CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3647

Heard in Montreal, Wednesday, February 11, 2008

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

The Company's use of outside contractors ("surge employees") to perform work that rightfully belongs to employees governed under the 4.3 agreement.

UNION'S STATEMENT OF ISSUE:

In April 2007, Labour Relations approached the Union, attempting to negotiate an agreement to retain retired conductors on individual contracts to alleviate a shortage of employees, working under the 4.3 agreement, in Edmonton, Alberta.

On May 31, the Company served the Union notice that they were going to use these "surge conductors" in Melville, Saskatoon and Biggar, Saskatchewan. There was no agreement in place between the parties to allow contractors to perform work under agreement 4.3, nor is there today. These "surge conductors" hold no seniority under agreement 4.3, nor are they employees of the Company. On June 29, the Union filed

The Union contends that the work in question rightfully belongs to employees holding seniority under agreement 4.3 and that the Company's actions are contrary to the collective agreement. The Union requests that the Company cease and desist utilizing contractors to perform work governed by agreement 4.3.

The Union contends that the Company was dealing in bad faith and had no intention of obtaining an agreement with the Union. Additionally, the Union further contends that the use of these contractor has caused adverse effects to employees properly entitled to the work and we request they be made whole for all losses.

COMPANY'S STATEMENT OF ISSUE:

In early 2007 the Company was dealing with an unexpected and serious manpower shortage of train service personnel in Western Canada.

The Company's position is twofold: **(A)** The use of retired union members was a temporary measure to address an ongoing shortage of employees at select locations in Western Canada for a defined period of time. They were utilized only when unionized employees were not available and there is no evidence that the Company was engaged in sharp practice or that the use of these workers had any impact on bargaining unit employees as alleged by the Union. **(B)** There is no provision in agreement 4.3 preventing the contracting out of work to retired union members in the manner used by the Company, nor has the Union identified any.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) R. S. THOMPSON	(SGD.) K. MADIGAN
GENERAL CHAIRPERSON	VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

K. Morris	– Manager, Labour Relations, Edmonton
D. S. Fisher	– Director, Labour Relations, Montreal
D. VanCauwenbergh	– Director, Labour Relations, Edmonton

B. Laidlaw – Manager, Labour Relations, Winnipeg

And on behalf of the Union:
D. Ellickson – Counsel, Toronto
R. S. Thompson – General Chairperson
R. A. Hackl – Witness

The hearing was adjourned by the Arbitrator.

On Wednesday, 9 April 2008, there appeared on behalf of the Company:
K. Morris – Manager, Labour Relations, Edmonton
D. VanCauwenbergh – Director, Labour Relations, Edmonton
B. Laidlaw – Manager, Labour Relations, Winnipeg
T. Bourgonje – Regional Chief Engineer, Eastern Canada

And on behalf of the Union:
D. Ellickson – Counsel, Toronto
R. S. Thompson – General Chairperson
R. A. Hackl – Witness
S. Pommet – Local Chairperson

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not substantially disputed. In the spring of 2007 the Company found itself gravely short of manpower to handle traffic in Western Canada. In a previous circumstance, in 1997, the Company had negotiated an agreement with the Union for the temporary employment of retired conductors to get through a similar period of shortage. It appears that the parties met to discuss a similar arrangement on May 7, 2007. What the Company proposed was no loss of employment or employment advantages to any bargaining unit employees, with the understanding that the former railroaders would be utilized only to handle work which the bargaining unit could not cover. That arrangement would also necessitate some relief from normal provisions of the collective agreement, given the wish of the retired railroaders to be assigned to work only in their normal places of residence, principally Melville, Saskatoon and Biggar, Saskatchewan. After an exchange of several possible letters of understanding for the use of the "surge" employees, and a number of discussions, the parties were unable to agree on the terms under which the retirees would be used. It appears that one of the points of disagreement was the Union's insistence that all of the retirees be fully qualified in belt pack operations, and an underlying concern that if they were not so qualified they might be assigned to preferential road work, ahead of bargaining unit members.

When no agreement could be reached, the Company nevertheless went ahead. In a letter dated June 23, 2004, the Company's Senior Vice-President, Western Canada Region advised the Union's General Chairperson, Mr. Roland Barr, that the Company would proceed to recruit and use surge employees. That letter reads as follows:

> Dear Sir:
>
> As you are well aware the company continues to manage the increase in business opportunities in Western Canada with a critical shortage of employees in the running trades.
>
> The company approached the union in regard to the solicitation of former qualified train service employees (commonly referred to as surge employees) as a means of temporarily supplementing the workforce until the company's hiring initiative was capable to addressing the workforce shortage.
>
> The surge employee would in fact be called upon to provide train service (yard or road) after all existing provisions of the 4.3 agreement were exhausted and the vacancy still remained unfilled.
>
> This letter will confirm the company is moving forward in this initiative at various locations in western Canada such as for example Melville, Saskatoon and Biggar Saskatchewan. The company will continue to canvass former qualified train service employees at other locations in the event their services were required as a temporary resolve to the shortage.
>
> The company will continue to provide the union with regular updates on where and how many surge employees will be used in this capacity.

> The eight (8) surge employees presently available to the company have received the necessary qualification updates to ensure the safe and effective use if their experience in the workplace. These surge employees are presently assigned to protect service in Melville, Canora, Humboldt, Saskatoon and Biggar Saskatchewan.
>
> If you have any questions please feel free to contact the undersigned. [sic]
>
> (signed) Kerry Morris
> For: Jim Vena, Sr. Vice-President – Western Canada Region

The Company communicated to the Union, and the Arbitrator accepts without reservation, that it had no intention to undermine the Union's bargaining rights. On the contrary, it made it clear to the bargaining agent that it was making efforts to hire, train and deploy new employees into the bargaining unit to deal with its manpower shortage on a permanent basis. To that end, in 2007, some 697 employees were hired into the bargaining unit in Western Canada. The effect of the Company's hiring initiative was to entirely eliminate the need for any retirees to work as surge employees by November 20, 2007.

The Union nevertheless insists that the Company acted outside the collective agreement. It seeks a declaration from the Arbitrator that it was unlawful for the Company to hire employees and negotiate with them individual terms and conditions of employment outside the collective agreement. It further seeks a cease and desist order from the Arbitrator, presumably to prevent the Company from continuing in that course of action.

The Company's response to the grievance is that it was in effect contracting out bargaining unit work, and that the collective agreement contains no prohibition against contracting out. Having considered the Company's argument, the Arbitrator cannot accept it. I am compelled to share the characterization of Union counsel who maintains that what occurred was "contracting in". Rather than make use of the employees of another company, with whom a contract might be made, the Employer simply negotiated with individuals, hiring them to work to all intents and purposes, as employees alongside the bargaining unit employees, but outside the terms of the collective agreement. It is clear that that is not permissible under the **Canada Labour Code**. Section 36 of the **Canada Labour Code** provides, in part, as follows:

> **36.** Where a trade union is certified as the bargaining agent for a bargaining unit,
>
> **(a)** the trade union so certified has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit;

The **Code** further provides, in section 54:

> **56**. A collective agreement entered into between a bargaining agent and an employer in respect of a bargaining unit is, subject to and for the purposes of this Part, binding on the bargaining agent, every employee in the bargaining unit and the employer.

These provisions plainly do not allow an employer, who is subject to a certificate under the **Code**, or the terms of a collective agreement with a normal scope clause, to engage a parallel group of employees to perform what is plainly bargaining unit work, and to do so outside the terms of the collective agreement. There is no principle of collective bargaining in Canada that is more fundamental. (See, **Hydro Ottawa Ltd. v. I.B.E.W., Local 636**, 85 O.R. (3d) 727 (Ont. C.A.); **Re MacMillan Bloedel Industries Ltd. and Pulp Workers of Canada, Local 8**, (1974) 5 L.A.C. (2d) 337 (Weiler); **Re Bristol-Meyers Phamaceutical Group, Division of Bristol-Meyers Canada Inc. and C.A.W., Local 1538**, (1990) 15 L.A.C. (4th) 210 (Shime); **Re Radio Shack and U.S.W.A., Loc. 6709** (1994) 44 L.A.C. (4th) 69 (Beck); **Re St. Jude's Anglican Home and B.C.N.U.** (1996), 53 L.A.C. (4th) 111 (Larson).)

On the law, therefore, there can be no doubt but that the Union is correct. While, as indicated above, the Arbitrator is satisfied that the Employer did not have any anti-union motive, and was desperately seeking to simply ensure that its operations continued to meet customer demands, the inevitable conclusion is that it did so in a manner inconsistent with its rights and obligations under the collective agreement. It is not clear, from the scope of this policy grievance, whether in individual cases bargaining unit employees were in fact adversely affected by the Company's actions. Those questions are matters over which this Office retains jurisdiction, it appearing that a series of individual grievances may indeed have been filed in that regard. The more immediate question is the scope of the remedy which should be granted in this case.

I am satisfied that the Union is entitled to a declaration. Given what the Company has experienced, given that its intent was never to undermine the Union, and that it made every effort to reach an acceptable arrangement with

the bargaining agent, and especially given that the Company in fact hired several hundred new employees into the bargaining unit to more permanently correct the problem and that it ceased to use surge employees as of November of 2007, on what responsible basis should a tribunal issue a cease and desist order? I can see none. In my view the appropriate remedy in the case at hand is simply a declaration.

The grievance is therefore allowed. The Arbitrator declares that the Company's actions in hiring "surge employees" between June and November of 2007 for running trades operations in Western Canada was in violation of the collective agreement and of the **Canada Labour Code**, to the extent that it disregarded the exclusive bargaining authority of the Union in respect of all employees performing bargaining unit work. I do not consider it appropriate, for the reasons touched upon above, to issue a cease and desist order, given that it appears that the Company has made every effort to bring itself within the collective agreement and the **Code**.

April 30, 2008

(signed) MICHEL G. PICHER
ARBITRATOR