CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1667

Heard at Montreal Tuesday, July 14, 1987

Concerning

CNCP TELECOMMUNICATIONS

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS

JOINT STATEMENT OF DISPUTE:

(1.) The Employer contracted with Canadian National Railway Company (CNR) for the installation, splicing and maintenance of a fibre optic cable owned by the Employer and running from Toronto, Ontario to London, Ontario. This cable was installed by CNR on CNR's right of way during the period April, 1986 to October, 1986 inclusive.

(2.) The Union grieved on April 4, 1986 concerning this work. The Union contends that the installation, splicing and. maintenance of the Toronto-London fibre optics cable should be done by its members under its collective agreement (the 'Agreement') with the Employer. The Union further contends that the Employer has violated Appendix 'E' to the Agreement by contracting out the installation, splicing and maintenance of this cable.

(3.) The Employer contends that Appendix 'E' to the Agreement requires the Union to demonstrate that an employee has been unable to hold work as a result of its contracting with CNR and the employer puts the Union to the strict proof thereof. In any event, the Employer contends that it has not contravened the provisions of Appendix 'E' to the Agreement.

FOR THE UNION:

(SGD.) M.B. KEALEY
GENERAL CHAIRMAN

FOR THE EMPLOYER:

(SGD.) J. SZYMANSKI
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

K. Billings	– Counsel, Toronto
B. Ballantyne	– Director, Human Resources, Toronto
F. Tutt	– Director, Special Projects, Toronto
A. Montgomery	– Engineer, Toronto
T. Ferens	– Manager Labour Relations, Montreal

And on behalf of the Brotherhood:

M. Rotman	– Counsel, Toronto
M.B. Kealey	– General Chairman, Kingston
S. Genest	– Local Chairman, Montreal

AWARD OF THE ARBITRATOR

The principle thrust of the Union's case is that Appendix 'E' to the Collective Agreement, which governs the prohibition against contracting out and the exceptions that allow it, expressly or impliedly requires the Company to retrain employees who, although not directly affected by the contracting out at the time it occurred, are on layoff at the time of the contracting out or are subsequently laid off from jobs in other classifications. The Company asserts that there is no such obligation, that no employees were held out of work on account of the contracting out and that, consequently, there is no violation of the Collective Agreement. It also maintains that the contracting out falls within the enumerated exceptions in Appendix E, which expressly permit such action.

The material facts are not in dispute. While bar- gaining unit employees are qualified to splice fibre optic cable they are not qualified, nor does the Company have the equipment necessary, to plow or bury the fibre optic cable adjacent to railway trackage. The work in question is performed by a track propelled by a locomotive and attached to railway cars containing materials used in the process. The plow buries the cable some 5 to 8 feet from the track at an approximate depth of 4 feet. It is not disputed that CN's right of way from Toronto to London, as elsewhere in Canada, provides a ready corridor for the location, installation, and maintenance of the Company's fibre optic cable, which will eventually link the entire country. It is also common ground that CN refuses to permit the Company's employees access to its right of way either for the purpose of installation or maintenance of this equipment. Lastly, it is agreed that no employee has lost his or her job because of the contracting out entered into. At the hearing the Union restricted its claim to the cable splicing and maintenance, conceding that its bargaining unit members cannot claim that the track mounted plowing is work which they have performed or are qualified to perform.

In the Arbitrator's view the final paragraph of Appendix 'E' is dispositive of this grievance. It provides as follows:

> Where it is contended that CNCP has contracted out work contrary to the foregoing and this results in an employee being unable to hold work, the Union may progress a grievance in respect of such employee by using the grievance procedure of the Collective Agreement in effect between the parties. Such grievance shall commence at Step 3 with the General Chairman submitting the facts on which the Union relies to support its contention. Any such grievance must be submitted within 30 days from the alleged non-compliance.

It is also helpful to reproduce the operative portion of the appendix and the listed exceptions allowing contracting out which are as follows:

> CNCP agree that, in the period to contract termination, work presently and normally performed by employees represented by BRAC will not be contracted out except:
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> 1) When technical or managerial skills are not available within CNCP; or
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> 2) Where sufficient employees, qualified to perform this work, are not available from active or laid off employees in the promotion and seniority territory where the work is required to be completed; or
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> 3) Where essential equipment or facilities are not available at the time and place required; or
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> 4) Where the nature or volume of the work is such that it does not justify the capital or operating expenditures involved, or
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> 5) Where the required time of completion cannot be met with the skills, personnel, or equipment available at the location or the work; or
>
> 6) Where the nature or volume of the work is such that undesirable fluctuations in the employment would automatically result.

In **CROA 1244** the Arbitrator made the following observation:

> ... The provision of the letter requiring that the trade union establish that an employee is unable to hold work as a result of the contracting out of work goes to the root of the Arbitrator's authority to entertain the grievance. It is the threshold question that must be satisfied as a condition precedent to putting the employer to the onus of showing that the contracted out work falls within the enumerated exceptions inclusive of Item (2).

In the instant case no employees had been "unable to hold work" within the meaning of Appendix 'E'. There has, in other words, been no layoff or other loss of employment to the Company's employees normally engaged in the splicing or maintenance of fibre optic cable. While the Union submits that laid-off employees in other classifications had a claim to the work, including a right to retraining, there is nothing in Appendix 'E', nor in any other part of the Collective Agreement to sustain that assertion. While the parties are privy to a job security agreement which contains provision for the retraining of laid-off employees there is nothing to be found in the job security agreement that would tie the obligation to retrain employees to, the prohibition against contracting out articulated in Appendix Collective Agreement. In the Arbitrator's view it would be manifestly unworkable and highly prejudicial to the

Company if it could, in good faith, enter into an arrangement for contracting out at a particular point in time and subsequently, perhaps much later, after it had incurred a substantial contractual obligation, be met with a claim that employees subsequently laid-off from an unrelated job classification are entitled to the work.

It would require the clearest of language to reflect an intention that the Union could establish, *ex post facto*, a violation of the Collective Agreement for which the employer might bear substantial liability. That is plainly not within the contemplation of Appendix 'E'. In my view that document must be taken as speaking to the time the Company enters into the engagement to contract out. That is reflected in the language of the Appendix, which is generally framed in the present tense. The first exception describes the situation "when mechanical or managerial skills are not available with CNCP". The more opposite exception, being the second, provides "where sufficient employees, qualified to perform this work, are not available from active or laid-off employees in the promotion and seniority territory where the work is required to be completed;"

Secondly, I cannot see how, even if it is assumed that bargaining unit employees who are not within the classification of cable splicers were on lay-off at the time the contracting out occurred, the second exception would apply. Such laid off employees would plainly not be "qualified to perform (the) work" within the meaning of the second exception. The express reference to "qualified" employees negates the Union's position that there is an implied obligation to retrain the unqualified.

For all of these reasons the grievance must be dismissed. If it were necessary to so conclude, I would also find that that conclusion is justified on the alternatives advanced by the employer namely that the work in question is not work presently or normally performed by employees represented by the Union, given the intrinsic involvement of the rail mounted plow in the installation and splicing process, and also that the essential equipment or facilities, including access to the CN right of way, were not available at the time or place required and, lastly that the nature and volume of the work is such that it does not justify the capital or operating expenditures involved, it being agreed that in excess of a quarter of a million dollars would be required for the Company to obtain the necessary equipment to do the work itself, assuming that was possible.

For all of the foregoing reasons, which also apply in **CROA 1668**, heard concurrently, this grievance must be dismissed.

(signed) MICHEL G. PICHER
ARBITRATOR