

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1226

Heard at Montreal, Tuesday, April 10, 1984

Concerning

CANADIAN NATIONAL RAILWAY COMPANY
(CN Rail Division)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Contracting out of repairs to Locomotive Crane No. 50476 at Joffre Work Equipment Shop, Quebec.

JOINT STATEMENT OF ISSUE:

During the week of 4 October, 1982 the Company contracted out the repairs to Locomotive Crane No. 50476 to R. Dyna Moteur Service Enr.

The Brotherhood contends that the Company violated the letter dated 5 March, 1982 concerning contracting out.

It is the position of the Company that the work in question is not presently and normally performed by employees represented by the Brotherhood and that as there were no employees who were unable to hold work as a result of the contracting out, in accordance with the final paragraph of the letter of 5 March, 1982, there is no grievance under the Collective Agreement and the matter is therefore not arbitrable.

FOR THE BROTHERHOOD:

(SGD.) PAUL A LEGROS
System Federation
General Chairman

FOR THE COMPANY:

(SGD.) D. C. FRALEIGH
Assistant Vice-President
Labour Relations

There appeared on behalf of the Company:

D. Lord	- System Labour Relations Officer, CNR, Montreal
T. D. Ferens	- Manager Labour Relations, CNR, Montreal
P. J. Thivierge	- Manager Labour Relations, St. Lawrence Rgn, CNR, Montreal
G. Cournoyer	- Superintendent Shops - Work Equipment, CNR, Montreal

And on behalf of the Brotherhood:

Paul A. Legros - System Federation General Chairman, BMWE,

Ottawa
R. Y. Gaudreau - Vice-President, BMW, Ottawa
A. Toupin - General Chairman, BMW, Montreal

AWARD OF THE ARBITRATOR

The company decided to contract out certain repair work to Locomotive Crane No. 50476 at the Joffre Work Equipment Shop, Quebec, to Mr. M. R. Rousseau, owner of R. Dyna Moteur Service Enr. Mr. Rousseau also happened to be a member of the bargaining unit who was laid off at the time the repair work was needed.

The grievor, Mechanic D. Bergeron, was also on lay off at the time and grieved the company's decision to recall Mr. Rousseau to perform the repair work. It is common ground that Mr. Rousseau is less senior than Mr. Bergeron in service with the company.

The employer has characterized the trade union's grievance as an alleged violation of The Letter of Contracting Out dated March 5, 1982 and in so framing the issue has argued that the employer's actions are not arbitrable because of the trade union's failure to demonstrate that the contracted out work resulted "in an employee being unable to hold work". In addition, it was argued that the contracted out work in question fell squarely into several of the exceptions contemplated by The Letter of Contracting Out.

The trade union has characterized the grievance quite differently. It views the employer's action as a violation of the recall privileges to which the most senior, qualified, laid off employee is entitled. Article 5.5 reads as follows:

"A laid off employee shall, if qualified and available, be returned to the service in order of seniority when staff is increased, or when vacancies occur."

There is a unique feature in this case that distinguishes it from the CROA precedents involving the employer's contracting out of work. Unlike those cases, the contracted out work herein was granted to a laid off employee who maintained a business enterprise that was relevant to the trade expertise he offered the company in his capacity as an employee. The company, presumably, has taken advantage of Mr. Rousseau's services and expertise as an entrepreneur at the expense of the recall privileges of the grievor.

I am satisfied that Mr. Rousseau's dual status as both entrepreneur and employee should not be permitted to blur the company's obligations to its laid off employees under the collective agreement. Notwithstanding the company's wish to use Mr. Rousseau's services when no incumbent employee could perform the repair work, it was first required to satisfy its primary obligation to respect the grievor's recall privileges. Should it have considered Mr. Bergeron unqualified to perform the required task, then the company may have been justified in bypassing Mr. Bergeron for Mr. Rousseau.

But Mr. Bergeron's lack of qualification was not the reason the

company purported to suspend the rights of its more senior employees by its having recourse to the contracting out procedure. Contracting out has simply been used in these circumstances as an instrument to mask an assignment of work to a less senior employee. The Board simply will not permit the company to use Mr. Rousseau's status as an entrepreneur to circumvent the obligations it owes its more senior qualified employees.

In the result, the employer has violated Article 5.5 of the collective agreement and is thereby directed to compensate the grievor for the 15 hours worked by Mr. Rousseau. I shall remain seized for the purposes of implementation of this award.

For the purposes of clarity I make no finding with respect to the propriety of the employer contracting out the repair work to a non-employee.

DAVID H. KATES,
ARBITRATOR.