

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 2944

Heard in Montreal, Thursday, 16 April 1998

concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

and

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

### **DISPUTE:**

Contracting out of bargaining unit work on the Webbwood and Little Current Subdivisions.

### **JOINT STATEMENT OF ISSUE:**

On March 4, 1997, the Company served an article 8 notice thereby advising the Brotherhood of its intention to lease the Webbwood and Little Current subdivisions. The Brotherhood grieved on the basis that such a lease arrangement would have the effect of illegitimately contracting out bargaining unit work.

The Union contends that the Company's actions are in violation of sections 31.1, 31.4 and 31.5 of agreement no. 41.

The Union requests that: **1.)** The article 8 notice in question be rescinded; **2.)** All affected employees be returned to their former positions and continue to perform their duties as before; **3.)** All affected employees be compensated for all losses incurred as a result of the Company's action; and **4.)** The Job Security Fund be reimbursed an amount equal to that paid out of the Fund to all affected employees.

The Company denies the Union's contention and declines the Union's requests.

### **FOR THE BROTHERHOOD:**

**(SGD.) J. J. KRUK**

**SYSTEM FEDERATION GENERAL CHAIRMAN**

There appeared on behalf of the Company:

R. M. Andrews	– Manager, Labour Relations, Calgary
G. D. Wilson	– Counsel, Calgary
G. R. Mackie	– Witness
G. Chambers	– President, Genesee Rail-One, Montreal
J. C. Presley	– Director, Co-Production, Calgary

And on behalf of the Brotherhood:

D. W. Brown	– Sr. Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
G. Beauregard	– General Chairman, Atlantic Region

## AWARD OF THE ARBITRATOR

The facts in relations to this grievance are not in dispute. For many years, until recently, the Company operated the Webbwood Subdivision, being approximately a 185 mile length road between Sudbury and Sault Ste. Marie. In addition, it operated the Little Current Subdivision between Turner and McKerrow Ontario, where it connected to the Webbwood Subdivision. Because of the profitability of the lines over time, the Company gave notice, in its three year plan dated September 30, 1996, that it would transfer the lines to a shortline operator.

After preliminary discussions with interested shortline operators, the Company negotiated a twenty-year lease with the Huron Central Railway Inc. (HCR), a wholly owned subsidiary of Genesee Rail-One, a Canadian shortline railway owned in part by Genesee & Wyoming Railway Company, a US shortline road, and in part by Cygnus Group, an independent Canadian company. Neither Huron Central Railway Inc., Genesee Rail-One nor Cygnus has any corporate relationship to the Company. It is common ground that the Huron Central Railway is incorporated under the laws of Ontario and has been licensed as a shortline railway pursuant to the terms of the **Shortline Railways Act** of Ontario. The material before the Arbitrator establishes that the lease of the property, and all related equipment, buildings and fixtures, is a full and complete transaction which vests permanent control of the property and facilities in the Huron Central Railway, for the full duration of the twenty year lease, which commenced on July 28, 1997. From that date forward the HCR has had entire control of the roadbed, track materials, ballast, switches, crossings, bridges, bridge abutments, stations, culverts, structures, communications and signals facilities, parking and storage areas, depots, yards, shops, buildings, and all other facilities and fixtures. It also appears that some equipment in the nature of tools was transferred as part of the lease, and that certain locomotives of the Company were leased to HCR for a temporary period to assist in the transition, pending delivery of its own locomotives. In addition, for a time, a number of basic track maintenance force trucks were leased from the Company, until such time as HCR obtained delivery of its own vehicles. The trucks, like the locomotives, were leased at fair market rates.

A review of the lease agreement, filed in evidence, confirms that the lessee, HCR, has stepped into the position of a fully independent shortline operator in respect of the Webbwood Subdivision and a section of the Little Current Subdivision, including yards, sidings, connections and spur tracks. The Company no longer operates over the territory, save for a minor allowance which permits it to continue to service a mine located at Crean Hill. According to the submission of Counsel for the Company, the leasing arrangement negotiated with HCR is in many respects similar to that previously made between the Company and another shortline operator, RailLink, in respect of its former Ottawa Valley lines.

The Brotherhood submits that, based on the facts disclosed, if there had been an outright sale of the lines to the shortline operator, there would be no allegation of a contracting out. It submits, however, that as the Company has retained residual ownership in the lines, what has occurred, from the standpoint of track maintenance, is a contracting out to the Huron Central Railway of work previously performed by members of the bargaining unit. It is common ground that the shortline operator is responsible for track maintenance, and performs that function utilizing its own employees. The Brotherhood submits that the Company was not within its rights to treat the transaction as an operational or organizational change, by reason of which it gave a notice to the Brotherhood under article 8 of the Job Security Agreement. It is common ground that as a result of that notice, subject of course to the grievance of the Brotherhood, of the eighteen employees negatively impacted by the change, one received an early retirement package, another a bridging package and the balance severance packages. Although there is some dispute as to the numbers, it does appear that some of the employees who accepted severance packages went to work for HCR on the same territory, albeit as non-unionized employees.

The Arbitrator has substantial difficulty with the initial position of the Brotherhood, which is that what transpired is a contracting out of part of the Company's business. The generally accepted understanding of contracting out was well expressed by Arbitrator Ian Springate in **Coca Cola and United Brewery Workers** (1983), 11 L.A.C. (3rd) 207 where, at p.210 the following appears:

Contracting out is generally understood to be the practice whereby one employer arranges to have a second employer perform work on its behalf.

Can it be said in the instant case that the Company has contracted with HCR to perform work on its behalf? I think not. Very simply, CP Rail no longer operates on the territory which has been fully leased to the shortline operator. It no longer has any risk of profit or loss in respect of the territory, has no interest in the operations or

profitability of the shortline operator and is, subject to the usual rights reserved to a lessor of real property, without any rights in the property which would allow it to operate an ongoing business on the lines in question. It has, literally and figuratively, left the premises. Subject to receiving the payment of rental fees, it has no ongoing economic interest in the leased property. Should it wish to make use of the lines in question it must do so through normal arrangements for running rights, negotiated at arm's length, as would be the case with any railway.

On the facts presented, the Arbitrator is compelled to the conclusion that, for a period of twenty years, the Company has surrendered its interest in the property, and its ability to operate a railway on it. That interest has vested entirely in the shortline lessor, HCR, which has full control over all aspects of the property for the duration of the lease. In that circumstance what has occurred cannot fairly or properly be characterized as a contracting out. Nothing is being done on the Company's behalf by HCR. On the contrary, the Company has divested itself, for the duration of the lease, of all of that part of its business associated with the sections of the Webbwood and Little Current Subdivisions which are the subject of this dispute. It was therefore entitled, as it did, to treat the transaction as an operational or organizational change within the meaning of article 8 of the Job Security Agreement. Nothing in the evidence before the Arbitrator discloses a violation of the contracting out provisions found in section 31 of the collective agreement.

For the foregoing reasons the grievance must be dismissed.

April 17, 1998

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**