

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

CASE NO. 4093

Heard in Calgary, Tuesday, 13 March 2012

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

UNITED STEELWORKERS – LOCAL 1976

DISPUTE:

L'abolition du poste de nettoyeur au terminal de Lachine.

JOINT STATEMENT OF ISSUE:

L2 20 mai 2011, la Compagnie a aboli le poste de nettoyeur au terminal de Lachine et a embauché un sous-traitant pour effectuer ce travail.

Le Syndicat soutient que la Compagnie a attribué en sous-traitance du travail qui appartient à l'unité de négociation. Le Syndicat demande que ce travail soit rendu à l'unité de négociation et que le sous-traitant cesse son travail à Lachine.

Le Syndicat a également demandé la récupération de toute rémunération perdue par le candidat qualifié, M D. Plante.

La Compagnie n'est pas d'accord et rejette la demande du Syndicat.

FOR THE UNION:

(SGD.) N. LAPOINTE
POUR: VICE-PRÉSIDENT RÉGIONAL

FOR THE COMPANY:

(SGD.) B. DEACON
CHEF, RELATIONS SYNDICALES

There appeared on behalf of the Company:

E. Tyminski – Labour Relations Officer, Calgary
B. Deacon – Manager, Labour Relations, Calgary
J. Bairaktaris – General Manager, Transportation, Calgary

And on behalf of the Union:

N. M. Lapointe – Staff Representative, Montreal

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not disputed. Ms. D. Pajor, now a retired employee, held a position of Cleaner at the Lachine Intermodal Terminal until her retirement. Following her retirement, although the position was initially bulletined, the bulletins were cancelled and the position was contracted out by the Company. The Union maintains that the Company's decision to contract out the cleaning work at the Lachine Intermodal Terminal is in violation of the prohibitions against contracting out found in the collective agreement.

It appears that initially the Company did agree to bulletin the position based on an initial grievance filed by the Union. On or about May 3, 2011 employee Daniel Plante applied on the bulletin, however it was cancelled on the same day. Subsequently the Union was advised by the Company that the position was abolished and the work in question was subsequently contracted out. It does not appear disputed that a bargaining unit employee, Mr. Hernandez-Compres, was assigned the work of the position on a temporary basis during the bulletining process.

In this grievance the Union submits that the senior applicant for the position which was originally bulletined, Mr. Daniel Plante, should be recognized as the successful applicant and that he be compensated for wages and benefits lost by reason of the failure of his being appointed in light of the contracting out of the job.

The Union's representative submits that the exceptions to the contracting out prohibition in the collective agreement, found in article 17, do not apply in the instant

case, and that the Company was not at liberty to contract out. It also maintains that the Company failed to give notice of the contracting out to the Union in accordance with article 17.4 of the collective agreement.

The Company submits that the grievance is without foundation. Its representative stresses that for many years the work of the cleaners at the Lachine Terminal was performed by contractors, and not by bargaining unit employees. The unchallenged submission of the Company is that with the sale of Windsor Station, it entered into discussions with the Union with respect to how to minimize the adverse effects on employees who would otherwise face layoff. In the facts of that situation the Company and the Union agreed to assign cleaner work at the St. Luc Yard and the Lachine Intermodal Terminal to cleaners previously employed at the Windsor Station, including Ms. Pajor. It then suspended its cleaning contracts. The Company maintains that it entered into that arrangement on a without prejudice basis, predicated on the condition that the work in question could not be claimed by the Union as a matter of work ownership.

The arrangement whereby two positions would be established, one in St. Luc Yard and one in the Lachine Intermodal Terminal, as a means of alleviating the impact of the closure of Windsor Station, was addressed in a letter dated August 20, 2009 to the Union's President, by Mr. John Bairaktaris, the Company's Director of Labour Relations and concurred in by the signature of the Union's President. That letter reads as follows:

Further to our conversation on this matter in connection with anticipated permanent job reductions in the Montreal, the Company is prepared, without precedent or prejudice to future situations of a similar nature, to create two (2) permanent cleaner positions which will become associated with the Montreal B-Roster.

This will take place on or about January 27, 2010 or as mutually agreed by the both parties.

One of these positions will be located in St-Luc Yard and the other will be located at the Lachine Intermodal Terminal.

It is understood that the arrangement for these two positions will not bestow work ownership rights to the USW.

In keeping with the above communication the memorandum of agreement finally executed between the parties regarding the abolishment of positions in connection with the sale of Windsor Station contains the following passage:

In addition, as a result of the special circumstances surrounding this implementation, the Company is prepared on a without prejudice and precedent basis should a similar situation arise in the future, "contract in" certain specific work to the USW which is currently performed by a 3rd party contractor. These positions are governed by the Letter of Understanding between the USW and Canadian Pacific dated August 20, 2009, which outlines that there is no USW work ownership attached related to these positions.

How, then, are these documents to be construed? In the Arbitrator's view there can be no doubt but that they were agreed to as a means of reducing the adverse impacts on employee who would otherwise face layoff by reason of the sale of Windsor Station. It is not insignificant, I think, that the Company expressly stated within both its letter of August 20, 2009 and in the text of the memorandum of agreement itself that the arrangement for the transfer of employees to St. Luc Yard and the Lachine Intermodal Terminal was exceptional, was on a without prejudice basis and, most importantly, that it was done with mutual acknowledgement that the Union cannot claim work ownership to the work of the positions in question.

In my view there can hardly be a more clear understanding to limit or exclude the operation of the contracting out provisions of the collective agreement than the documents reviewed above. Very simply, the Union has effectively acknowledged that it cannot claim that the work at the Lachine Intermodal Terminal is “work presently and normally performed by employees who are subject to the provisions of this collective agreement ...” within the meaning of article 17.1 of the collective agreement. On what basis, therefore, can the Union now claim that there has been a violation of the prohibitions against contracting out by the Company’s decision to revert to contracting out following the retirement of Ms. Pajor from the position at Lachine? I can see none.

Nor can the Arbitrator give substantial weight to the suggestion of the Union’s representative that the abolishment of the position at Lachine should have triggered the obligation of the Company to give the Union notice under the terms of the Income Security Agreement and to implement the protective provisions of that document. In my view that is precisely what occurred when the Company established the position which was made available to Ms. Pajor, as a means of minimizing for her the adverse impact of otherwise losing her job upon the sale of Windsor Station.

In summary what transpired is that for many years the Company contracted out the cleaning work at the Lachine Intermodal Facility. In the extraordinary circumstances of the sale of Windsor Station it agreed to minimize the impact of what would otherwise have been the layoff of Ms. Pajor by fashioning an agreement with the Union to allow

her to take a cleaner position at Lachine. As a result, the contracting out of cleaning work at that location was suspended. As noted above, it is significant that the Company expressly preserved within its agreement with the Union the understanding that the Union could not claim work ownership to that work. With the retirement of Ms. Pajor the Company decided to return to the contracting out which had previously been in effect at that location.

While this case is extraordinary in its facts, by the agreements entered into by the Union itself, it appears clear that it placed itself in a position whereby it could not assert ownership to a permanent position at the intermodal terminal at Lachine. Rather, what transpired was an arrangement whereby the adverse effects of the sale of Windsor Station were minimized for Ms. Pajor, a situation which continued until such time as she retired. In my view, in light of its agreement to the arrangement, the Union must now be estopped from claiming that it has ownership of a permanent position at that location, so as to invoke the protections of the Income Security Agreement or so as to prohibit the contracting out of the cleaning work performed there.

For all of these reasons the grievance must be dismissed.

March 19, 2012

(signed) MICHEL G. PICHER
ARBITRATOR