CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 688

Heard at Montreal, Tuesday, November 14, 1978

Concerning

CANADlAN PACIFIC LIMlTED (C.P. RAIL)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim of the Union that the Company violated Wage Agreement No. 17 When it permitted outside forces to install a switch on its main line at Mileage 4.5, Outlook Subdivision on Saturday. September 24, 1977. Claim is for ten (10) hours of pay at their respective time and one-half for each member of Moose Jaw Sections #8, #1 and #2 who were not called to assist in performing the aforesaid work.

JOlNT STATEMENT OF lSSUE:

The employees on whose behalf the claims are made have established and hold seniority in their respective classes within the Track Department. They are regularly assigned to either Moose Jaw Sections #8, #1 or #2 and are regularly assigned to work Monday through Friday each week with Saturdays and Sundays designated as rest days.

The Union contends that the Company violated the December 9, 1974, Arbitration Award concerning the contracting out of work as set forth within its letter of March 3, 1975 when it permitted outside forces to install a switch at Mileage 4.5 on the Outlook Subdivision on Saturday, September 24, 1977 when the employees were available and when it did not advise the General Chairman in writing of its intention to contract out said work.

It is the position of the Company that in permitting the contractor engaged by the Saskatchewan Wheat Pool to install the turnout connecting the spur line to the Main Line at Mileage 4.5 it did not violate any of the provisions of Wage Agreement No. 17.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(Sgd.) A. Passaretti	(Sgd.) R. J. Shepp
System Federation	General Manager, O & M,
General Chairman	Prairie Region, CP Rail

There appeared on behalf of the Company..

J. A. McGuire	Manager Labour Relations, CP Rail, Montreal
J. A. Sampson	Supervisor Labour Relations, CP Rail, Winnipeg

1. J. Waddell	Labour Relations Officer, CP Rail, Montreal
W. L. Krestinski	Assistant Engineer - Track, CP Rall, Montreal

And on behalf of the Brotherhood:

A. Passaretti	System Federation General Chairman, BMWE, Ottawa
H. Thiessen	Federation General Chairman, BMWE, Calgary
R. Wyrostok	General Chairman, BMWE, Reglna
G.D. Robertson	Vice President, BMWE, Ottawa

AWARD OF THE ARBlTRATOR

The work in question was not directly subcontracted by the Company. lt was work performed for and paid for by the Saskatchewan Wheat Pool in connection with a grain elevator and farm service centre on land which it had secured adjacent to Mile 4.5, on the Outlook Subdivision. ln order that these facilities be served by siding trackage, the Saskatchewan Wheat Pool purchased materials and arranged for the installation of trackage some 4600 feet in length. This trackage is the property of the Saskatchewan Wheat Pool.

The issue in this case relates only to the construction of the switch on the main line. That construction was undertaken by the Saskatchewan Wheat Pool as part of the spur line project and was performed by the Contractor hired by the Saskatchewan Wheat Pool for the whole project. In my view, however, the installation of the switch, while obviously an essential part of the project, was a distinct and severable job of work. Although the switch was installed by a Contractor hired by the Saskatchewan Wheat Pool, using materials which were purchased by the Wheat Pool, it was constructed on railway property and has, in my view, become a part thereof. The railroad did, I find, permit this work (I speak only of the construction of the switch) to be performed on its property and for its benefit (that it was also for the benefit of the Wheat Pool is, in my view, irrelevant) and it did, as I find, effectively, if indirectly, subcontract the work.

Work of this sort - the matter is quite clear as to the switch construction of a spur line may involve different considerations - is normally, although not always, performed by members of the bargaining unit. The Company is, as it acknowledges, bound by letters of understanding or other agreements made pursuant to the arbitration Award of Mr. Justice Emmett Hall dated January 16, 1974. That award, in effect, made binding the undertaking of the railways not to contract out work that is presently and normally performed by employees, or at least to consult with the Union prior to contracting-out such work. In the instant case, I find, the Company did, in effect, contract-out such work, and it did so without prior consultation. In my view, this was contrary to the obligations and undertakings embodied in the Hall award and in the letters of understanding.

The contracting-out of this work (no less a contracting-out in that it was "passive", that is permitted by the Company), while it did not, in my view, tend to "erode" the bargaining unit in that no

positions were depleted, did in fact "adversely affect" employees in that they were deprived of a reasonable opportunity for overtime work. The project (insofar as it involved the switch) was well within the capacity of the employees concerned, working reasonable overtime hours.

In any event, it is clear that the Company did not comply with the obligation of advising the Union in advance of its intention to contract out the work. There was no bad faith in this: the determination which I make is essentially that the Company was in error in considering that this was not a case of contracting-out in which its recognized obligations arose. I would add that I do not decide this case on the basis of Article 7.01 of the collective agreement, but rather on the basis of the express undertakings relating to contracting-out.

For the foregoing reasons, the grievance is allowed. ln my view, relief should be granted to those employees who, on the balance of probabilities, suffered a loss of overtime opportunity on the occasion in question. The grievance appears to be brought on behalf of some 19 grievors. Two of these in fact worked, as flagmen, on the project, and so suffered no loss of earnings. It is not clear from the material before me how many of the others would in fact have worked had the Company performed the work with its own forces. The Company advises that the subcontractor employed 10 person on the proJect. If that figure is correct, the Union would be hard put to justify payments of any larger number. It is my award that the employees who would, on the balance of probabilities, have worked on the project receive compensation for loss of earnings, and I retain Jurisdiction to deal with the matter of compensation if the parties are unable to agree thereon.

J.F.W. WEATHERILL
ARBITRATOR