CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 4155

Heard in Calgary, Wednesday, 14 November 2012

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED STEELWORKERS, LOCAL 2004

DISPUTE:

Claim for Union dues 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.

On September 15, 2011, the Union filed a grievance contending that the contractor was a member of the USW LU 2004 for that period of time. The Union contends that the Company was in violation of articles 1.1, 1.2, 1.3 and 38 of the collective agreement 10.1.

The Union has requested payment of monthly Union dues for the months of July, August and September of 2011.

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 maintains that it should have received dues for work performed in the operation of an excavator by an individual supplied by a contractor to perform ballast repairs on the Lillooet Subdivision in August and September of 2011.. The facts relating to this case are more extensively touched upon in **CROA&DR 4154**, and need not be reiterated here.

The fundamental question in a case of this kind is whether the individual doing the work, Mr. Peter Campbell who was supplied by Hunter John Contracting, was effectively the employee of the Company or whether he was the employee of the contracting company. If he was the former, clearly there would be an obligation on the part of the Company to remit union dues on behalf of Mr. Campbell to the Union.

I must agree with the Company that the principles which govern a dispute of this kind are those canvassed by Arbitrator P.C. Picher in **Re IKO Industries Ltd. and United Steelworkers of America** (2002), 118 L.A.C. (4d) 1 (P.C. Picher). On page 10 of that award the following comments appear:

> The parties to the instant dispute agree that under the jurisprudence respecting the identification of an employer in an employment agency situation such as this, the primary question is to identify which party exercises fundamental control over the employment circumstances of the persons in question. To this end, i.e. for the identification of the entity exercising fundamental control over the employment of the millwrights supplied by Gray Hawk, the parties have adopted the seven-fold test for fundamental control set out in **Re Don Mills Foundation**

for Senior Citizens and Service Employees International Union, Local 204 (1984), 14 L.A.C. (3d) 385 (P.C. Picher).

These seven *indicia* for the identification of the seat of fundamental control, and, therefore, the employer, were first set out by the Ontario Labour Relations Board in **Re York Condominium Corp., No. 46 and L.U.I.N.A., Local 183**, [1977] O.L.R.B. Rep. October 645 (Furness). They are listed as follows:

1. The party exercising direction and control over the employees performing the work;
2. The party bearing the burden of remuneration;
3. The party imposing discipline;
4. The party hiring the employee;
5. The party with the authority to dismiss the employee;
6. The party which is perceived to be the employer by the employees;
7. The existence of an intention to create the relationship of employer and employees.

In the instant case it is clear that there was an important element of direction and control exercised by the Company in the day-to-day assignments performed by Mr. Campbell. However, virtually all of the remaining six factors reviewed in **IKO** tend to lean to the side of the Company's case. Insofar as the record before me would indicate, the contracting company retained the obligation to pay Mr. Campbell. It is the contractor which hired Mr. Campbell and had the ability to discipline him, although there can be little doubt that the Company might have some input into that exercise. Hunter John Contracting retained the ability to terminate Mr. Campbell and, in my view, must be viewed as having had the greater control over his employment. Moreover, there is no indication before me of any intention on the part of the Company, the contractor or Mr. Campbell to create an employer-employee relationship between Mr. Campbell and the Company.

I do not dispute the authorities placed before me by the Union. There are circumstances where the application of the seven principles reviewed in IKO might well lead to a conclusion that an individual supplied to perform work does effectively become an employee, deemed to be part of a bargaining unit in respect of whom union dues should be paid. On the facts of the instant case, especially bearing in mind that the work performed by Mr. Campbell was sporadic and incidental, and cannot be said to have been in relation to establishing a permanent employment relationship, the Union's claim cannot succeed.

For these reasons the grievance must be dismissed.

November 19, 2012

signed
MICHEL G. PICHER
ARBITRATOR