CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4315

Heard in Edmonton June 10, 2014

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE –

MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Contracting Out of Scrap Sorting Work Normally Performed at the Transcona Rail Yard Facility.

JOINT STATEMENT OF ISSUE:

Beginning in 2011 the Company utilized a contractor to perform scrap sorting work at the EJR Reload Facility in Winnipeg (320 Sutherland), A grievance was filed.

The Union contends that prior to the contractor performing the work at EJR, scrap sorting work was performed by bargaining unit members at the Transcona Rail Yard. The Company failed to notify the Union about the contracting out. The Company's actions are in violation of sections 13.2, 13.4, 13.5 and 13.6 of the collective agreement.

The Union requests that the contracting out cease immediately and that the employees who regularly perform the work at Transcona be compensated for all hours worked by the contractor including overtime.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Brehl	**(SGD.) M. Moran**
President	**Manager Labour Relations**

There appeared on behalf of the Company:

D. Guerin	– Director, Labour Relations, Calgary
W. Kuczek	– Supervisor Machine Operations,
N. Hasham	– Counsel, Toronto
R. Hope	– Director Track Removal,
A. Damji	– Manager, Workforce Planning

There appeared on behalf of the Union:

W. Brehl	– President, Ottawa
D. Brown	– Counsel, Ottawa
G. Doherty	– Director Prairie Region, Brandon
H. Helfenbein	– Director Pacific Region, Medicine Hat

AWARD OF THE ARBITRATOR

This grievance is about whether the Company has violated the collective of agreement by contracting out Other Track Material ("OTM") sorting work performed by

bargaining unit members, specifically three permanent labourers and one Group 1 Machine Operator, who regularly performed that work at the Transcona Yard in Winnipeg prior to 2011.

The Company generates OTM, which consists of metallic material other than rail, such as spikes anchors and plates. Some of the OTM material has no value to the Company and is sold to scrap buyers ("scrap OTM)". Other OTM is suitable for use on short lines and is sold to other railroads and may be reusable by the Company (relay OTM). Since the 1990s the OTM has been sorted exclusively by bargaining unit members. Since 2001, this sorting work has been done at Transcona Yard. In 2011, T-Rail Products Inc. ("T-Rail") began sorting OTM at the EJR Reload Facility in Winnipeg.

According to the brief that was submitted by the Company at the hearing:

> In 2011 CP entered into an agreement with T-Rail and Griffin Wheel. The nature of this contract was that Griffin Wheel would purchase whatever scrap the company had en mass. A third-party, T-Rail Inc. was then hired by Griffin Wheels to sort through the scrap in order to recover the more value types of material that can be re-sold to other Companies. What is important to note is that the scrap no longer belongs to the company and that none of the material ever return to CP. The Union cannot claim ownership of the work as the material in question no longer belonged to the Company.

The Company also maintains that since bargaining unit members stopped performing OTM sorting at Transcona and T-Rail began performing it at the EJR Reload

Facility, bargaining unit members have been sorting OTM it in the field. I accept the Union's evidence tendered at the hearing, that this has not been the case.

While the Union bears the onus in this case to show that work once performed by bargaining unit employees is now being performed by a third-party – and it appears undisputed that the Transcona employees did perform OTM sorting until the end of 2010 – the onus shifts to the Company to demonstrate that, as claimed, it sold its OTM to Griffin and divested itself entirely of its OTM assets. The Company is the party that is uniquely in the position of proving such a claim, and that is why the onus shifts to it for an explanation. That principle was clearly established in **CROA 3036**.

The document upon which the Company relies in support of its assertion that it had an agreement in 2011 with both T-Rail and Griffin, is an unsigned Supply Services Agreement ("SSO") that is clearly only between the Company and T-Rail and that applies in the 2013 calendar year. In its submissions concerning the SSO, the Company merely referred me to Schedule B dealing with "DESCRIPTION OF SERVICES – Agency Agreement 2013 Rail & OTM." It made no detailed submissions as to how I should interpret Schedule B or, for that matter, any other provision in the SSO.

The SSO document speaks to an arrangement by the Company's with T-Rail whereby T-Rail sorts "Surplus OTM" separating scrap OTM from relay OTM at 500

Jarvis, then delivers the scrap OTM to Griffin, on the Company's behalf. The SSO references an obligation on the Company's part to supply 12,320 net tons of scrap OTM to Griffin in 2013. It contains clauses that stipulate that title to relay OTM and to scrap OTM remain with the Company until the Company has received payment from T-Rail and Griffin, respectively. There is nothing in the SSO to suggest to me, as the Company claims, that there was an outright sale of its assets to either T-Rail or to Griffin and that the Company retained no interest in the OTM after the sale.

In fact, the SSO seems to suggest that T-Rail retains the relay OTM on consignment, which it then markets and sells on the Company's behalf on the most advantageous terms to the Company. Clause 5, Schedule B of the SSO addresses the handling and agency fees associated with the sale of the Company's relay OTM.

The Company has failed to demonstrate its claim of an outright sale of assets to Griffin and/or T-rail, or that as a result of such sale it divested itself of its assets.

Finally, the fact that the sorting of OTM may have been irregularly performed by bargaining unit employees, is irrelevant. Prior to the contract with T-Rail, bargaining unit employees were "presently and normally" performing the OTM sorting work. This collective agreement contains categorical language prohibiting the contracting out of work "presently and normally" performed work by bargaining unit employees. The

fundamental purpose of the prohibition against contracting out is to protect the integrity of bargaining unit employees (see **CROA 3113**).

I declare that the Company has violated article 13.2 of the collective agreement by contracting out the OTM sorting work performed by the bargaining unit employees at Transcona. The Company is ordered to cease the contracting out of OTM sorting.

There is no evidence before me as to the effect of the contracting out on affected employees at Transcona, and the remedial relief that should flow as a result. I retain jurisdiction to deal with remedy if the parties are unable to resolve the issue, as well as any other issue concerning the interpretation or implementation of this decision.

June 26, 2014

CHRISTINE SCHMIDT
ARBITRATOR