

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4058

Heard in Calgary, Thursday, 10 November 2011

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

**TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION**

DISPUTE:

Contracting out of Thermite Welding work on the Winchester Subdivision.

JOINT STATEMENT OF ISSUE:

On June 28, 2010, the Company advised the Union of its intention to contract out joint elimination on the Winchester Subdivision in Ontario. The work would consist of approximately 267 welds and would begin on or about July 28, 2010. On August 3, 2010, the matter was grieved. The grievors are TP Ontario Thermite Welders who were fully capable of performing the work in question (Messrs. B. Metcalfe, G. Barnes, M. Watkinson, M. Lavergne, L. Clubine, C. Eadie, J. Prior, R. Pomfret, J. Hardy, S. Parrotta, D. Poulin, P. McDowell, M. Therrien, R. Loiselle, L. Ferreira and J. Evans).

The Union contends that: **(1)** The work involved was work presently and normally performed by members of the bargaining unit. **(2)** An overtime ban had been unilaterally imposed by the Company. **(3)** The Company's actions were in violation of sections 3.1 and 13.2 of the collective agreement.

The Union requests that the above named workers be compensated at the overtime rate for all hours worked by the contractor while performing bargaining unit work.

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

FOR THE UNION:

(SGD.) WM. BREHL
PRESIDENT

FOR THE COMPANY:

(SGD.) M. CHERNENKOFF
ASSISTANT LABOUR RELATIONS OFFICER

There appeared on behalf of the Company:

V. White	– Labour Relations Officer, Calgary
S. Seeney	– Director, Labour Relations, Calgary
H. Rubert	– Director, ES Track Systems, Calgary

M. Chernenkoff – Assistant Labour Relations Officer, Calgary
W. Scheuerman – Labour Relations Officer, Calgary

There appeared on behalf of the Union:

Wm. Brehl – President, Ottawa
D. Brown – Counsel, Calgary
A. R. Terry – Vice-President, Lethbridge

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the Company has embarked on a program to eliminate existing jointed track on a number of subdivisions, including the Winchester Subdivision. Its objective is to substitute continuously welded rail (CWR) which, it does not appear disputed, is less prone to repair and maintenance issues which are frequently associated with the location of joints which are obviously more frequent on sections of road which are comprised of shorter lengths of “stick rail”.

As part of its program of improvement the Company scheduled elimination work on the Winchester Subdivision between Mile 18.9, near Montreal westward to Mile 123.8 in the area of Smiths Falls for the summer of 2010.

The Company states that in June of 2010 it became concerned as to whether the thermite welding, being performed by the Southern Ontario Thermite Crew which is comprised of some sixteen employees, could be completed as the crew was able to perform an average of 11.5 welds per day. It does not appear disputed that no additional thermite welding employees were available within the Company’s manpower at the time. In the circumstances the Company hired a contractor, Sersa Total Track, to complete the thermite welding work on the Winchester Subdivision, performing 227 welds in the period between September 12, 2010 and October 15, 2010.

It appears that from the time the contractor was brought in to complete the project the Southern Ontario Thermite Welding Crew were fully assigned elsewhere to complete joint elimination work in other locations such as Belleville, Galt, Hamilton, Mactier and Windsor. It does not appear disputed that the Southern Ontario Thermite Welding Crew remained fully employed for the normal thermite welding season until November 19, 2010. It also appears that the Northern Ontario Thermite Welding Crew was fully engaged in thermite welding work until the time of their layoff on November 9, 2010. The Company's unchallenged assertion is that no bargaining unit thermite welding crew members were laid off while the contractor performed approximately one month of work on the Winchester Subdivision.

The Union asserts that the Company has violated the prohibitions against contracting out under the collective agreement. Its representatives submit that the thermite welding work assigned to the contractor could have been performed by bargaining unit employees on an overtime basis or that, alternatively, additional bargaining unit employees could be hired or trained and qualified to perform the thermite welding work in question.

The Arbitrator has some difficulty with the Union's submission. It is not disputed that thermite welding work is work "presently and normally" performed by the bargaining unit within the contemplation of article 13.2 of the collective agreement, the article which prohibits contracting out. However, the exceptions to that article do, in my view, properly

come to bear on the facts of the instant case. Article 13.2(b) of the collective agreement allows the Company to resort to contracting out in the following situation:

- (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;

As should be evident from the foregoing language, the prohibition against contracting out does not compel the Company to hire or train additional employees. Where sufficient qualified active or laid off employees are not available the Company is permitted to contract out the work if that work cannot be delayed until such time as the Company's employees are available. In the case at hand it is clear that there is a relatively defined thermite welding season which generally comes to a close with the advent of wet weather in November. During the welding season all of the members of the thermite crews were fully engaged in employment and, at the time of the Company's retaining of the contractor in the period between September 12 and October 15, 2010, they were assigned elsewhere on the system to complete joint elimination work in Southern Ontario.

In the circumstances, the Arbitrator cannot see how it can be argued that they were reasonably available to perform the work in question on an overtime basis or that, given the constraints on overtime permissible under the **Canada Labour Code**, that it would have been practicable to assign them to work overtime on a virtually regular basis until such time as the project was complete. While I agree with the Union's representatives that mere cost saving or the avoidance of overtime is not a justification or exception which would allow contracting out (see **CROA 2875**), in the case at hand I

am compelled to conclude, as argued by the Company, that completing the thermite welding work on the Winchester Subdivision in the welding season of 2010 on the basis of assigned overtime was not practicable or efficient given the overall plan for joint elimination and the need for the Southern Ontario Thermite Welding Crew to be assigned to other locations. I am also in agreement with the submission of the Company that the exception stated in sub-paragraph (e) of article 13.2 has its application, as the required time for completing the work planned by the Company could not be met if the work was performed exclusively by bargaining unit employees.

For all of the foregoing reasons, I am satisfied that the Company was entitled to contract out the portion of thermite welding work which it did, late in the 2010 season, on the Winchester Subdivision. No violation of the collective agreement is therefore disclosed and the grievance must be dismissed.

November 14, 2011

(signed) MICHEL G. PICHER
ARBITRATOR