

**CANADIAN RAILWAY OFFICE OF ARBITRATION**

**CASE NO. 4154**

Heard in Calgary, Wednesday, 14 November 2012

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**UNITED STEELWORKERS, LOCAL 2004**

**DISPUTE:**

Claim for \$2,000 as punitive monetary damages by the Union when the Company contracted in the services of an operator to perform excavating work on the Lillooet Subdivision during July, August and September 2011.

**JOINT STATEMENT OF ISSUE:**

During the last two weeks of July, the last week of August and the first, second and third weeks of September 2011, the Company retained the services of one (1) employee from Hunter John Contracting to perform excavating work, which was normally performed by the USW Local 2004.

The Union was not provided with notice of intent to contract out this work.

On September 15, 2011, the Union filed a grievance contending that the Company was in violation of articles 33.1, 33.3, 33.4, 33.5, 33.6, 34.3 and 38 of the collective agreement 10.1. The Union requested payment from the Company in the amount of \$2,000 as punitive monetary damages on the basis that no notice was provided.

The Company denies there has been a violation of Agreement 10.1 and has declined the grievance.

**FOR THE UNION:**

**FOR THE COMPANY**

**(SGD) P. JACQUES**

**(SGD). B. LAIDLAW**

**REGIONAL CHIEF STEWARD, MOUNTAIN REGION    MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

B. Laidlaw	– Manager, Labour Relations, Winnipeg
R. Bateman	– Director, Labour Relations, Toronto
R. Fenelon	– Sr. Manager, Engineering, Vancouver
D. Brodie	– Manager, Labour Relations, Edmonton
P. Payne	– Manager, Labour Relations, Edmonton

There appeared on behalf of the Union:

P. Jacques – Regional Chief Steward – Mountain Region, Edmonton  
R. Gatzka – Staff Representative, Edmonton

### **AWARD OF THE ARBITRATOR**

The Union seeks \$2,000 in damages for what it alleges was the Company's violation of its obligation to provide it notice of its intention to contract out certain ballast excavator work on the Lillooet Subdivision on some eleven occasions in August and September, 2011.

The facts are not in dispute. The Company's Tie Gang was assigned to perform repairs on the Lillooet Subdivision during the summer of 2011. The gang required a machine operator who was assigned to operate the tie crane. As the work progressed the gang supervisor noticed that the ballast under the ties was in unsatisfactory condition at a number of locations and needed to be shored up. There were, however, no qualified employees available on the territory to run the excavator at that point in time. In the circumstances the Company utilized the employee of a contractor who had been working for the Company on a separate project in the same area. In the result, it utilized qualified Machine Operator Peter Campbell, an employee of Hunter John Contracting, to operate the Company's excavator and accomplish the ballast shoring work that needed to be done.

The Union alleges that the Company violated a number of provisions of articles 33, 34 and 38 of the collective agreement, as noted in the joint statement.

Article 33.1 concerns the fundamental limitations on the Company's right to contract out. An exception to that limitation is expressed as follows in article 33.1(2):

(2) where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees; or

I am satisfied that that exception is amply made out in the case at hand. There simply was no qualified employee on the territory available to operate the excavator at the time that the ballast repair work needed to be done. In these circumstances I can find no violation of article 33.1 of the collective agreement.

The question then becomes whether there was a violation of the Company's obligation to provide adequate notice to the Union in certain circumstances relating to contracting out. In that regard article 33 provides as follows:

**33.3** At a mutually convenient time at the beginning of each year and, in any event, no later than January 31 of each year, representatives of the Union will meet with the designated officers to discuss the Company's plans with respect to contracting out of work for that year. In the event Union representatives are unavailable for such meetings, such unavailability will not delay implementation of Company plans with respect to contracting out of work for that year.

**33.4** The Company will advise the Union representatives involved in writing, as far in advance as is practicable, of its intention to contract out work, which would have a material and adverse effect on employees. Except in case of emergency, such notice will not be less than 30 days.

The Union presents to the Arbitrator extensive jurisprudence which confirms that damages can be awarded by a board of arbitration where it is established that a Union's substantive right to have notice and an opportunity to discuss a possible contracting out, in advance of the event, is denied to it by the employer's refusal or failure to provide that notice in a timely fashion. Significant among the cases cited by the Union are **Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of**

**America** (1973) 4 L.A.C. (2nd) 254 (O'Shea), an award ultimately upheld by the Ontario Court of Appeal (**Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486** [1975] 57 D.L.R. 3rd 199 (Ont. C.A.)). Reference is also made to the well accepted decision of Arbitrator Christie in **Re Berrard Yarrows Corporation, Vancouver Division, and International Brotherhood of Painters, Local 138** (1981) 30 L.A.C. (2nd) 331 (Christie). The cases relied upon by the Union confirm, properly in my view, that it is entirely appropriate for a board of arbitration to assess some monetary value to the right of a Union to receive advance notice of a company's intention to contract out, with a correlative opportunity to make alternative proposals that might avoid the need to contract out. Monetary damages have been found to be an appropriate means to remedy that violation of a Union's right, a proposition which this Office accepts without qualification.

However, the right of the Union to claim an obligation of notice on the part of the Company must depend on the provisions of the collective agreement and the facts of each particular case. As is evident from the material touched upon above, this is not a case where the Company preplanned any ballast repairs on the Lillooet Subdivision. Its business plan was to effect tie repairs on that territory and it was only during the course of that exercise that it discovered the need for ballast repair at a number of locations. In my view, therefore, this is not a circumstance that would fall under the provisions of article 33.3, requiring the Company to give the Union notice of the work in question no later than January 31st of the year.

The question then becomes whether article 33.4 can be invoked in the instant case. For that article to apply the Union bears the burden of establishing that the contracting out of the work "... would have a material and adverse effect on employees". Should that condition be demonstrated, the Company is under an obligation to give prior notice in writing, as far in advance as is reasonable, that it intends to contract out certain work.

On what basis can it be said that in the instant case that the contracting out of the operation of the excavator can be said to have had a material and adverse effect on employees? I can see none. This is not a circumstance where the Union can demonstrate that employees were laid off or otherwise lost work opportunities by reason of the contracting out engaged in by the Company. As that is the case, there was no obligation of notice arising under article 33.4 of the collective agreement. Nor could the provisions of articles 33.5 or 33.6, dealing with the nature of the information which must be provided, said to have been properly engaged.

The Arbitrator readily appreciates the Union's concerns. There is no substantial doubt that the work performed by the contractor was indeed work "presently and normally performed by employees" of the bargaining unit. However, the Arbitrator is bound to apply the collective agreement as it is. I am compelled to find that there were not sufficient employees qualified to perform the work in question, which then gave the Company the right to engage in contracting out as it did. It did so, for the reasons touched upon above, in circumstances in which prior notice to the Union was simply not

practicable, as the need for ballast work became only evident at the last minute, during the course of the performance of the tie gang's work. Nor was there any adverse effect on any employee.

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

November 19, 2012

SIGNED  
MICHEL G. PICHER  
ARBITRATOR