

**CANADIAN RAILWAY OFFICE OF ARBITRATION**  
**& DISPUTE RESOLUTION**  
**CASE NO. 4633**

Heard in Calgary, May 8, 2018

Concerning

**CANADIAN NATIONAL RAILWAY**

And

**UNITED STEELWORKERS – LOCAL 2004**

**DISPUTE:**

Wage claim hours worked by contractors.

**THE UNION'S EXPARTE STATEMENT OF ISSUE:**

The work performed by the Contractors is presently and normally performed by members of USW Local 2004.

The Union contends the work was planned work, and members of Local 2004 were available.

The Union contends that the Company violated Article 15 (Bulletin and filling position) 15.3, 15.14 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.

The Union requests B.E., J.A., T.L., J.T., J.B. and F.A. are made whole at overtime rates for all hours worked by this contractor outside of their regular assigned shift, rest days including but not limited to any associated benefits.

The Union requests the difference in rates of pay from that of a trackman to the untrained Forman (TMF) rate of pay or full rate of pay of a Track Maintenance Forman (TMF) where applicable.

The Union requests the Company provide the starting date along with the number of manpower and hours worked by each of the contractors listed in the grievance.

The Company responded October 2, 2017 declining the grievance and parties have not been able to resolve the dispute to date.

**FOR THE UNION:**  
**(SGD.) M. Piché**  
**Staff Representative**

**FOR THE COMPANY:**  
**(SGD.)**

There appeared on behalf of the Company:

B. Laidlaw	– Manager Labour Relations, Winnipeg
S. McCartney	– Senior Manager, Design and Construction, Winnipeg
S. Smith	– Manager Labour Relations, Edmonton

There appeared on behalf of the Union:

T. Lundblad	– Staff Representative, Toronto
G. Colli	– Chief Steward, Prairie Region, Winnipeg

### **AWARD OF THE ARBITRATOR**

Article 33.1 of the Collective Agreement between the parties provides as follows:

33.1 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 ...(in five circumstances enumerated therein).

The Union contends that the Company was in breach of the above provisions in that it contracted out “*flagging work*”, which belongs to USW, to Universal Rail to work on the following projects

1. The Portage Jct. by the WYE (Contractor Arnie Sanderson);
2. Fermor Overpass extract in Symington (Contractor Bob Opar);
3. Work Around Mile 2.5 Letellier Sub for the Rapid Transit (name of flagman unknown).

The work of “*Protecting Foremen*” (“flagging”) is work that is normally done by USW members in the course of their duties. However, while flagging is a key part of the USW employees’ duties - because they routinely work on the track and right of way given the nature of their job - there is no job classification in the agreement for “flagging” *per se* (**CROA 4606**).

There was no serious dispute that the projects enumerated above, done on CN property, were carried out entirely by the City of Winnipeg and/or the Province of Manitoba. No work done by the Union was put in jeopardy as a result of the Province/City carrying out the projects; nor, was any time lost by any of the Union’s membership. While

the work enumerated was done on CN property to facilitate the necessary construction by the City/Province, the personnel hired to perform the duties for track protection were not hired by or for the benefit of CN. The Company's sole involvement was to ensure that the track protection personnel were qualified to CN Rail standards under the CRO Rules.

Two comprehensive Project Agreements (Tabs 13 and 14) were filed which relate to the work carried out by the City/Province. The Agreements reflect that the Company is not a party to the same and that its only participation, relative to track protection, is set out in Article C23.17.2 of Tab 14 which requires that the Company be solely responsible:

“...for determining the level of protection including the number of Protecting Foreman necessary in order to ensure safe railway operations”.

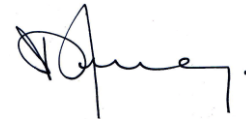
The facts disclosed that the Company accommodated the requirements of the City of Winnipeg and the Province of Manitoba with respect to the work required for infrastructure improvements required by both. The Company had no role with respect to the selection process, recruitment, hiring, remuneration, discipline, training, and evaluation of the employees carrying out the work nor the duration of time the services were provided. The Company's only obligation was to ensure that the track protection provided by Winnipeg/Province met its safety and CROR requirements. Although the Company had the authority to require that the track protection personnel hired by the City/Province, met CROR requirements, it had no further involvement with the same and cannot, in the circumstances, be said to have had fundamental control over the work at issue.

While other arguments were raised including: the necessity to post the positions at issue and whether or not, in light of the recent decisions in **CROA 4606**, the work belonged to the Union, it is unnecessary, in light of my decision above, to deal with the same.

Given the circumstances above, and having regard to the decisions in *Pointe-Claire (City)* 1997 1 S.C.R. 115; and *IKO Industries Ltd and U.S.W.A.* (2002) 118 LAC (4<sup>th</sup>) 1, the Union has not proven, nor can I conclude, that the Company violated Article 33.

The grievance is dismissed.

May 15, 2018



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RICHARD I. HORNUNG, Q.C.  
ARBITRATOR