# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

# CASE NO. 3683

Heard in Montreal, Thursday, 10 July 2008

Concerning

## CANADIAN NATIONAL RAILWAY COMPANY

and

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

## EX PARTE

**DISPUTE:**

Alleged contracting out of bargaining unit work at CN Headquarters and Central Station complex (henceforth designated as "CNHQ").

**UNION'S STATEMENT OF ISSUE:**

On August 6, 2007, the Company served an article 8 notice on the Union to advise that fourteen (14) positions in Facility Management would be abolished December 4, 2007 on account of the "expected sale" of CNHQ.

At a meeting on October 25, 2007, the Company advised the Union that under a sale agreement expected to be finalized November 30 with Homburg, it would continue to occupy the Headquarters building and most of Central Station as a tenant and carry on many of the same activities as before, including subleasing the station to VIA Rail and the AMT. The cleaning and other maintenance work, however, presently and normally performed by bargaining unit members, would become the responsibility of Homburg.

The Union filed a grievance alleging that the change in work assignment constituted contracting out in violation of Article 35.1 of Agreement 5.1. It further requested full documentation and any contracts related to the sale and the new work arrangements, with reserving its rights pending review of those documents. The Company has not to date provided any such documentation, nor has it responded to the grievance almost five (5) months after its filing.

The Union submits that the change in work assignment constitutes contracting out in violation of article 35 of the collective agreement. It requests an order that such violation cease, that the work be returned forthwith to the bargaining unit, and that the Union and any adversely affected employees be made whole. Given the failure of the Company to date to supply any

copies of agreements or contracts, the Union reserves the right to amend or expand on the contentions and claims if and when such information is made available.

The Company denies the Union's contentions and claims.

**FOR THE UNION:**

**(SGD.) A. ROSNER**
**NATIONAL REPRESENTATIVE**

There appeared on behalf of the Company:

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| J. Cavé | – Counsel, Montreal |
| D. S. Fisher | – Director, Labour Relations, Montreal |
| S. Grou | – Manager, Labour Relations, Montreal |
| R. Bateman | – Sr. Manager, Labour Relations, Toronto |
| R. N. McFadyen | – Director, Corporate Facilities, Montreal |
| S. Couture | – Sr. Mananger, Building Operations, Montreal |
| R. Magnan | – Manager Facility, Montreal |

And on behalf of the Union:

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| A Rosner | – National Representative, Montreal |
| R. Fitzgerald | – President, Council 4000, Toronto |
| H. Grant | – Secretary-Treasurer, Toronto |
| C. Rainville | – Regional Representative, Montreal |
| S. Auger | – Regional Representative, Montreal |
| D. St-Louis | – Staff Representative, Montreal |
| G Fortin | – Local Chairman, Montreal |
| D. Bélanger | – Witness |

## AWARD OF THE ARBITRATOR

The facts pertinent to this dispute are not contested. For many years the Company has owned its own Headquarters building, as well as the adjacent Central Station in Montreal. For business reasons, which are not questioned in these proceedings, the Company decided to sell its real estate holdings in both buildings. On September 19, 2007 it announced an agreement with Homburg Invest Inc. in relation to the sale of the Central Station complex in Montreal as well as the adjacent CN Headquarters building. On November 30, 2007 CN announced the closing of the sale.

The Company continues to occupy the premises in both the Headquarters building and Central Station, now in the capacity of lessee on the basis of a thirty year lease negotiated as part of the sale of the property. Part of the leasehold agreement is that the new owner of the property, hereinafter referred to as Homburg, is to provide janitorial services for the premises in Central Station previously provided by bargaining unit employees. It should be noted that Central Station is a multi-tenant facility. Prior to the sale CN leased premises within the station to a number of restaurants and retail outlets. It also leased space to VIA Rail, to the AMT/Montrain commuter train service as well as to Amtrack. By virtue of the sale of the premises Homburg has taken over the leases of the restaurant and retail business within Central Station. CN, on the other hand, continues to lease the remainder of the premises and to sub-let those parts of the station now occupied by VIA Rail and AMT/Montrain, much as it did before.

For the purposes of clarity, it should be noted that the bargaining unit employees did not, prior to this sale, perform any cleaning duties in the CN Headquarters building. Additionally, their work within Central Station was substantially limited, with considerable segments of the cleaning of that facility also being performed by an outside contractor prior to the sale of the premises. The work of the bargaining unit, numbering some fourteen employees, consisted of cleaning brass, sweeping and washing stairs, garbage removal from the main hall, cleaning and maintaining washrooms, including garbage removal, as well as cleaning and garbage removal from the platform level and the removal of garbage and recycling from locker rooms and VIA's Panorama Lounge, as well as the AMT kiosk.

As noted above, the sale and leasehold arrangement made between CN and Homburg vests in Homburg the obligation to provide janitorial service for the entire area of Central Station. Specifically, the lease arrangement, described as a thirty year "railway lease" contains the following article entitled "Cleaning Services":

> The Landlord shall provide, at its expense, the cleaning services, garbage pickup and disposal, recycling pickup and disposal and pest control in the Premises to the specifications attached as Schedule "H" and the Landlord shall follow a competitive bid process for all cleaning services to the Buildings and the Premises in order to obtain favourable pricing for the Tenant.

As is evident from the foregoing, the costs of cleaning and garbage disposal contracted by the new landlord will be charged back to CN, in accordance with the lease arrangement.

The Union submits that the whole of the arrangement constitutes an effective contracting out contrary to the provisions of the collective agreement. Its representative argues that all of the elements of contracting out are established. He submits that just as before the sale, CN remains in entire and exclusive possession of the parts of Central Station which were previously cleaned by bargaining unit employees. Through the leasehold arrangement, although the cleaning services are now contracted for by the new landlord, CN remains responsible for paying for the costs of those services. Significantly, he argues, CN continues to maintain its leasehold arrangement, albeit by sub-lease, with VIA and AMT in the Central Station premises, where cleaning services continue to be performed under a new contract. In the Union's submission all of these facts add up to what its representative characterizes as an indirect form of contracting out, engineered through the sale and leasehold arrangement. While conceding that the

situation is essentially without legal precedent, insofar as the jurisprudence is concerned, he submits that what has transpired must be viewed as a contracting out, as the work previously performed remains to be performed, it is performed on behalf of CN even though it may be contracted through the landlord, and, in effect, nothing has really changed within the workplace to the extent that CN remains in possession of the premises.

The Company's representatives argue a very different perspective. They submit that, for valid business reasons not questioned in these proceedings, the Company simply ceased to be the owner of Central Station. To that extent it gave up its leasehold relationship with the restaurant and retail shops within the premises, and by a lease-back arrangement has continued in possession of the balance of the building, including its sublease arrangements with VIA and AMT, apparently in furtherance of certain governmental obligations which it is apparently bound to honour. Most importantly, as stressed by the Company's representative, the arrangement between CN and Homburg is entirely normal and consistent with commercial leases, to the extent that the landlord bears the primary responsibility for supplying janitorial services. It is admitted, in other words, that it is entirely normal for Homburg to be responsible for janitorial services, and any contrary arrangement would be highly unusual in any commercial lease arrangement. On that basis the Company maintains that what has transpired cannot be characterized as a contracting out, whether direct or indirect.

I turn to consider the merits of the submissions of both parties. In doing so I acknowledge the characterization of this dispute by the Union's representative as being

unprecedented. There is, to the Arbitrator's knowledge, no prior jurisprudence which would support the notion that when an employer divests itself of real property, and remains on the premises as a tenant, the future performance of janitorial work by contractors must be deemed to be a contracting out. It is true, as reflected in the jurisprudence, that it is substance and not form which must govern in considering whether the work jurisdiction protection of contracting out prohibitions within a collective agreement may have been violated. However, it is perhaps not surprising that there are no reported awards which support the Union's position.

It would in fact appear that such precedent as there is runs entirely contrary to the position of the Union. In **Telus v. Telecommunication Workers' Union** [2001] C.L.A.D. no. 35, an award dated January 11, 2001, then Arbitrator S. Kelleher was called upon to rule on a claim of contracting out in a situation very similar to the case at hand. Telus decided to sell its Headquarters building in Burnaby, B.C. to the Insurance Corporation of British Columbia. A key term of the agreement of purchase and sale was that the new owner would lease the premises back to Telus, as well as to certain other tenants. The leasehold agreement which emerged contained a provision whereby janitorial and cleaning services were to be provided by the new landlord, ICBC. The grieving union argued, in part, that the transfer essentially involved a contracting out of the maintenance and janitorial work from Telus to ICBC. Arbitrator Kelleher rejected that submission. In paras. 34-39 he commented as follows:

> 34 What is determinative of the case before me is the proper characterization of the transaction. Counsel for the Union argues that when TELUS entered into the Lease, it contracted out the janitorial and maintenance work.

35 But one must have regard to the entire transaction, including the **sale**. TELUS has ceased to own the Burnaby Headquarters. The transaction is not a transfer of the maintenance and janitorial work. [*original emphasis*]

36 To consider the transaction as a transfer of the maintenance and janitorial from TELUS to ICBC (and then to its property manager) is to mischaracterize it. I agree that the work which TELUS performed, cleaning and maintaining the building, is now being done by ICBC through a property manager.

37 But the work is being done by the new owner. A normal incident of ownership is that an owner maintain its asset. That is the uncontradicted evidence of Mr. Sandrin. When TELUS owned the asset, TELUS maintained it.

38 If the Union's position were correct, the Employer would not be permitted to dispose of its real estate assets unless it found a purchases who would not only lease the premises back to TELUS, but permit TELUS to maintain and clean the premises. As Mr Sandrin stated in his opinion it is expected that a landlord in a multi-tenant building will insist upon maintaining control of the building operation, repair and maintenance:

> I regard provisions permitting or requiring the Tenant to perform building service and building maintenance as unusual in most leasing situations and highly unusual in a multi-tenant building. The rights of the Tenant to elect to vacate space in the Building reinforces these concerns. It would be highly unusual for a Landlord to agree that any Tenant (however significant) in a multi-tenant building would provide or co-ordinate services for building repair or maintenance to premises of other tenants. In advising any Landlord or major tenant, I would strongly recommend against any such an arrangement to avoid obvious problems arising out of the Landlord's performance of its obligations to other tenants of the Building, liabilities for breach by the Major Tenant of its obligations, insurance, indemnities, fidelity concerns, security and cost recoveries, to name only a few apparent issues.
>
> (emphasis added)

39 The underlined sentence explains a key reason that owners consider it to be in their interest to provide janitorial and maintenance services. …

[original emphasis] [added emphasis not apparent in copy provided]

In the Arbitrator's view it is important to respect the fact that, as a matter of law, CN has ceased to be the owner of the premises and has surrendered any obligation to maintain and clean them. As the new principal tenant of the premises, it obviously needs cleaning services and, in an agreement that is entirely consistent with such commercial arrangements, it has contracted with Homburg to provide, as landlord,

normal janitorial and cleaning services. It is also normal to expect that Homburg would wish to protect its investment by having control of all maintenance and cleaning functions.

With the greatest respect to the contrary view of the Union, what transpired is a normal commercial real estate transaction, the incidental consequence of which is that CN ceases to be responsible for performing janitorial work on the premises. That, in the Arbitrator's view, cannot fairly be characterized as a "contracting out" merely because the lease negotiated by CN contains what is a normal provision for the landlord to provide janitorial services. To allow the Union's claim would be tantamount to forcing Homburg, a purchaser in good faith which has spent several hundred million dollars to buy the facility, to have the premises cleaned and maintained employees not of its choosing. So extraordinary a result should, I believe, be founded on some clear and compelling legal principle. The fact that CN remains as the principal tenant in Central Station, much as TELUS did in its own Headquarters building in the case considered by Arbitrator Kelleher, does not of itself support a conclusion that there has been a contracting out as contemplated within the terms of the collective agreement. In my view it is implicit within the terms of the collective agreement that the prohibition against contracting out relates to work performed on Company premises or using Company equipment and staff for the sole benefit and profit of the Company. In the case at hand it is obviously in Homburg's interest to have the premises cleaned and maintained, notwithstanding that that is also an important service to the new tenant, CN. In these circumstances I cannot conclude that what has transpired constitutes contracting out as contemplated within the collective agreement.

While it is not pertinent to the merits of this dispute, it may also be noted that all of the employees adversely affected by the loss of the janitorial work did have the benefit of a technological, operational and organizational change notice from the Company under the terms of the collective agreement. It appears that three of them have opted to retire, while the balance of the employees have been reassigned elsewhere, with collective agreement protections which include the maintenance of basic rates.

For all of the foregoing reasons the grievance must be dismissed.

July 18, 2008

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