CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY AWARD TO CASE NO. 3041

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

SUPPLEMENTARY AWARD OF THE ARBITRATOR

By letter dated November 30, 1999 counsel for the Brotherhood requests a cease and desist order in this matter. He relates that the Company "… intends to transfer the Transcona Facility to Progress Rail and to have Progress Rail's subsidiary Chemetron assume full operational control of the Facility by December 13, 1999." Counsel submits that the Company's actions prejudice the rights of the Brotherhood and the employees with respect to the scheduled mediation and arbitration of the merits of this dispute on January 10 and 11, 2000. The Brotherhood therefore requests that the Arbitrator issue a cease and desist order directing the Company not to proceed with the transfer pending the mediation or adjudication of this dispute. The Brotherhood submits that the actions of the Company constitute "… an illegal contracting out, in violation of both the collective agreement and CROA 3041 …".

In light of the urgency of this matter the Arbitrator convened a conference call on December 1, 1999 to hear the full submissions of both parties with respect to the Brotherhood's request.

The position and concern of the Brotherhood is captured in the following two paragraphs of the letter of its counsel:

> The situation is serious as far as its impact on the workers involved is concerned. If it is found that an illegitimate contracting out is occurring then the conclusion may follow that the workers, from a strict collective agreement point of view, will have bee laid-off from their bargaining unit positions and appointed to some other positions with the contractor. Such a conclusion may result in the forfeiture of seniority and other employee benefits that arise out of membership in the CP/BMWE bargaining unit.
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> In conclusion, the Brotherhood requests that you order the Company to postpone its proposed transfer to Chemetron on December 13, 1999, until the mediation/arbitration process scheduled for January is completed. The Brotherhood believes that, on a balance of conveniences, this is the best way to proceed given (1) the very serious nature of the issues involved, (2) the difficulty in unravelling the situation after the fact, (3) the impact on the employees involved, and (4) the very short time frame involved. Furthermore, it is difficult to envision the value of mediation if the Company has already divested itself entirely of its welding function.

The Company disputes the Brotherhood's request. Firstly, it advises the Arbitrator that the operational change in question does not involve the contracting out of bargaining unit work. According to its representative a new article 8 notice of a different organizational change was provided to the Brotherhood on September 30, 1999. That change involved, among other things, an arrangement whereby Progress Rail is to assume ownership of the Transcona Butt Welding Plant, including a lease of the land in question, with all buildings, tools and equipment to vest in Progress Rail. At that location Progress Rail is to produce continuous welded rail (CWR) for both CP Rail

and for its other railway customers. The Arbitrator is also advised that the arrangement further includes the supply of CWR to the Company from Progress Rail's separate plant in Surrey, British Columbia.

The Company's representative stresses that by its arrangement with Progress Rail all labour in relation to the production of CWR for the Company at Transcona and at Surrey is to continue to be performed by members of the Brotherhood's bargaining unit whose terms and conditions of employment will continue to be governed by the collective agreement, with CP Rail continuing to be the employer of employees in question. While it is anticipated that the volume of production at Transcona may decline, by reason of a reduced demand for CWR within the Company's operations in the near future, the Transcona employees will have the protection of the Job Security Agreement and the possibility of negotiating transfers to Surrey for employees who may be willing. The Company's representative also notes that its employees at both locations will also be employed in the production of CWR destined to Progress Rail's other customers.

In addition, the Company advises the Arbitrator, and indeed expressly undertook, that its arrangement with Progress Rail includes an escape clause by whose terms CP Rail will be released from its contractual obligations with Progress Rail should the arrangement be found by the Arbitrator to be in violation of the collective agreement or of CROA 3041.

The present dispute arises from the Arbitrator's decision in **CROA 3041**, an award dated May 14, 1999, in which it was found that a prior transfer of the Transcona Plant to Chemetron, which involved the full abolishment of all bargaining unit jobs, was in violation of the collective agreement. In that award I ruled, in part, as follows:

> … [T]he Arbitrator finds and declares that the Company's intention to transfer the Transcona Butt Welding Plant to Chemetron, and thereafter to purchase CWR from Chemetron, constitutes contracting out in violation of clause 31.1 of the collective agreement. The Arbitrator further directs that the Company rescind the article 8 notice which it conveyed to the Brotherhood and that it treat the employees affected in conformity with the provisions of the collective agreement, maintaining all affected employees in their current positions. …

The jurisdiction of the Arbitrator to issue an order of the type requested by the Brotherhood is found in article 60(1)(a.2) of Part I of the **Canada Labour Code** R.S., 1985, c. L-2, as amended January 1, 1999 which reads as follows:

> **60 (1)** An arbitrator or arbitration board has
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> …
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> **(a.2)** the power to make the interim orders that the arbitrator or arbitration board considers appropriate;

In my view the above quoted jurisdiction must be applied carefully, and in keeping with general principles governing injunctive remedies insofar as the issuing of cease and desist orders is concerned. In that regard the principles enunciated by the Courts which govern the issuing of interlocutory injunctions are instructive and appropriate. In considering whether to issue a cease and desist order a board of arbitration must consider the balance of convenience and, in particular, must determine whether the failure of injunctive relief will prejudice a party. More specifically, a board of arbitration must weigh the possibility that the action sought to be enjoined would, if carried out, place the grieving party in a position which frustrates the possibility of a fully effective remedy or make whole order upon the determination of the merits of the dispute.

What do the foregoing principles mean in a dispute such as this? For the sake of discussion it is arguable that a cease and desist order pending arbitration of the Brotherhood's claim might be appropriate if, for example, the Company proposed to demolish the plant before the hearing of the grievance. That is plainly not in the order of action presently contemplated. What is contemplated is the continued employment and job security protection of the bargaining unit employees under an arrangement which involves the transfer of certain of their work from Transcona to Surrey and the apparent contracting out of their supervision to Progress Rail. To the extent that, quite apart from its contractual arrangement with Progress Rail, the Company might in any event introduce operational changes of that kind, it is difficult to see on what basis the employees can be said to be threatened with an irremediable situation. That is the more so to the extent that the escape clause which will operate in the event that the Brotherhood is successful on the merits will allow the Company to return to the *status quo*, subject of course to any make whole remedies that might be appropriate.

None of the foregoing observations are to be taken as indicative of the ultimate merits of the Brotherhood's complaint. The allegation contained in its letter, namely that the new arrangement with Progress Rail, is contrary to **CROA 3041** and the contracting out prohibitions of the collective agreement, remain fully to be dealt with when this matter proceeds to arbitration. The instant analysis is solely for the purpose of determining whether the balance of convenience would support the Brotherhood's request for a cease and desist order. For the reasons touched upon above I am satisfied that this is not an appropriate circumstance for the granting of such an order. Should the Company's proposed action go forward effective December 13, 1999 the employees affected will either continue in employment under the terms of the collective agreement, will have the benefit of the protections of the Job Security Agreement or will transfer with the work to Surrey, where the collective agreement will still apply to them. Most importantly, should the Company's arrangements with Progress Rail ultimately be found to be an improper contracting out the employees affected will be in a position to be made whole by a remedial order which may include compensation and a direction for the restoration of the *status quo*. Bering in mind that a cease and desist order such as that being sought in these proceedings is an extraordinary remedy, I am satisfied that the circumstances disclosed do not justify such a recourse.

For all of the foregoing reasons, and without prejudice to the merits of the dispute which is pending, the Brotherhood's request for a cease and desist order is declined. The Arbitrator continues to retain jurisdiction in respect of this matter.

December 4, 1999

(signed) MICHEL G. PICHER
ARBITRATOR