CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 955

Heard at Montreal, Tuesday, June 8, 1982

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

DISPUTE:

Claim by the Union that the Company violated the provisions of the Preamble of the Collective Agreements governing (1) Sub-Foremen and Checkers and (2) Freight Handlers, Forklift Truck Operators, Tractor Operators, Coopers, etc. at West Saint John, N.B. The Preamble of each of the two Collective Agreements reads as follows:

> This agreement contemplates that the general work of handling the Company's freight from shed to cars and vice versa shall be performed by the Freight Handlers, whether by hand or mechanized equipment. Any substantial deviation from this practice should be subject to prior understandings and agreement between the Company and the Local Committee and/or the General Chairman.

JOINT STATEMENT OF ISSUE:

Sheds 1A and 1B on the west side of the Port of Saint John were leased by the National Harbours Board to FORTERM, a company established by a consortium of stevedoring companies, by an agreement as of May 15, 1979. FORTERM, a terminal operator and a member of the Maritime Employers Association (MEA), utilizes labour (longshoremen) supplied by the International Longshoremen's Association (ILA) on the basis of a collective agreement between the MEA and the ILA.

Prior to the introduction of terminal operations at Sheds 1A and 1B, CP Freight Handlers unloaded traffic from railway box cars and brought it into the sheds. Since the introduction of terminal operations at these two sheds, the traffic has been handled solely by members of the ILA paid by FORTERM.

The Union contends **(1)** that the Company violated the Preamble of the two collective agreements in question when it submitted to the work being performed by ILA labour at Sheds 1A and 1B without a prior understanding being reached with the Union; **(2)** the Company be required to provide for CP employees to unload traffic at Sheds 1A and 1B; and **(3)** that the appropriate employees aggrieved by allowed payment for all time lost account of this violation.

The Company contends **(1)** that the Preamble of the two collective agreements in question was not violated; **(2)** that there is no contractual requirement for the Company to make provision for its employees to unload traffic at Sheds 1A and 1B; and **(3)** that there exists no basis for any payments to be made to any employee.

FOR THE EMPLOYEES:

(SGD.) W. T. SWAIN
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. B. CHABOT
GENERAL MANAGER, OPERATIONS & MAINTENANCE

There appeared on behalf of the Company:

D. W. Flicker	– Counsel, Montreal
D. Cardi	– Labour Relations Officer, Montreal
M. A. Pinard	– Manager, Special Projects, Atlantic Region, Montreal

And on behalf of the Brotherhood:

J. Shields	– Counsel, Ottawa
W. T. Swain	– General Chairman, Montreal
D. Herbatuk	– Vice-General Chairman, Montreal
P. Vermette	– Vice-General Chairman, Montreal
R. Saunders	– Local Chairman, Saint John

AWARD OF THE ARBITRATOR

As is noted in the Joint Statement of Issue, it has historically been the work of Freight Handlers, employees of the Company, to load and unload railway cars at the Port of Saint John as at other port facilities. Loading and unloading of ships has then been performed by longshoremen, being members of another union and employees of other employers. The material so handled was, at least with respect to its transport by rail, "the Company's freight" within the meaning of the Preamble to the Collective Agreement. As a result of the "terminalization" which is described, this traffic is now handled – at the sheds referred to – by longshoremen and not by the Company's employees.

The changes which have occurred are not simply changes of work assignment. Previously, at the sheds in question (and it remains the case at other sheds), "common user" operations were conducted. While the sheds were the property of the National Harbours Board, the railway as well as the stevedoring companies had access thereto, and each used its own workforce to perform the work it had to do. Now, however, (at the sheds in question), the National Harbours Board has leased the premises to FORTERM, and FORTERM refuses, in effect, to permit access to the sheds or performance of work there by any other than the longshoremen whom it employs pursuant to the Collective Agreement by which it is bound.

The "terminalization" of the operations would appear to create efficiencies and to be in the best interests of all concerned – except the Freight Handlers. While the Company has made representation to the National Harbours Board on their behalf, and has sought at all times to point out the labour relations implications of the changes being made, it does not appear to have had control over those changes, and its position is perhaps best described by the Union's contention as set out in the Joint Statement that it "submitted to the work being performed by ILA labour". The Company may, in the event, benefit from the changes that have taken place, but it does not appear to have had much choice in the matter, or to have played any role in bringing them about.

The National Harbours Board is more than the lessor of the premises. It may, in the exercise of its authority, direct the flow of any type of cargo through whatever port facility it chooses. The "terminalization" which has occurred has been as a result of its policies, implemented through its leases and other contractual arrangements with FORTERM and others. The longshoremen now loading and unloading freight cars in the sheds may be performing tasks formerly performed by Freight Handlers, but they do not do so as employees of the Company, nor, it seems clear, does their employer FORTERM act under the direction and control, or at the instance of the Company in this respect. That is, I do not consider that FORTERM or any other party involved acts as a subcontractor for Canadian Pacific with respect to the performance of their work. The work has not been contracted-out by the Company, and it is not causing the work to be performed by other than its own employees: rather, Canadian Pacific has, by reason of the new arrangement, ceased to perform this work, which is now performed by others, as a part of their own operations. The performance of those tasks at the sheds in question can no longer properly be described as "handling the Company's freight" within the meaning of the Preamble to the Collective Agreement.

The Preamble does, in my view, establish a form of prohibition of contracting-out. Indeed, it goes beyond that and calls for the assignment of the work described not simply to members of the bargaining unit, but to members of a particular classification. What is "contemplated" is, expressly, of a general nature, and the possibility of deviation from the historical practice is raised. The instant case, however, is not one of a "deviation" from the Company's practice. Such might occur where the Company itself continues to perform the work, or where indeed it subcontracts it. Here, however, the implicit basis for what is dealt with in the Preamble is absent: the Company is, at sheds

involved, no longer doing the work of handling freight from shed to cars or vice versa; the cargo so handled is not now “the Company’s freight”. That phrase, as used in the preamble, does not, in my view, relate to any distinction involving the rates paid by shippers.

While, without elaborating on its effect, I agree that the Preamble includes a form of prohibition of contracting-out, I find that there has, in the circumstances described, been no contracting-out, and no violation of the Collective Agreement by the Company. Accordingly, the grievance must be dismissed.

(sgd.) J. F. W. WEATHERILL
ARBITRATOR