CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3086

Heard in Montreal, Thursday, 13 January 2000

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

The Company's proposed reorganization of its Transcona Rail Yard and CWR Plant.

EX PARTE STATEMENT OF ISSUE:

The Company advised the Brotherhood that it intends to sell its Transcona Rail Yard and CWR Plant to a contractor, Progress Rail, and to have CP/BMWE members perform both the welding work at the Plant and all of the work in the associated Rail Yard (including, but not limited to, material handling, sorting, supply and distribution). Subsequent t this, on September 30, 1999, the Company issued a notice pursuant to article 8.1 of the Job Security Agreement advising the Brotherhood that "effective January 28, 2000, an organizational change will be implemented involving employees at the Transcona Rail Yard & CWR Plant". The notice provides that the 24 positions listed at Appendix "A" to the notice will be abolished. The notice also provides that there will be at least 11 positions created in Vancouver to work at a Progress Rail facility to be operated there. The Vancouver Progress Rail facility will also perform rail welding. The Brotherhood grieved.

The Union contends that: **(1.)** Section 1.1 of agreement no. 41 defines of maintenance of way employees as "employees working in the Track and Bridge and Building Departments" of CP Rail. The definition does not and cannot include CP employees (whether bargaining unit or otherwise) performing duties for a contractor; **(2.)** In view of this, CP employees who work at the Progress Rail facilities must, as a matter of law, be considered as having been laid-off from their bargaining unit positions and as having been awarded new positions involving the performance of work outside of the bargaining unit; **(3.)** Since, from this view, the work at Progress Rail will be performed by non-bargaining unit workers, a contracting out in violation of section 31 of agreement no. 41 will have occurred; **(4.)** Although, according to the Company, the employees in question will remain CP Rail employees, Progress Rail will, in fact, and for legal purposes, be the actual employer of the employees; **(5.)** Section 32.3 of agreement no. 41 provides the maintenance of way employees shall not "be required to do any work except such as pertains to his division or department of maintenance of way service"; **(6.)** Work for a third party contractor can never be regarded as work that "pertains" to a maintenance of way employee's "division or department of maintenance of way service"; **(7.)** The real purpose of the Company's actions is to defeat and to subvert the Arbitrator's award in **CROA 3041**.

The Union requests **(1.)** That the article 8 issued September 30, 1999, be ordered rescinded; **(2.)** that it be declared that the Company's actions are in violation of the collective agreement; **(3.)** that the Company be ordered to continue to own and to operate the Transcona Facility (including CWR Plant and Rail Yard); **(4.)** that it be ordered that, in the event that the Company chooses to have welding work (or associated yard work) performed in the Vancouver area, the facility used to accomplish the work be Company owned and operated; and **(5.)** that, in the event that the Company transfers any rail welding (or associated yard work) away from Transcona (e.g., to Vancouver), that it be ordered that an article 8 notice be served upon all employees at the Transcona Facility (including both Shop and Yard).

The Company denies the Union's contentions and declines the Union's request.

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
M. G. DeGirolamo	– Assistant Vice-President, Industrial Relations, Calgary
M. E. Keiran	– Director, Labour Relations, Calgary
D. J. Fox	– Director, Supply Services
P. C. Leyne	– Director, Equipment & Facilities
G. D. Wilson	– Legal Counsel, Calgary
K. Fleming	– Legal Counsel, Calgary

And on behalf of the Brotherhood:

J. J. Kruk	– System Federation General Chairman, Ottawa
D. McCracken	– Federation General Chairman, Ottawa
G. D. Housch	– Vice-President, Ottawa
K. Deptuck	– Vice-President, Ottawa
R. Geist	– Local Representative, Transcona
R. Mitchell	– Local Representative, Transcona
D. W. Brown	– General Counsel, Ottawa
P. Davidson	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

The Brotherhood alleges that the Company has engaged in contracting out contrary to section 31 of the collective agreement by effectively transferring the control and management of its butt welding plant at Transcona, Manitoba to an outside contractor, while retaining its own employees to work in the plant, as before. The Brotherhood advances a number of articles of the collective agreement, including section 1.1 and section 32.3 in support of its argument that its members, working in the plant, and in a related facility at Vancouver, are in fact the employees of the contractor, and that an improper contracting out has occurred. The Company submits that there is no loss of bargaining unit work whatsoever, as the same employees continue to be employed by CP Rail, with their employment relationship entirely governed by the terms of their collective agreement, with no resulting loss of bargaining unit work and no contracting out contrary to the provisions of section 31 of the collective agreement. In essence, the Company submits that as regards the butt welding plant, it has contracted out everything except the work of the bargaining unit, and has done so in conformity with the terms of the collective agreement and the prior award of this Office in **CROA 3041**.

By way of background, it is helpful to review the factual circumstances giving rise to the prior decision of this Office in **CROA 3041**. In that case the Brotherhood successfully challenged the decision of the Company to contract out all of its operations in the Transcona Plant, including the work of the bargaining unit. The award in **CROA 3041** usefully summarizes certain facts and issues, as follows:

> None of the facts pertinent to this grievance are in dispute. For many years the Company has utilized continuous welded rail (CWR) in the construction and maintenance of its rail lines. CWR is a seamless string of segments of rail welded together into lengths which are, on average, approximately 1,400 feet. The Company purchases 80 foot lengths of rail, referred to "stick" rail from a steel mill located in Sydney, Nova Scotia, and from a Japanese supplier, via Vancouver. For the past ten years, following the closure of a butt welding plant at Smiths Falls, Ontario, all of the Company's CWR has been butt welded and assembled at the Transcona facility. CWR is an important material in the Company's operations, as its longer lengths allow for fewer joints in the track, resulting in substantially less wear and tear on rail cars and locomotives, as well as a reduced need for maintenance of the track itself. As there were no manufacturers of CWR at the time the technology emerged, the Company, like other railways, established its own

manufacturing plants. In 1968 plants were set up at Transcona, in Winnipeg as well as at Smiths Falls. As noted above, all of the production has been from the Transcona plant since 1989.

The CWR plant is situated on some twelve acres of land in a location on the east side of Winnipeg adjacent to the Company's Transcona freight yard. The Company relates that it commenced in 1996 to examine methods of increasing its efficiencies and reducing costs in relation to producing or obtaining CWR. That exercise eventually led to its receiving a proposal from an independent producer of CWR, with operations in the United States, Chemetron – Railway Products Inc. Following negotiations with Chemetron, a contract was executed, the terms of which involve the sale of the building, equipment and tools of the Transcona Butt Welding Plant to Chemetron, as well as a long term lease of the land upon which the plant is situated. Part of the contract is an undertaking by Chemetron to supply CWR to the Company, although it is common ground that it is free to produce welded rail at Transcona for sale to any other customers which Chemetron may service. The contractor is also at liberty to supply the Company CWR from its other plants located in Steelton, Pennsylvania, Pueblo, Colorado and Vancouver, British Columbia, subject to certain conditions and mutually established specifications.

The agreement between the Company and Chemetron is to take effect on June 5, 1999. The parties therefore agreed to expediting this matter to arbitration to obtain a ruling in advance of the proposed change. It is not disputed that the change will involve the abolishment of virtually all of the bargaining unit positions of the Brotherhood covered by a dedicated supplementary agreement to the collective agreement, representing approximately fifty positions.

The Brotherhood invokes article 31.1 of the collective agreement, which regulates the ability of the Company to contract out work and provides as follows:

> **31.1** Work presently and normally performed by employees who are subject to the provisions of this wage agreement will not be contracted out except:
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> **(i)** when technical or managerial skills are not available from within the Railway; or
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> **(ii)** where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees; or
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> **(iii)** when essential equipment or facilities are not available and cannot be made available at the time and place required (a) from Railway-owned property, or (b) which may be bona fide leased from other sources at a reasonable cost without the operator; or
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> **(iv)** where the nature or volume of work is such that it does not justify the capital or operating expenditure involved; or
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> **(v)** the required time of completion of the work cannot be met with the skills, personnel or equipment available on the property; or
>
> **(vi)** where the nature or volume of the work is such that undesirable fluctuations in employment would automatically result.

The Arbitrator examined the facts of the contracting out proposed very closely, and analysed them in light of the prevailing jurisprudence, and most particularly in light of the clear and unequivocal prohibitions against contracting out particular to the railway industry, as reflected within the terms of section 31 of the instant collective agreement. In that regard the Arbitrator further commented, in **CROA 3041**, as follows:

> Since the seminal decision of Arbitrator Arthurs in **Russelsteel Ltd.** (1966) 17 L.A.C. 253, arbitrators in Canada have recognized that absent collective agreement language to the contrary, management retains the discretion to contract out work. As the jurisprudence indicates, such prohibitions must be expressed in relatively clear and unequivocal language. In my view the language of section 31 of the collective agreement here under consideration is clear and unequivocal. Titled "Contracting Out", the article specifically states that work "presently and normally" performed by bargaining unit employees "… will not be contracted out" save in certain clearly enunciated exceptions. The six exceptions provided within clause 31.1 do not expressly provide or implicitly suggest that the contracting out by sale of an entire segment of the

> Company's operation constitutes a permissible contracting out. On the contrary, the six enumerated exceptions narrowly define closely circumscribed circumstances generally tied to the proven inability of the Company to be able to perform the work in question by the use of its own managerial skills, manpower and equipment. The only two variants on that theme are found in sub-paragraph 4, which relates to extraordinary capital or operating expenditures and sub-paragraph 6 which deals with work which would require the management of an unstable or fluctuating work force. In my view, for the reasons related below, none of the exceptions can fairly be said to apply to the facts of the instant case.

The Arbitrator further commented on the nature of the business which the Company was purporting to transfer to the contractor, the purpose of section 31.1 of the collective agreement and concluded that there was in fact an improper contracting out under the scheme then established between the Company and the contractor, Chemetron. In that regard the award reads, in part, as follows:

> … In the instant case the production of CWR at Transcona has been an integral part of the company's business for thirty years. There can be no question that the work related to that production has been and is work presently and normally performed by employees of the bargaining unit, within the meaning of clause 31.1 of the collective agreement. As noted above, the collective agreement makes no exception for work which may or may not qualify as part of the core undertaking of the Company, assuming that a workable definition of that concept could ever be determined. Once it is determined that the work in question is bargaining unit work, it must next be established that there has been a contracting out and whether such contracting falls within any of the exceptions provided within clause 31.1.
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> I am satisfied that what has transpired in the instant case is manifestly a case of contracting out. Prior to this arrangement the Company produced all of its CWR at its own production facility at Transcona. With the advent of its contract with Chemetron, the Transcona plant and facility would pass into the hands of the contractor which would, in turn, supply all of the Company's CWR needs which are essentially unchanged. Whether the transaction so characterized qualifies as the sale of a business or part of a business within the meaning of the **Canada Labour Code** is not a question which this Office needs to determine. The possibilities of successorship and other rights which might flow from the arrangement between the Company and Chemetron are matters to be properly assessed under the jurisdiction of the Canadian Industrial Relations Board, pursuant to the **Canada Labour Code**. Those considerations can have no significant bearing on the contractual rights and obligations of the parties as contained within clause 31.1 of their collective agreement. It is the application and interpretation of that provision which is the jurisdiction and obligation of this Office.
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> The purpose of clause 31.1 is relatively obvious. It is intended, by agreement, to provide a form of job security and protection of work to those members of the bargaining unit who have traditionally performed work falling within the job classifications of their collective agreement. In the instant case there is an entire supplement to the collective agreement dedicated to the terms and conditions of employment of persons employed at the Butt Welding Plant at Transcona. A corollary purpose to the contracting out provisions is, of course, to protect the integrity of the bargaining unit and the Brotherhood's interests in that regard.

The Arbitrator found that the exceptions within section 31.1 of the collective agreement did not apply, and allowed the grievance. The final paragraph of the award reads as follows:

> For the foregoing reasons the 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. While the Brotherhood has further requested a direction in respect of the compensation of employees who may have been adversely impacted, as well as reimbursement of the Job Security Fund, there is no evidence before the Arbitrator to the effect that there have been any adverse consequences in that

> regard. I therefore retain jurisdiction in respect of that aspect of the award, as well as any other issue concerning the interpretation or implementation of this decision.

As is now evident, based on the Arbitrator's decision, the Company went back to the drawing boards to consider how it might best achieve a withdrawal from the day to day management and operation of the butt welding plant, while respecting the Arbitrator's award and the conditions of the collective agreement which prohibit the contracting out of bargaining unit work. In fairness, the Company reserves its right to dispute the decision of the Arbitrator in **CROA 3041**, and in that regard has undertaken judicial review proceedings before the Alberta Court of Queen's Bench. Under that reserve, however, it has reformulated its plan, in terms which again involve a transfer of the plant to Chemetron, but which it maintains preserves the bargaining unit work to the Brotherhood's members, under the continuing terms of the collective agreement.

The Company submits that it remained faced with serious business issues related to productivity and profitability as a result of this Office's decision. It submits that it remained faced with the problem of importing Japanese stick rail through Vancouver, shipping it to Winnipeg for butt welding into longer segments, and re-shipping much of it back in a westerly direction to service a large segment of its territory. It remained the employer's view that the management and operation of the butt welding plant, including the purchase and shipping of both raw material and finished product, was an undue burden which should be eliminated, insofar as possible. On that basis, it decided to renegotiate its agreement with the contractor, now defined as Chemetron Railway Products Inc. (hereafter Chemetron) in terms which it submits achieve its business ends while respecting the terms of the collective agreement and the award of this Office in **CROA 3041**. Specifically, it has sold to Chemetron the plant and equipment at Transcona, and entered into an eight year arrangement, leasing to it the land which encompasses the plant and related yard facilities. The contract, the terms of which were tabled in evidence, provides that Chemetron will operate the plant, from which it will produce all continuous welded rail (CWR) required by CP Rail, as well as such CWR as it may produce and sell to its other customers. It is also understood that CWR may be supplied to the Company from Chemetron's other facilities, including its plant in Vancouver. At the conclusion of the eight year term, the Company reserves the right to re-purchase the plant and equipment at Transcona from Chemetron, should it then wish to do so.

The principal difference in the newly negotiated contract is that all production employees utilized by Chemetron in the production of CWR for CP Rail will continue to be the employees of the Company's maintenance of way department, who shall remain employed by CP Rail for all purposes, including all aspects of the collective agreement under which they are governed. The Company submits that the critical difference is that the present arrangement does not involve the abolishment of the bargaining unit positions, as was the case in **CROA 3041**. The arrangement so structured is reflected, in part, by the following provisions of the labour supply agreement made between the Company and Chemetron:

> **2.1 CPR Work** – Chemetron agrees to utilize, during the Term, CPR Employees to perform CPR Work at the Transcona and Vancouver Welding Plants.
>
> **2.2 Contract Work** – Subject to Part 3, Chemetron agrees to utilize, during the Term, CPR Employees to perform Contract Work at the Transcona and Vancouver Welding Plants.
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> **2.3 CPR to provide CPR Employees** – CPR shall provide, at the request of Chemetron, a sufficient number of CPR employees to meet the requirements of Chemetron provided to CPR in accordance with section 2.4

The Company stresses that its arrangement with Chemetron involves enhanced work opportunities for the employees. In that regard it notes that its agreement with Chemetron goes beyond requiring that it will supply the employees for the production of its own CWR. The contract also stipulates that CPR employees are to be utilized by Chemetron to perform all work in the production of CWR, notwithstanding the railway to which it may be destined. The production of CWR for third party customers of Chemetron is dealt with in the following terms under the agreement:

> **Part 3 – Contract Work**
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> **3.1 Contract Work conditional** – The use of CPR employees by Chemetron to perform Contract Work is subject to the following conditions:
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> **3.1.1** Chemetron obtaining and retaining contracts with third parties to provide the products or services which require the provision of the Contract Work; and

3.1.2 Chemetron being satisfied with the performance of Contract Work by CPR Employees

3.2 Contract Work temporary – CPR acknowledges that it is aware that the Contract Work is temporary in nature and that its availability will be dependent upon the conditions set out in Section 3.1 and the volume of Contract Work created by Chemetron's contracts with third parties.

The arrangement so established is unique, if not unprecedented. The Arbitrator is aware of no other similar arrangement reflected in the Canadian arbitral jurisprudence concerning contracting out. The Company submits that as innovative as its arrangement with Chemetron may be, it cannot fairly be said to be in violation of the Company's collective agreement with the Brotherhood. Specifically, it submits that under the present arrangement it is clear that "work presently and normally performed by employees [of the bargaining unit]" continues to be performed by the same employees, employed by CP Rail under the terms of the collective agreement. The Company stresses that all aspects of the collective agreement continue to apply to the employees, including job security provisions, seniority and job bulletining, discipline and any other matter which may arise. While the Company does not maintain an on-site supervisor, employees have been advised of a management officer to whom all collective agreement issues are to be addressed.

The Brotherhood submits that the employees of the bargaining unit are in fact no longer the employees of CP Rail, and are not employees of the Company as defined under the collective agreement. As its first base of analysis the Brotherhood points to certain provisions of the collective agreement which it submits define the concept of "employees" for the purposes of that document. In particular, the Brotherhood stresses section 1.1 of collective agreement no. 41, which provides in part:

> … by maintenance of way employees is meant employees working in the Track and Bridge and Buildings Departments, for whom rates of pay are provided in this agreement.

The Brotherhood further notes that elsewhere two of the supplemental agreements, not here under consideration, speak of "… employees in the maintenance of way department, employed in rail yards, rail reclamation plants and frog (turn out) reclamation plants on the system". It further notes, more pertinent to the instant supplemental agreement, the following definition of persons to whom the collective agreement applies: "… employees in the maintenance of way department, employed in rail butt welding plants".

The Brotherhood submits that the key phrase is found in section 1.1, and that in the instant case it cannot be said that the employees are any longer working in the track and bridge and building departments of the Company. On that basis it submits that they no longer fall under the terms of the collective agreement, and can only be characterized as the employees of Chemetron. In that regard Counsel for the Brotherhood stresses that to the extent that CP Rail is no longer in the business of CWR welding, it cannot purport to treat the employees involved as continuing to be its employees for the purposes of the collective agreement. He submits that the work is no longer the Company's but is now Chemetron's work and that the employees involved in its performance can no longer be viewed as working in the Company's departments, as contemplated by section 1.1 of the collective agreement. The Brotherhood submits, on that basis, that as the work is in fact now performed by persons who have become the employees of Chemetron, the Company has violated the contracting out provisions of the collective agreement.

In the submission of Counsel for the Brotherhood the application of the accepted tests, developed within the jurisprudence, applied for the purposes of determining which entity is the employer of a group of individuals supports its submission that the bargaining unit employees are now in fact the employees of Chemetron, and are no longer employed by CP Rail. In that regard the Brotherhood cites the seminal decision in **Montreal v. Montreal Locomotives Ltd.** [1947] 1 D.L.R. 161 (P.C.). It submits that the four-fold test emerging from that decision of the courts points to Chemetron as the employer. The elements of the four-fold test are:

1. control over work performance;
2. ownership of the tools;
3. chance of profit;
4. risk of loss.

Further reference is made to a number of decisions of boards of arbitration and labour relations boards, including the decision of the Ontario Labour Relations Board in **York Condominium** [1977] O.L.R.B. Rep. 645 and the following arbitration awards: **Re Riverdale Hospital** (1974) 7 L.A.C. (2nd) 40 (Schiff); **Re Goodyear Tire** (1977) 16 L.A.C. (2nd) 177 (Gorsky); **Re Don Mills Foundation for Senior Citizens and Service Employees' International Union, Local 204** (1984) 14 L.A.C. (3d) 385 (P.C. Picher); **Re Radio Shack and United**

Steelworkers of American, Local 6709 (1994) 44 L.A.C. (4th) 69 (Beck); and **Re Saskatchewan Wheat Pool and Grain Services Union** (1998) 20 L.A.C. (4th) 335 (Smith). The Arbitrator was also referred to the decision of the Supreme Court of Canada in **Pointe-Claire v. Quebec** (1997) 97 C.L.L.C. para. 220-039.

On the basis of **Don Mills** award, the Brotherhood submits that seven factors have been identified as bearing on the issue as to which entity is the employer. Those factors are as follows:

1.) The party exercising direction and control over the employees performing the work;

2.) The party bearing the burden of remuneration;

3.) The party imposing discipline;

4.) The party hiring the employees;

5.) The party with the authority to dismiss the employees;

6.) The party which is perceived to be the employer by the employees;

7.) The existence of an intention to create the relationship of employer and employees.

The Brotherhood further submits that the provisions of the collective agreement itself support its view that the Company's employees cannot be assigned to perform work for another employer. More precisely, it submits that they cease to be employees for the purposes of the collective agreement if they no longer work within operations owned, managed and operated by CP Rail. In that regard the Brotherhood relies upon the provisions of section 32.3 of the collective agreement which provides as follows:

> Except in cases of emergency or temporary urgency, employees outside of the maintenance of way service shall not be assigned to do work which properly belongs to the maintenance of way department, nor will maintenance of way employees be required to do any work except such work as pertains to his division or department of maintenance of way service.

The Brotherhood submits that employees whose work activities are entirely confined to the production endeavours of Chemetron within its own plant cannot be said to be employed in work which falls within their division or department of maintenance of way service, within the meaning of the foregoing provision. It maintains that they no longer work within the track and bridge and building departments of the Company, as contemplated under section 1.1 of the collective agreement. The Brotherhood argues that its members, being under the day to day control and supervision of Chemetron, working entirely in a plant no longer operated by CP Rail, are no longer the employees of CP Rail, but rather the employees of Chemetron. In that circumstance, it submits that there has been an improper contracting out of the work of the bargaining unit.

I turn to consider the merits of the dispute. In doing so I have considerable difficulty with the manner in which the Brotherhood has framed its argument. The true nature of the dispute before me is whether the Company has improperly contracted out the work of the bargaining unit. That is not a question which is determined by reference to general principles. It must be determined by reference to the language of the specific collective agreement governing the parties. As noted in **CROA 3041**, it is arguable that the initial arrangement made between the Company and Chemetron, found by that award to be improper contracting out, might have passed muster under the terms of most collective agreements in Canada, the provisions of which are generally less restrictive than those found within the railway industry. This Office concluded, in **CROA 3041**, that the abolishing of the bargaining unit jobs, and the assignment of the work to employees who would be retained and paid by Chemetron did constitute the contracting out of work "… presently and normally performed by employees", contrary to the prohibition expressly articulated in section 31.1 of the collective agreement. The issue now before me remains the same. Has the Company contracted out work presently and normally performed by bargaining unit employees, when regard is had to the more recent arrangement which it has now made with Chemetron?

In the Arbitrator's view that question must be answered in the negative. There can be little dispute that the work, which has traditionally been performed by bargaining unit employees under the terms of the collective agreement between the Brotherhood and the Company, continues to be performed by the same bargaining unit employees, pursuant to the same collective agreement. If, as the Brotherhood contends, form is not to prevail over substance, the substance of the transaction is the preservation of the *status quo* for the employees of the bargaining unit. In practical terms, what the Company has achieved is a contracting out of the ownership, operation and management of the butt welding plant at Transcona, without taking away from the employees access to the work

which they have traditionally performed at that location. More precisely, subject to its reversionary right to recover its buildings and equipment after eight years, the Company has effectively contracted out everything except the bargaining unit work, and appears to have done so, as it submits, to comply with the terms of the collective agreement and the award of this Office in **CROA 3041**.

In my view, for this Office to embark upon a determination as to whether the bargaining unit employees could be found to be employed by Chemetron, as might arise if, for example, the Brotherhood sought to enforce successorship rights against Chemetron in an appropriate application before the Canadian Industrial Relations Board, it could well be charged with asking itself the wrong question, and dealing with issues beyond the grievance and the proper jurisdiction of the Arbitrator. The fundamental issue to be resolved is whether the Company, by its arrangement with Chemetron, has violated section 31.1 of the collective agreement by contracting out the work of the bargaining unit. Based on the language of the agreement, I do not see how that argument can logically be supported. If the purpose of the contracting out provision is to protect the work and job security of the employees, and to ensure that they continue to perform the same work, as employees of the Company, how can that provision be said to be violated on the facts before me? The employees have lost nothing. They continue to have exclusive jurisdiction to perform all work in relation to the production of CWR for the Company. In fact their work opportunities have been expanded to include a second location of Chemetron at Vancouver, and the opportunity to perform additional contract work for other railroads.

Nor does it appear to the Arbitrator that the arrangement between the Company and Chemetron does significant violence to the words and general scheme of the collective agreement. The Brotherhood has pointed to no provision of the collective agreement which would, for example, prevent the Company from contracting with a third party to, for example, furnish a crew of employees from the track department to perform construction or ongoing maintenance of a customer's industrial yard or siding. Given the overall scheme of the collective agreement, it is far from clear to the Arbitrator that the employees of the Company working within the Transcona plant cannot be said to be "employees in the maintenance of way department, employed in rail butt welding plants" as those terms appear within the language of collective agreement no. 41.

In the result, assessing the merits of this grievance from what the Arbitrator considers to be the primary basis of whether there has been a violation of the provisions of section 31.1 of the collective agreement, I would be compelled to conclude that there has been no such violation. Whatever its overall arrangements with Chemetron with respect to the transfer of the operation, management and supervision of the Transcona plant may be, the Company cannot fairly be said to have placed bargaining unit work "presently and normally performed by employees" into the hands of a third party contractor. That is precisely what it has not done.

Alternatively, if it were necessary to determine the issue of whether the employees in question continue to be the employees of CP Rail, a matter which should, I think, be addressed, given the nature of the Brotherhood's argument, the grievance must also fail on that basis. Accepting, for the purposes of this part of the analysis, that the factors and tests articulated within the **Don Mills** award are to be applied, the Arbitrator is not persuaded that the evidence supports a conclusion that CP Rail is no longer the employer of the production employees of the Transcona plant. It is clear that, although there is a "wash" arrangement for accounting purposes which involves a paper invoicing of labour costs from the Company to Chemetron, in the final analysis it is CP Rail which bears the burden of remuneration for the employees, insofar as they are involved in the production of CWR for its consumption. There can be, moreover, no doubt that CP Rail retains full control with respect to the hiring, dismissal and discipline of all of the employees concerned. While Chemetron may exercise discretion with respect to day to day assignments and normal supervision of the tasks performed by the employees, it has no authority with respect to their most vital job interests, including hiring, firing, the negotiation of their wages and benefits upon the renewal of the collective agreement, or the ongoing administration of that document as relates to such critical factors as wages, benefits, seniority rights, entitlement to statutory holidays and vacation and virtually all of the elements most fundamental to an employment relationship in a collecting bargaining setting. Nor is it entirely clear, as the Brotherhood suggests, that the Company could easily revert to a pure contracting out of bargaining unit work after the expiry of the eight year contract, presumably on the basis that it no longer possessed the necessary facilities. As noted above, the Company appears to have retained an unconditional right to recover the assets in question should it choose to do so.

In the Arbitrator's opinion the arrangement between the Company and Chemetron does not violate the collective agreement, nor does it in fact do violence to the general principles reflected within labour relations statutes such as the **Canada Labour Code**, and much Canadian jurisprudence, with respect to the protection to the protection of the integrity of bargaining units and collective bargaining relationships. If anything, the actions of the

Company are consistent with those values, and with the Company's obligations under the terms of section 31.1 of the collective agreement, as well as the prior award of this Office in **CROA 3041**. On the whole of the material before me no violation of the collective agreement is disclosed, and the grievance must therefore be dismissed.

January 21, 2000

(signed) MICHEL G. PICHER
ARBITRATOR