# CANADIAN RAILWAY OFFICE OF ARBITRATION

# & DISPUTE RESOLUTION

# CASE NO. 4197

Heard in Montreal, April 10, 2013

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

And

**UNITED STEELWORKERS LOCAL 2004**

**DISPUTE:**

Contracting out rail pick-up work to RemCan on Prairie Region during 2011.

**JOINT STATEMENT OF ISSUE:**

The worked performed by the Contractors was presently and normally performed by members of USW Local 2004. The Company contracted out rail pickup work to RemCan provided the scrap rail pickup services on the Prairie Region since January 2011 for the entire year. This work formed part of the Company's contracting out plans for 2011 that were discussed with the Union at the joint contracting out meeting in January 2011, as required by Article 33.3 of the CBA. The company must provide the Union with a list of contracting out that may take place in the upcoming year. The Company also provided notice of this work again in March 2011 as per Article 33.5, however this was 3 months after the contactor was working.

The Union contends the work was not an emergency and should have been offered to employees of the bargaining unit. The Union contends that the Company violated Article 33 "Contracting Out", 33.1 (1)(2)(3)(4)(5)(6), 33.3, 33.4, 33.5, 34.3, Appendix VI the *Outsourcing Protocol* of Agreement 10.1. and failure to follow Appendix VIII (Off Region Gang agreement) It is also the Union's position that this adversely affected the Local's finances due to the loss of due dollars that would have been generated from the members performing the work. It is also the Union's position that failure to provide a timely notice as per Article 33.4 to inform the Union that the Company is going to actually do this work. It is the Union's contention that due to the untimely notice they have not been provided sufficient time to investigate or request information as per Article 33.6. Failure to provide notice as per Article 33.5 also impedes the Unions ability to insure there are no members working "Off Region" at the time, as per Appendix VIII. It is the view of the Union that the contractor was dependent on CN for its revenue and therefore should be considered a dependent contractor. The Union contends that the Company is liable for payment of Union dues in this case for punitive damages for breaching the Collective Agreement.

The Union and the Company have met in Joint Conference on April 3, 2012 and June 22, 2012 to discuss the grievance. The Company's position is that there has been no violation of Agreement 10.1, and has declined the Union's request for Union dues.

| **FOR THE UNION:** | **FOR THE COMPANY:** |
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| **(SGD.) M. Piché** | **(SGD.) B. Laidlaw** |
| **USW Representative** | **Manager Labour Relations** |

There appeared on behalf of the Company:

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| B. Laidlaw | – Manager Labour Relations, Winnipeg |
| T. Wincheruk | – Assistant Chief Engineer, Winnipeg |
| S. Grou | – Senior Manager Labour Relations, Montreal |

There appeared on behalf of the Union:

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| M. Piché | – USW Staff Representative, Toronto |
| G. Colli | – Chief Steward, Winnipeg |
| T. Cotie | – Chief Steward, Sudbury |

## AWARD OF THE ARBITRATOR

The Union grieves the contracting out of scrap rail pick-up to a private contractor, RemCan, on the Prairie Region over a six month period in 2011. The unchallenged representation of the Company is that the work in question was included in a notice to the Union, pursuant to Article 33.3 of the collective agreement, conveyed at the joint contracting out meeting held between the parties in January 2011. Further, it appears that additional notice was provided to the Union of the work having been undertaken as of March 2011, in compliance with Article 33.5 of the agreement, albeit that notice was somewhat late as the contractor had already commenced the work in question.

A substantial focus of the Union's case is what it alleges is a violation of Appendix VIII of the collective agreement. Appendix VIII, which appears to have been added to the collective agreement in 2008, deals generally with Off-Region assignments. It gives the Company the flexibility to assign gangs from a given seniority

territory to work, for temporary periods, on an another seniority territory, apparently to a maximum of sixty-five employees. In the case at hand it does not appear disputed that a number of employees from the Prairie Region were assigned off-territory to work in the Mountain Region. The Union relies in particular on the following paragraph of Appendix VIII :

> The use of off-territory gangs will not permit the Company to invoke the exceptions of Article 33.1 (2) to justify contracting out.

In essence, the position argued by the Union is that the Company could not have a number of Prairie Region employees working off-territory in the Mountain Region while simultaneously engaging a third party contractor to preform work which is normally performed by bargaining unit members. The position of the Union is that the Company was under an obligation to recall the employees assigned off-territory to perform the work which was contracted out. It submits that the Company could have used welders to cut rail into smaller segments and could have made use of certain boom trucks and similar equipment available to it to have the work performed by bargaining unit employees.

It is common ground that the contractor had in its possession and made use of a Wellman crane, a substantial piece of equipment which can work in tandem with a track-mobile and a utility truck to perform the lifting and cleaning work required. The Company’s position is that while it has its own Wellman crane on the Prairie Region, that equipment was fully employed elsewhere, and was therefore not available for the project in question. Additionally, the unchallenged representation of the Company’s representatives is that virtually all of the lighter equipment which might otherwise have

been used to perform a cleanup work was fully engaged and not available to do the track cleanup project. Similarly, the Company maintains that all employees were fully engaged in their own assignments, and would not, in any event have been available to perform the work which is the subject of the contract with RemCan.

Article 33.1 of the collective agreement generally covers the limitations on contracting out. It provides as follows :

> Effective February 3, 1988, work presently and normally performed by employees who are subject to the provisions of this collective agreement will not be contracted out except:
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> 1. when technical or managerial skills are not available from within the Railway; or
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> 2. where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees;
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> 3. when essential equipment of facilities are not available and cannot be made available at the time and place required (a) from Railway-owned property, or (b) which may be bona fide leased from other sources at a reasonable cost without the operator; or
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> 4. where the nature of volume of work is such that it does not justify the capital or operating expenditure involved; or
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> 5. the required time of completion of the work cannot be met with the skills, personnel or equipment available on the property; or
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> 6. where the nature or volume of the work is such that undesirable fluctuations in employment would automatically result.

Although the Union argues that the Company failed to comply with the notice requirements of Article 33 of the collective agreement, citing in particular the provisions of article 33.4 dealing with contracting out which would have material or adverse effect on employees, I am not satisfied that this aspect of the grievance can succeed. There is

no dispute that no employees were laid off or deprived of any work opportunities by reason of the contracting out here under examination. In essence, the Union's argument is that but for the contracting out the complement of employees in the bargaining unit would have been larger, thereby occasioning a greater volume of union dues. Its representative submits that the dues would have been used for the benefit of the employees in the bargaining unit. On that basis he submits that what occurred was effectively an adverse effect on the employees.

With respect, I do not believe that the language and intention of Article 33.4 can be said to extend so far. That Article provides as follows:

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

The concept of adverse effects has been addressed by this Office in prior awards. It is generally understood as relating to a reduction in job security, such as lay-offs, or at a minimum a reduction in work opportunities, including the possibility of overtime. It has never, to my knowledge, been argued that the lost opportunity of additional Union dues is in and of itself a "material and adverse effect on employees." In light of the jurisprudence, I am satisfied that it would require clear and unequivocal language in the collective agreement to confirm that for the Union to miss the opportunity of having additional union dues is to be construed as an adverse effect on employees. While it obviously cannot be disputed that dues are the life blood of the Union and do ultimately benefit employees, in my view the link between the two in the

case at hand is far too remote to fall within the intention of the parties in drafting the language of Article 33.4 of the Collective agreement.

With respect to the substance of the grievance, I also have some difficulty with the Union's position concerning the application of Article 33 in the case at hand. It does not appear substantially disputed that the Company did not have at its disposal a Wellman crane, a piece of equipment whose purchase would have cost in excess of three million dollars. And further, as noted above, there appears to be no dispute that all other lighter equipment such as speed swings or boom trucks were fully engaged and not available to be deployed for the purposes of the scrap rail pick-up project. In the circumstances I am compelled to conclude that the Company is correct in invoking sub paragraphs (3) and (4) of Article 33. 1 of the collective agreement in the case at hand. This is a situation where the essential equipment was not available to the Company and where the nature and volume of the work would not have justified the capital expenditure necessary to acquire that equipment.

What of the Union's assertion with respect to the application of Appendix VIII of the Collective agreement, essentially arguing that the Company could not continue to utilise bargaining unit employees off-territory while resorting to contracting out? The Union's argument is tantamount to saying that so long as employees are assigned off-territory the Company is effectively prohibited from contracting out any work if that work could in fact be performed by the off-territory complement of employees. In my view it is a sufficient answer to that submission to stress that the Company's position in the

instant case is not based upon the lack of available employees. Rather, as noted above, it is entirely grounded in the fact that the Company did not have at its disposal the heavy equipment necessary for the clean-up operation. In the instant case, if the Union could have demonstrated that a Wellman crane was in fact sitting idle while employees were working off-territory, the strength of the Union's argument, would be substantially different. I cannot, however, sustain the Union's argument, a submission which would in effect disregard the application of Articles 33.1 (3) and (4) of the collective agreement. I cannot conclude on the basis of the material before me, that by the provisions of Appendix VIII the parties intended to effectively overturn the core elements of Article 33.1 of the Collective agreement which governs contracting out.

No violation of the collective agreement is disclosed on the facts at hand. For these reasons the grievance must be dismissed.

April 15, 2013

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MICHEL G. PICHER
ARBITRATOR