

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1009

Heard at Montreal, Wednesday, November 10th, 1982

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)  
(PRAIRIE REGION)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim of the Union that the Company violated Wage Agreement No. 17 and letter on contracting out dated April 28, 1978, when it permitted outside forces (Prairie Rail) to dismantle trackage on the Matador Subdivision between Kyle and Matador (5.04 miles). Claim is for 1 Extra Gang Foreman, 1 Group One Operator and 2 Group Three Operators at their respective rates of pay for the number of hours expended by Contractor performing the track work between Kyle and Matador on the Matador Subdivision.

JOINT STATEMENT OF ISSUE:

The Union contends that the claims are on behalf of Extra Gang Foreman D. J. Lesuk, Group One Operator L. P. Vickberg and Group Three Operators J. S. Irwin and G. E. Smith. All four hold seniority in their respective classes within the Track Department. They were on layoff status from their positions on the gangs.

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 April 28, 1978, when it permitted outside forces to dismantle 5.04 miles of trackage on the Matador Subdivision between December 1 to 5, 1980 and March 1 to April 15, 1981, without giving the General Chairman adequate notice of its intention to contract out the work and employees were available and on layoff status.

The Company contends:

- that the contracting out was in accord with Wage Agreement No. 17 and the letter on contracting out dated April 28, 1978, and
- that there were no employees who were unable to hold work as a result of the contracting out, therefore, pursuant to the final paragraph of the letter on contracting out, there is no grievance under the Wage Agreement and the matter is not arbitrable.

FOR THE UNION:

(SGD.) H. J. THIESSEN  
System Federation General Chairman

FOR THE COMPANY:

(SGD.) R. J. SHEPP  
General Manager,  
Operation and Maintenance

There appeared on behalf of the Company:

R. D. Falzarano - Asst. Supervisor, Labour Relations, CPR,  
Winnipeg  
R. E. Petley - Asst. Regional Engineer, CPR, Winnipeg  
M. M. Yorston - Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen - System Federation General Chairman, BMW, Ottawa  
R. Wyrostok - Federation General Chairman, BMW, Edmonton  
E. J. Smith - General Chairman, BMW, London  
L. DiMassimo - General Chairman, BMW, Montreal  
F. L. Stoppler - Vice-President, BMW, Ottawa

#### AWARD OF THE ARBITRATOR

The work in question was of a sort which bargaining unit employees had sometimes performed in the past, but which had often (and indeed, in a majority of instances in recent years), been performed by outside contractors. It was nevertheless work which fell within the scope of that normally performed by members of the bargaining unit, and for the purposes of this case at least, I am prepared to hold that it was work "normally performed" by them within the meaning of the Agreement of April 28, 1978, even though it may also have been performed by others.

It is the Company's position that this work came within exceptions (2) and (3) to the prohibition of contracting out, in that the Company did not have sufficient available employees, active or laid-off, and that essential equipment or facilities were not available.

The claim is made on behalf of certain named employees. None of these was on layoff at the material times. While it may be (although this is not conceded), that some of them might have had increased earnings had they been assigned to the work which was contracted-out, none of them was "unable to hold work" as a result of the contracting-out. That is a condition of there being any grievance under the Agreement of April 28, 1978. Thus, even if the Company's contention that the matter comes within exceptions (2) and (3) is not correct, the grievance cannot succeed, since the requirements of the Agreement have not been met.

Accordingly, the grievance must be dismissed.

J. F. W. WEATHERILL,  
ARBITRATOR.