Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31754
Docket No. MW-30696
96-3-92-3-478

The Third Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

(*Brotherhood of Maintenance of Way Employes*
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when it assigned outside forces (B. Sykes Ltd.) to perform Maintenance of Way work (operating a log loader and flatbed trucks in conjunction with ties removal work) on the Pymatuning Industrial Tracks between Mile Post 49.7 and Mile Post 57 near Warren, Ohio beginning October 15. 1990 and continuing (System Docket MW-1912).

(2) The Agreement was further violated when the Carrier did not give the General Chairman prior written notification of its plan to assign said work to outside forces.

(3) As a consequence of the violations referred to in parts (1) and/or (2) above, Vehicle Operators J. A. Castrilla, P. A. Castrilla and Machine Operator D. J. Rossetti shall each be allowed pay at their respective straight-time rates and overtime rates of pay for all time worked by the outside forces who performed the work described in (1) above."

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.

Sometime before October 15, 1990, the Carrier entered into a sales agreement with B. Sykes Ltd., selling a portion of abandoned track on an as-is, where-is basis. The sales contract specified that the contractor would purchase, dismantle and remove the facilities from Conrail property as well as return to the Carrier any fit, or useable ties that it discovered during removal.

Apparently, the removal work began on October 15, 1990, and ended on an unknown date. On November 12, 1990, the Organization submitted a claim on behalf of the Claimants alleging that the work performed by the contractor in removing the abandoned trackage violated Rule No. 1-Scope. The Organization further suggested that the Carrier failed to give it proper notification prior to subcontracting.

The Carrier rebutted by arguing that the sale and removal of the Carrier's property by an independent contractor is work outside of the Agreement. Furthermore, the Carrier argued that the pre-subcontracting notification requirement embodied in the side letter between National Railway Labor Conference Chairman, Charles Hopkins and BMWE President O. M. Berge dated December 11, 1981 is inapplicable to Conrail. The Carrier also argued that the Organization failed to demonstrate that the work of removing trackage and ties is work is within the scope of the Agreement.

The parties conferenced the matter at which time the Carrier allowed the Organization an opportunity to review the sales agreement. The parties were unable to reach agreement and submitted it to this Board for final resolution.

The Organization, in a lengthy Submission, basically argues: (1) that the work of removing the ties in the track falls within Scope Rule No. 1; (2) that the Carrier failed to comply with the prenotification requirements as required by the December 11, 1981 Letter of Agreement between Chairman Hopkins and President Berge; (3) that Conrail is covered by the December 11, 1981 National Agreement.

With respect to the Carrier's affirmative defenses, the Organization argues that despite repeated requests for the actual sales contract between the Carrier and the contractor, the Carrier refused to supply it with the appropriate document. Therefore, the Organization argues, since the Carrier failed to make the agreement with the contractor part of the record, it cannot reasonably rely on it as an affirmative defense. The Organization notes that the Carrier's tactic of merely allowing the Organization a cursory perusal during the final conference on the property was inadequate to establish the sales agreement as an affirmative defense to the Organization's impermissible subcontracting claim.

Finally, the Organization points to the fact that the Carrier's retention of usable cross-ties is an important fact in determining whether the Carrier can utilize the sales contract as a complete affirmative defense. According to the Organization, any retention of usable material by the Carrier, places the Carrier's act of contracting with B. Sykes Ltd. within the scope of the Agreement since it never relinquished ownership rights to the cross-ties it retained for later use. As support for this position, the Organization points to *Public Law Board No. 4370, Award 21 (BN-MW)* in which under essentially similar facts, a contract violation was found.

The Carrier views the dispute differently. First, the Carrier believes that the sale of the abandoned track on an as-is, where-is basis to B. Sykes Ltd. is a complete defense to the Organization's subcontracting claim. The Carrier does not believe that its retention of usable ties found by B. Sykes while dismantling the abandoned trackage is anything more than an incident affect to the sale of its property. The Carrier cites a long list of precedent, in particular Third Division precedent, which holds that work performed by a contractor in dismantling and/or removing property sold to it by a carrier is outside of the scope of the agreement.

The Carrier also does not believe that the work claimed by the Organization falls within the Scope Rule. It argues that the Organization bears the burden of proving that the removal of trackage and cross-ties aptly fits within the work contemplated by Rule No. 1.

The Carrier also puts forth the argument that it is not required, per the National Agreement, to pre-notify the Organization of its intent to subcontract even if the work performed by B. Sykes was subject to the Scope Rule. The Carrier bases this belief on the fact that the December 11, 1981 Hopkins-Berge letter was never incorporated into Conrail labor Agreements since the Carrier bargained separately during that round of national negotiations.

As support for this position, the Carrier points to a February 1, 1982 Agreement, wherein the parties concurred that the Senior General Chairman and Conrail's Director of Labor Relations would jointly determine a list of Agreements that survived for future application. The Carrier argues that any Agreement not so listed on Appendix B failed to be a viable Agreement. The Carrier notes that the December 11, 1981 letter between President Berge and Chairman Hopkins is not listed in Appendix B to the Carrier's Agreement with its Organizations and therefore, the Agreement is inapplicable on Conrail property.

Finally, the Carrier argues that damages are inappropriate since all Claimants were either fully employed or unavailable for work on the dates in question.

After considering the parties' contentions, we make the following findings.

Initially, we note that Special Board of Adjustment No. 1016, Award 66-A disposed of the applicability of the December 11, 1981 Letter on this Carrier and we need not comment on it here. In addition we note that in the Addendum to Award 9 of SBA No. 1016 the parties agreed that the test for Scope coverage under this Agreement is customary and traditional rather than exclusive performance.

Next, the work of dismantling trackage and cross-ties arguably fits within the Scope of Rule No. 1. Since the work of dismantling trackage and cross-ties arguably fits within the Scope Rule, the Carrier is obliged to give the Organization a pre-subcontracting notification. Despite the fact that the Carrier continues to argue the inapplicability of the pre-notification requirement, this matter has been established by this Division in *Award 26314* in which the Board held that the pre-notification requirement was applicable to this particular Carrier. Therefore, we find that the Carrier failed to give a pre-notification requirement if, in fact, one was required.

We also find, based upon a long line of precedent that, the Carrier's act of selling equipment to outside parties constitutes a complete defense to a subcontracting claim. Had the Carrier completely sold the tracks and ties, including any usable or fit ties, to B. Sykes, our analysis would end here and we would dismiss the claim. However, the crux of this dispute is the affect of the Carrier's retention of usable ties as part of its sale of the abandoned track as-is, where-is to B. Sykes. In this particular situation, the Carrier did not completely relinquish the ownership of the usable ties, but rather, retained them for future use. Given that the situation creates a hybrid wherein a portion

of the abandoned trackage was completely sold to the contractor while a portion remained the Carrier's property, we must determine if the hybrid sales and retention nullifies the Carrier's complete subcontracting defense of sale of the abandoned property.

Unfortunately, the Carrier failed to place the complete sales agreement upon the record thereby, allowing this Board an opportunity to review the agreement in detail. If the Carrier's retention of the ties was truly incidental to the focus of the agreement which was the sale and removal of the abandoned property from the Carrier's premises, it would be unlikely that the incidental nature of the Carrier's retention of some property would nullify its complete subcontracting defense of sale of property.

On the other hand, if the Carrier's retention of property was more than incidental and arguably could be a circumvention of the subcontracting agreements and the Scope Rule, this Board would necessarily need to make a different finding.

As guidance in resolving this matter, we turn to *Public Law Board No. 4370, Award 21.* In that case, the Board was confronted with essentially the same facts presented to this Board in this particular matter. After finding a violation in that case, the Board remanded the matter to the parties to determine "what approximate portion of the work consisted of 'stacking usable material' which remained under the control and the ownership of the Carrier. The appropriate hours at straight-time rate should then be paid to the Claimants." In that decision, the Board crafted an effective solution to the hybrid nature of an abandoned property sales agreement wherein the Carrier sells part of the property to a contractor and retains part of the property, all work which is arguably subject to the Scope Rule.

Consequently, we will find a violation of the subcontracting provisions and the Scope Rule by the Carrier for failing to notify the Organization of the pendency of the subcontract. As in PLB 4370, Award 21, we remand the matter to the property for the parties to determine what portion of the actual contract constituted retention of usable or fit ties and we will further order the Carrier to pay the Claimants an appropriate pro rata rate of the claim in conjunction with the portion of the work which involved sorting the fit ties, stacking the fit ties, thereby enabling the Carrier to utilize the ties in the future.

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 24th day of October 1996.