CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4091

Heard in Montreal, Thursday, 16 February 2012

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Contracting out of flagging duties on the Kootenay Subdivision.

JOINT STATEMENT OF ISSUE:

The Company contracted out flagging duties on the Kootenay Subdivision which were performed by PNR effective August 19, 2011. The PNR employee who performed this work received training to do so by the Company. A grievance was filed.

The Union contends that bargaining unit employees were available to perform the work and that the Company's actions were in violation of Appendix C, section 10.10 (and Appendix A3), section 1013(a) and section 3.2 of the collective agreement.

The Union requests that the Arbitrator declare that the Company's actions were in violation of the collective agreement, order that compensation for all hours lost including overtime be paid to any and all employees adversely affected by the Company's decision, and order the Company to reimburse employees for any personal expenditures that occurred as a result of this matter.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) WM. BREHL	(SGD.) M. CHERNENKOFF
PRESIDENT	LABOUR RELATIONS OFFICER

There appeared on behalf of the Company:

M. Chernenkoff	– Labour Relations Officer, Calgary
M. Moran	– Manager, Labour Relations, Calgary
V. Parr	– Superintendent Engineering, Cranbrook

There appeared on behalf of the Union:

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

AWARD OF THE ARBITRATOR

The issue in the case at hand is whether the Company was justified in contracting out flagging work in relation to an extensive project of grading work and new turnout and track construction on the Cranbrook Subdivision in early 2011. It appears that the improvements being implemented were in furtherance of enhancing the Company's service to its customers, notably the mining company Teck which operates five southeastern British Columbia coal mines. It is not disputed that the project, called Net Cap, involved sufficient construction of extensive siding facilities so as to require that the work be contracted out. The work was in fact contracted to a company called PNR. Four flagmen positions were required for the various projects, three of which positions were awarded to bargaining unit employees. One of the positions, associated with the construction on the Keevil Siding on the Fording Subdivision, was in fact contracted to PNR which supplied its own employee to perform the flagging duties. The individual who did that flagging, Mr. Dan Frost, was in fact trained by the Company to gain the necessary knowledge and accreditation to perform the flagging duties.

It does not appear disputed that Mr. Frost worked the position for approximately three months, between August 19 and November 21, 2011. Thereafter the work was assigned to a bargaining unit employee.

The Company maintains that the exceptions to the collective agreement rule against contracting out applied to the facts of this case, notably that sufficient employees qualified to perform the work were not available from among the active employees, it being understood that there were no laid off employees. The Company submits that to have bulletined the fourth flagging position would have attracted a bid from a senior employee, likely a foreman, thereby depriving the Company of the knowledge and skills of that individual in their normal functions of track inspections and/or repair.

The Arbitrator has some difficulty with that submission. As stressed in the Union's submission, and illustrated by a substantial number of Pacific Region job bulletins, in the years 2008 through 2011 it was extremely common for the Company to bulletin jobs which involved flagging for contractors at various points on the Pacific Region. Some three dozen such examples are provided. The Union's representatives submit, without contradiction, that it is not uncommon for the Company to post such positions and to have them successfully bid on by track maintenance foremen.

Reduced to its most basic elements, the Company's argument is that employees in the field are not "available" within the meaning of article 13.2 of the collective agreement which governs contracting out whenever it can be shown that they are performing valuable work elsewhere. If that interpretation were accepted, it would be tantamount to saying that contracting out would be permissible save where employees are in fact fully available because they are laid off. With respect, that is not the

interpretation of these provisions which has operated for many years. The collective agreement provides for the back-filling and replacement of persons who successfully bid on posted positions which are anticipated to be greater than forty-five days in duration.

I am not satisfied that the Company would have been significantly impeded in its normal operations by allowing a track maintenance foreman to bid and hold the flagging position which is the subject of this dispute. The grievance must therefore be allowed.

I therefore declare that the Company's actions did violate the collective agreement and direct that compensation for all hours lost, including overtime, be paid to the employees who were adversely affected by what occurred. Should it be demonstrated that employees may have incurred personal expenditures by reason of the violation of the collective agreement, compensation may extend to include those amounts. On the foregoing basis the matter is remitted to the parties to determine the appropriate remedial result by agreement, failing which the matter may be spoken to.

February 20, 2012 **(signed) MICHEL G. PICHER**

ARBITRATOR