CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1035

Heard at Montreal, Tuesday, February 8th, 1983
Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(PACIFIC REGION)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

On May 26, 1982, the Alberta South (Medicine Hat) Division served notice to contract the removal of trackage on the Langdon Sub-Division between Mile 58.6 to Mile 79.1. On the same date the Company advised the Union that 14 track and B&B employees were being laid-off.

JOINT STATEMENT OF ISSUE:

The Union contends that the Railway should have utilized the employees being laid-off to remove the trackage.

The Union further contends that these 14 employees be paid for the number of hours expended by the Contractor to remove the trackage.

The Union further contends the Company violated letter on Contracting Out of work dated March 5, 1982.

The Company declines the Union's contention and denies payment of claim.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) H. J. THIESSEN System Federation General Chairman	(SGD.) L. A. HILL General Manager, Operation and Maintenance

There appeared on behalf of the Company:

M. M. Yorston	- Labour Relations Officer, CP Rail, Montreal
F. R. Shreenan	- Assistant Supervisor, Labour Relations, CP Rail, Vancouver
D. J. David	- Labour Relations Officer, CP Rail, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen	- System Federation General Chairman, BMWE, Ottawa
L. DiMassimo	- Federation General Chairman, Secy-Tr. BMWE, Montreal
G. Valence	- General Chairman, BMWE, Sherbrooke
F. L. Stoppler	- Vice-President, BMWE, Ottawa

AWARD OF THE ARBITRATOR

By the letter of March 5, 1982, the Company agreed that it would not contract-out work "presently and normally performed" by employees in the bargaining unit, except in certain listed circumstances. In the instant case, no issue was raised as to the work in question not being of the sort "presently and normally performed by employees". It was contracted-out. That would therefore be contrary to the Collective Agreement unless the circumstances can be brought within one or more of the exceptions.

The exceptions are as follows:

> "(1) when technical or managerial skills are not available from within the Railway; or
> (2) where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees; or
> (3) when essential equipment or facilities are not available and cannot be made available from Railway-owned property at the time and place required; or
> (4) where the nature or volume of work is such that it does not justify the capital or operating expenditure involved; or
> (5) the required time of completion of the work cannot be met with the skills, personnel or equipment available on the property; or
> (6) where the nature or volume of the work is such that undesirable fluctuations in employment would automatically result."

It is further provided that,

> "The conditions set forth above will not apply in emergencies, to items normally obtained from manufacturers or suppliers nor to the performance of warranty work."

but those circumstances do not apply in the instant case.

In the instant case the Company contends that exceptions (3) and (4) apply. As to exception (3), it was the Company's position that the following essential equipment was not available and could not be made available:

> "2 J.D. 544 2 1/2 yard front end loaders
> 2 low bed trailer trucks
> 2 crew cab trucks
> 2 tandem dump trucks
> 1 crane"

It was said that the Company did not have sufficient front-end loaders; that its low bed trailer trucks could not be released for the work in question; that it did not have sufficient crew cab trucks; and that it did not have the dump trucks in its inventory of Maintenance of Way equipment. It was not suggested that the employees would not be familiar with the operation of such equipment, or able to carry out the work.

There was no evidence as to the inability of the Company to procure such equipment on a reasonable basis, whether by way of lease or otherwise, and it was stated by the Union at the hearing that at least one of the Company's low bed trucks was not used "all summer long".

The onus is on the Company, in circumstances such as those of this case where the general provisions of the agreement apply, to show persuasively that one or more of the exceptions is applicable. While it would indeed appear that essential equipment was not immediately available, it has not been shown that it could not be made available. That matter, of course, is related to the fourth exception, which raises the question of the justification of the expense (whether on capital or operating account) of the Company's arranging for essential equipment and performing the work with its own forces. From the material before me, it would appear that, in relation to the contract cost of just over $60,000.00, the excess cost to the Company by having the job done by its own forces would have been rather more (without taking into account equipment costs), than $37,000.00. It would be my view that the nature or volume of the work would not justify an expense of that order.

In any event, it would appear that none of the persons on whose behalf this grievance was brought were unable to hold work because of the contracting-out. Even if it were the case that the extra expense were justified, it has not been shown that a contracting-out contrary to the Collective Agreement resulted in the grievors being "unable to hold work". The final paragraph of the agreement is as follows:

> "Where a Union contends that the Railway has contracted out work contrary to the foregoing and this results in an employee being unable to hold work, the Union may progress a grievance in respect of such employee by using the grievance procedure which would apply if this were a grievance under the collective agreement. Such grievance shall commence at (*), the union officer submitting the facts on which the Union replies to support its contention. Any such grievance must be submitted within 30 days from the alleged non-compliance."

In fact, each of the grievors had exercisable seniority rights (some of which were exercised) which would enable him to "hold work". It has not been established, then, that any violation of the Collective Agreement in this case would entitle any individuals to relief.

For all of the foregoing reasons, the grievance must be dismissed.

J. F. W. WEATHERILL,
ARBITRATOR.