CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1339

Heard at Montreal, Tuesday, March 5, 1985

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Claims of Messrs. 0. LeBlanc and B. Gagnon of Moncton, N.B. alleging the Company violated Appendix X of Agreement 5.1.

JOINT STATEMENT OF ISSUE:

Prior to 18 June 1984, Messrs. LeBlanc and Gagnon worked as Tractor Trailer Operators driving Company tractors on mail run 910/911 between Moncton and Halifax. On 5 June 1984 Canada Post advised the Company that changes were required in the operating times for this mail run. The Company advised the Regional Vice President of the Brotherhood that the Company did not have Tractors available to handle mail run 910/911 at the new operating times.

On 18 June 1984 mail run 910/911 was contracted out. Messrs. LeBlanc and Gagnon subsequently retained their Tractor Trailer Operator classification, hours of work and rest days but worked other runs.

The Brotherhood contends the Company violated Appendix X of Agreement 5.1 by contracting out mail run 910/911. The Company denies the allegation.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) TOM MCGRATH	(SGD.) D. C. FRAIEIGH
NATIONAL VICE-PRESIDENT	ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

W. W. Wilson – Manager Labour Relations, Montreal
V. Wheaton – Labour Relations Officer, Moncton

And on behalf of the Brotherhood:

G. Murray – Representative, Moncton

AWARD OF THE ARBITRATOR

On June 5, 1984 Canada Post advised the company of a change in schedule in mail run 910/911 between Moncton, N.B. and Halifax, N.S. from 1800 hrs. to 0330 hrs. Because the company's tractor trailers were otherwise committed to different schedules at that hour it was compelled to contract out the mail run service to a private transport company. As a result the grievors, Messrs. Gagnon and Leblanc, were deprived of their regular runs.

Both the trade union and the company raised several issues with respect to the relevance of Appendix 10 of Agreement 5.1 to the facts and circumstances that prompted the employer's contracting out action. They will be dealt with as follows:

(i) The company in the circumstances had no prior intentions of engaging in a "planned" contracting out of bargaining unit work. Given the very short notice that was extended the employer of Canada Post's intention to alter the scheduled of mail run 910/911 it can hardly be said that it was "practicable" for the company to involve the trade union in the notification procedures as would otherwise be prescribed by Appendix 10 to a planned contracting out action. Accordingly, this particular objection must be dismissed.

(ii) The trade union has not established that an employee was unable to hold work as a direct consequence of the contracting out. Both grievors, owing to the early retirement of two other employees, were transferred to their work assignments and thereby did not lose an hour's pay as a result of the company's action.

Moreover, it is of no consequence that spare employees were denied the opportunity for work as a result of the contracting out because they did not directly fail to hold work as contemplated by Appendix 10. Numerous CROA precedents have established that employees hitherto on layoff prior to the contracting out do not fail to hold work resulting directly from the contracting out situation. Accordingly, employees on call because of their quasi lay-off status are in no better or worse a position as a result of the employer's contracting out. They continue to retain their status as relief employees "on call". Accordingly, in accordance with the requirements of Appendix 10, it is dubious as to whether this grievance is arbitrable.

(iii) In any event, even if the grievance raises an arbitrable issue that may be adjudicated upon, the employer adduced uncontradicted evidence establishing that no tractor-trailers were available at the required time to carry mail on mail run 910/911. Accordingly, the exemption under item (3) of Appendix 10 enabling the company to contract out bargaining unit work where it can establish that "essential equipment was not available ... at the time and place required" would apply. As a result, the contracting out of the said mail run was permissible under the terms of that provision. The grievance must therefore be dismissed on that ground as well.

Before leaving this case it is necessary that I address myself to the "control" submission advanced in the trade union's brief. Correctly stated, the "control" argument would suggest that because CN retained control of the mail run contract with Canada Post the drivers of the private contractor who performed the work in the grievors' stead should be treated as the employees of CN and not the private contractor. This would obviously result in the absorption of those employees into the bargaining unit.

The evidence established that there is no merit in that position. Quite clearly, Canada Post dictated the terms of the mail run contract and CN obviously had no "control" over the situation. From the company's perspective it had to comply with Canada Post's directive for a changed schedule or risk losing a lucrative contract. I cannot discern how it could be possibly stated that CN thereby was "the real employer" of the contracted out employees because of the "control" the company continued to exert.

For all the foregoing reasons the grievance is denied.

(signed) DAVID H. KATES
ARBITRATOR