 2018 in the Acela Lounge at Amtrak's 30th Street Station in Philadelphia, Pennsylvania (System File BMWE-153716-TC AMT).

(2) The Agreement was further violated when the Carrier failed to comply with advance notification and conference provisions in connection with the Carrier's intent to contract out the subject work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, BMWE members in Gangs I013, I015, I017 and I046 located in Philadelphia 30th Street Station shall be compensated seventy-two (72) hours, split equally amongst them, at their proper straight time and overtime rates of pay."

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 14, 2018, renovation work was performed in the Acela lounge at Philadelphia's 30th Street Station that involved the installation of carpet tiles. On May 9, 2018, the Carrier had sent the Organization a contracting out notice and a conference was held on June 8, 2018. No agreement was reached. The carpet tile removal and installation work was performed by outside contractors. Other work related to the renovation was performed by BMWE members.

The Organization argues that the Carrier was not in good faith when it sent the notice and met with the Organization. It had no intention of reaching an agreement. Carpet installation has historically, though not exclusively, performed by BMWE. Exclusivity is not necessary. This situation is covered by PLB 6671, Award #1. This case is virtually indistinguishable.

The Carrier first argues that this Board lacks jurisdiction to hear this case because the parties have an agreement that Scope Rule interpretations would be heard by a Special Board of Adjustment and that agreement should be respected. Further, the Carrier asserts that it complied with the terms of the Agreement when it sent a notice to the General Chairman and held a conference to discuss the contracting out. Further, the work of carpet installation has not been done in the past exclusively by Organization employees; carpet tiles were not used until 1990 and so could not have been anticipated by the Scope Rule; Claimants were not available to do the work, as they were assigned to other duties at the time and the Acela Lounge renovation had to be completed over one weekend; the carpet came with a contractor installation warranty; and the carpet had a unique pattern that required carpet installation experts to install. In addition, if it is found that a violation was committed, the claim is excessive. There were only six, not nine, contractor employees working on the installation work (the others were the owner and two delivery people). Finally, the

Carrier argues that it is well-established that the appropriate payment for missed work opportunities is at the straight time rate of pay.

Upon a review of the record, the Board finds as follows.

We reject the Carrier's contention that this Board has no jurisdiction because the dispute had to be presented to the Special Board of Adjustment. The National Mediation Board abolished the Special Board of Adjustment in 2002. The case precedent submitted by the Carrier all preceded its abolition and the 3rd Division Boards since that time have all taken jurisdiction of Scope Rule cases.

On the merits, we find that the case before us is governed by Award 1 of PLB 6671, in which that Board found that the BMWE members had historically performed carpet installation work, both carpet rolls and carpet tiles, since shortly after 1978, such that the Scope Rule applied to the work. It rejected the Carrier's arguments about exclusivity and held that the only contracting out that would be permitted would be that that was pursuant to a specific exception set forth in the Scope Rule.

We find that Award 1 of PLB 6671 is controlling and thus we look to the exceptions in the Scope Rule. As in the 30th St Station carpet installation work at issue in the precedent cited above, here there was no claim that the work involved was an emergency situation, or that a lack of essential equipment meant that the work could not be completed in a timely fashion, or that it was a major construction project.

Thus the only Scope Rule exception that was not claimed as a defense in the installation dealt with in Award 1, PLB 6671 is when there is a lack of available skilled personnel that meant the work could not be completed in a timely fashion. We find that once the Organization proved that the work is covered by the Scope Rule, the burden of proof shifted to the Carrier to prove that the work falls within one of the exceptions. We find that the Carrier did not prove that there was a lack of skilled manpower. The Carrier argues the deadline for the project was before the end of the fiscal year and its own employees were busy doing other projects. However, the Carrier has not proved that it could not have assigned six employees work for eight hours, either straight time or overtime, in order to complete the project in a timely manner. It knew of the need to perform the work for months. It does not appear that the BMWE employees who were performing the painting work were working at the same time as the carpet installers and in fact the Carrier notes that the work done by those BMWE workers was able to be done without shutting down the Acela Lounge.

What it did not explain was why those workers (or others) could not have then done the carpet removal and installation work as well. The Carrier has control over the assignment of work. It did not prove that there was no way to schedule other work such that six employees would be available to perform this work on one day either during the week (the work in question here was done on a Friday during the day, not on a weekend) or on a weekend in September, 2018 before the end of the fiscal year.

We also do not accept the Carrier's assertion that the BMWE workers were not sufficiently skilled in this type of carpet installation. The Organization satisfactorily demonstrated that the carpet that was laid during the project dealt with in the prior case was more intricate than the carpet involved here.

The Carrier also argues that the Scope Rule does not apply because this work was warranty work. The existence of a warranty is not listed as an exception to the Scope Rule and Award 1 of PLB 6671 only observed that "there were no proven warranty or other issues associated with the disputed work that might lend support to the Carrier's decision to contract out the work." We do not accept the Carrier's argument that the warranty offered by the carpet installer somehow overrides the Scope Rule. The warranty in the record only applied to installation, not to the carpet itself. So what the Carrier is arguing is that because the contractor agreed to reinstall the carpet if it installed it incorrectly, the Carrier was permitted to have the outside contractor do the work rather than the Carrier's own employees. We see nothing in the Scope Rule that permits this exception. We also note that accepting such an argument would allow the Carrier to seek such a performance warranty (if we do it wrong, we'll do it again for free) on the performance of any bargaining unit work and thereby evade the language of the Scope Rule.

We therefore conclude that the Claim should be sustained. The Carrier has provided sufficient evidence that the work in question was performed by six installers on September 14, 2018. The other three contractor employees who signed in were the owner, who supervised, and two delivery people. In addition, we find that precedent supports the Carrier position that the appropriate remedy is to pay the hours lost at straight time, rather than at the penalty overtime rate. Thus the appropriate remedy is to pay 48 hours at straight time to Claimants in equal shares.

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 29th day of July 2021.