CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3113

Heard in Calgary, Thursday, May 11, 2000

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

EX PARTE

DISPUTE:

Contracting out of the chauffeuring of train crews in Kamloops Yard.

EX PARTE STATEMENT OF ISSUE:

On October 1, 1999, the Company contracted out the chauffeuring of train crews in Kamloops Yard to Kami Cabs. The work in question had been previously performed by employees within the scope of agreement 5.1, whose positions were abolished on September 30, 1998.

The Union submits that the contracting out of the work in question is prohibited by virtue of article 35.1 of the collective agreement. The Company also violated articles 35.2, 35.3, 35.4 and 35.5, in failing to give proper written notice, failing to disclose information to the Union upon request, and failing to provide the Union with the opportunity and means to put forward a "business case" pursuant to article 35.2, even in the alternative event that the contracting out did not violate the collective agreement.

The Union requests declarations to the above effect, an order that the Company forthwith cease and desist from contracting out the work in question, an order that the Company forthwith comply with its remaining obligations as set out above, and an order that any employee adversely affected by any or all of these violations be made whole.

The Company submits that the specific task of transporting crews does not fall within the provisions of article 2 of agreement 5.1, stating that in Kamloops specifically, it has utilized management personnel and restricted employees prior to the reduction of the permanent positions on September 30, 1999. The Company denies the Union's contentions and requests.

FOR THE UNION:

(SGD.) A. ROSNER
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:

R. Reny	– Human Resources Associate, Vancouver
S. Blackmore	– Labour Relations Associate, Calgary

And on behalf of the Union:

A. Rosner	– National Representative, Montreal
R. Johnston	– President, Council 4000, Montreal
S. Tash	– President, Local 4001, Kamloops

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in dispute. Commencing in 1997 the Company introduced an automated on-board reporting system (OBRS). That innovation allows train crews and traffic coordinators to enter data directly into the Company's computer system, thereby avoiding the need to report the same information indirectly through clerical employees, generally referred to as Servocentre Control and Train Movement Clerks. As the OBRS system was introduced across Canada, commencing in the east, the Company gave notice to the Union of job abolishments in the clerks' classification. On February 15, 1999 the Company gave the Union an article 8 notice concerning job reductions in Prince George, Terrace, Smithers, Vancouver and Kamloops to take effect on September 30, 1999. It is common ground that at Kamloops five positions of servocentre control and train movement clerks were abolished.

Part of the duties of the clerks at Kamloops involved driving train crews between the yard office and their locomotive units, both on departure and arrival. While the evidence is not precise with respect to the amount of work involved, it does not appear disputed that ferrying of crews within the yard would normally account for approximately three hours of work each day.

The evidence establishes that the chauffeuring responsibilities of the clerks at Kamloops extend back over a substantial period of time, to an earlier day when the collective agreement contained a classification of "chauffeur" and when, in many locations, the chauffeur's duties might have involved full-time responsibilities. It is not disputed that occasionally management personnel h have performed the driving function for crews within the yard, and that the work has also been awarded to injured employees from other bargaining units as a means of accommodation of physical disabilities with suitable modified duties. It is not, however, disputed that, subject to accommodating the disabled, at Kamloops the driving of the train crews within the yard has never been assigned to any bargaining unit employees other than those represented by the Union, most recently within the classification of servocentre control and train movement clerks. It is not disputed, however, that other transportation of train crews beyond the confines of the yard, for example to sleeping quarters at a nearby hotel, has been performed outside the bargaining unit. The instant claim is, therefore, confined to work in relation to the transportation of crews to and from their trains within the yard at Kamloops.

The instant grievance arises by virtue of the fact that following the abolishment of the clerks' positions the Company retained a taxi company to provide the chauffeuring services within the yard previously performed by the clerks. It is the position of the Union that that initiative by the Company constitutes improper contracting out. The Union's claim is based entirely on the contracting out provisions of the collective agreement. It alleges a violation of article 35.1 which reads as follows:

> **35.1** Effective February 3, 1988, work presently and normally performed by employees who are subject to the provisions of this collective agreement will not be contracted out except:
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> **(a)** when technical or managerial skills are not available from within the Railway; or
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> **(b)** where sufficient employees, qualified to perform the work are not available from the active or laid-off employees, and such work cannot be delayed until such employees are available; or
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> **(c)** when essential equipment or facilities are not available and cannot be made available at the time and place required (a) from the 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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> **(d)** 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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> **(e)** the required time of completion of the work cannot be met with the skills, personnel or equipment available on the property; or
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> **(f)** where the nature or volume of the work is such that undesirable fluctuations in employment would automatically result.
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> The conditions set forth above will not apply in emergencies, to items normally obtained from manufacturers or suppliers nor to the performance of warranty work.

The Union also alleges that the Company failed to provide proper notice to it with respect to its decision to contract out the work which is the subject of this dispute, contrary to article 35.2, thereby denying the Union an opportunity to make a business case for retaining work, assuming that one of the exceptions to article 35.1 could be established.

The first issue to be determined is whether, as the Union asserts, the work in question is "… work presently and normally performed by employees" of the bargaining unit. Upon a review of the evidence, as relates to the specific situation at Kamloops, the Arbitrator is compelled to conclude that the Union's position in that regard is made out. There is no evidence of the work assignments in question ever having been performed by members of another bargaining unit, save in the exceptional circumstance of an injured or disabled employee who might be assigned the work on a modified duties basis, or the occasional emergent involvement of a supervisor. When regard is had to the history of operations within the yard at Kamloops I am compelled to conclude, on the balance of probabilities, that for many years the work of transporting running trades crews between their trains and the yard office has consistently been performed by members of the bargaining unit and that, as of the time of the job abolishments, the chauffeuring of crews within the yard was in fact work "presently and normally performed" by members of the bargaining unit.

It should be stressed that this is not a case which involves an assertion of exclusive jurisdiction on the part of the Union, or grieving the assignment of work to other Company employees from a different bargaining unit or from management. In that context, the jurisprudence cited by the Company with respect to prior awards of this Office dealing with claims of work jurisdiction as between the Union and Company employees from other bargaining units is of limited, if any, real value. For example, in **CROA 2006** this Office concluded that the Company was entitled to assign employees on employment security to perform work also performed by members of the bargaining unit. It was there found "… there is nothing in the Collective Agreement which would require the Company to assign the clean up work in question to bargaining unit employees, notwithstanding that it may have done so in the past, or to prevent it from assigning to other employees…". Clearly that case, and others relied upon by the Company, turned on a different issue, being whether the Union could claim exclusive jurisdiction to certain disputed work, as against other Company employees. The instant case, however, turns on a different set of rights and obligations, the contracting out provisions of the collective agreement.

I am compelled to the inescapable conclusion that the Company did contract out work "presently and normally performed" by bargaining unit employees when it assigned the task of chauffeuring running trades crews between the yard office and their trains to an independent taxi contractor. As noted by Arbitrator Weatherill in **SHP 156**, a decision between **Canadian Pacific Limited and the Canadian Council of Railway Shopcraft Employees and Allied Workers**, an unreported award dated July 10, 1984, it is open to the Union to make a claim of contracting out based on the circumstances of a given location, notwithstanding that contracting out may have occurred in respect of similar work, without grievance or objection, at other locations. The same understanding is reflected in **CROA 1966** and **2146**.

The decisions of this Office have also been consistent in reflecting the view that, where contracting out is concerned, the fact that the work in question may constitute something less than a single full-time job, the prohibition against contracting out is nevertheless binding. The awards of this Office, as well as others, were commented upon in the following terms in an ad hoc award in a grievance between the instant parties, concerning the contracting out of fuel services at Melville, Saskatchewan, an unreported award of this Arbitrator dated November 26, 1997. At p.4-5 of that award the following comment appears:

> Nor does the fact that the work in question might not, of itself, constitute work to occupy a bargaining unit employee on a full time basis change the merits of the case insofar as the violation of the prohibition against contracting out is concerned. Prior arbitration awards have clearly established that the contracting out of work which amounts to less than a full time position is nevertheless a violation of the prohibition against contracting out, in recognition that the fundamental purpose of the prohibition is to protect the integrity of bargaining unit work. (*See, e.g.,* **CROA 713, 1596, 1812,** *and also* **Canadian Pacific Limited and Canadian Council of Railway Shopcraft Employees and Allied Workers, SHP-118**, *an unreported decision of Arbitrator Weatherill concerning the repair of crane wheels at Angus Shops, dated February 8, 1982, and* **Canadian Pacific Limited and Canadian Council of Railway Shopcraft Employees and Allied Workers**, *an unreported award of Arbitrator in respect of a grievance concerning the contracting out of work at Brandon, Broadview and Swift Current, dated July 10, 1984.*)

In the result, the Arbitrator is satisfied that the grievance must succeed. The evidence discloses that the work of transporting running crews to and from their trains within the yard at Kamloops was presently and normally performed by members of the bargaining unit. That work has now been contracted out to a private taxi company, an action which violates the prohibition against contracting out found in article 35 of the collective agreement. The Company has not adduced evidence which would bring it within any of the enumerated exceptions to article 35.1 of the collective agreement, and it must therefore be found to have contracted out without establishing any proper exception which would allow it to do so. It should, however, be stressed that the Arbitrator's conclusion in the instant case is particular to the Kamloops location, and the specific facts which obtain there.

The Arbitrator therefore finds and declares that the Company has violated article 35 of the collective agreement by contracting out the in-yard chauffeuring duties of bargaining unit employees at Kamloops. The Company is directed to cease and desist its practice of contracting out, to compensate any laid off or active employees who can be shown to have been adversely affected by the Company's action, and to compensate the Union for lost dues, if any, attributable to the contracting out.

May 12, 2000

(signed) MICHEL G. PICHER
ARBITRATOR