CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1490

Heard at Montreal, Wednesday, March 12, 1986

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(Prairie Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

The Company used a contractor to dispose of railway ties by burning same on the Arcola Subdivision from August 26 to October 16, 1985.

BROTHERHOOD'S STATEMENT OF ISSUE:

The Union contends that:

1. The Company violated the letter of May 23, 1985, on Contracting Out by employing a contractor to perform work normally done by track forces. Appendix "C" of Master Agreement signed July 9, 1985.

2. The employees on Reston and Carlyle Sections be reimbursed at their rate of pay, the total hours worked by the contractor, from August 26 to October 16, 1985, inclusive.

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

FOR THE BROTHERHOOD:

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

There appeared on behalf of the Company:

D. A. Lypka	- Supervisor Labour Relations, CPR, Winnipeg
R. Noseworthy	- Asst. Supervisor Labour Relations, CPR, Winnipeg
R. A. Colquhoun	- Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen	- System Federation General Chairman, BMWE, Ottawa
L. M. DiMassimo	- Federation General Chairman, BMWE, Montreal
M. L. McInnes	- General Chairman, BMWE, Winnipeg
V. Dolynchuk	- General Chairman, BMWE, Edmonton

R. Y. Gaudreau - Vice-President, BMWE, Ottawa
G. Schneider - Observer

PRELIMINARY AWARD OF THE ARBITRATOR

The principal issue in this case is whether the company may rely on the trade union's failure to respond to an appropriate notice of contracting out made pursuant to the Letter of Understanding on contracting out to raise an estoppel preventing the processing of a grievance challenging the validity of the company's action.

There is no dispute that the trade union at no time responded to the company's notice of contracting out dated April 1, 1985 with respect to the disposal of used railway ties on the Arcola Subdivision. And, it is also common ground that the first time that the company received any notice of objection was when it was confronted with the trade union's grievance dated September 25, 1985. The company also indicated that it commenced the implementation of the proposed contracted out work on August 26, 1985.

The relevant provisions of Letter of Understaning on Contracting Out dated May 23, 1985 read as follows:

> "It is further agreed that at a mutually convenient time at the beginning of each year and, in any event, no later than January 31 of each year, representatives of the Union will meet with the designated officers to discuss the company's plans with respect to contracting out of work for that year. In the event Union representatives are unavailable for such meetings, such unavailability will not delay implementation of Company plans with respect to contracting out of work for that year.
>
> In addition, the Company will advise the Union representatives involved in writing, as far in advance as is practicable, of its intention to contract out work which would have a material and adverse effect on employees. Except in case of emergency. such notice will be no less than 30 days.
>
> Such advice will contain a description of the work to be contracted out; the anticipated duration; the reasons for contracting out and, if possible, the date the contract is to commence. If the General Chairman, or equivalent, requests a meeting to discuss matters relating to the contracting out of work specified in the above notice, the appropriate Company representative will promptly meet with him for that purpose.
>
> Should a General Chairman, or equivalent, request information respecting contracting out which has not been covered by a notice of intent, it will be supplied to him promptly. If he requests a meeting to discuss such contracting out, it will be arranged at a mutually acceptable time and place.
>
> Where a Union contends that the Company has contracted out work contrary to the foregoing, the Union may progress a

> grievance by using the grievance procedure which would apply if this were a grievance under the collective agreement. Such grievance shall commence at the last step of the grievance procedure, the Union officer submitting the facts on which the Union relies to support its contention. Any such gricvance must be submitted within 30 days from the alleged non-compliance."

In succinct terms the company has argued that the trade union should be barred from processing its grievance challenging the validity of the contracting out action because it failed to respond to its notice. Rather, the trade union's "silence" should be construed as an acquiescence with the employer's proposal. Or, at least, its absence of objection should be construed as a representation that it has waived its rights to grieve the implementation of that proposal.

In my view this case demonstrates that the estoppel principle may be used in an unwieldly manner with respect tothe frustration of strict legal entitlements under the collective agreement. Although I was not given any explanation by the trade union as to why it failed to respond to the company's notice it appears an unwarranted inference that its "silence" in that regard should be construed as an acceptance of the employer's intention to contract out.

Quite clearly the trade union fails to respond to the company's notice at its peril. It foregoes the entitlements contemplated under the Letter of Understanding to request a meeting with the company in order "to discuss" the proposed contracting out or to request further information with respect to the contracting out which the company may be required to supply.

Its silence, however imprudent, simply cannot be oonstrued as a representation that the trade union has Waived its rights to challenge the validity of the company's contracting out action. As the trade union pointed out at the hearing the company is protected from belated or untimely challenges to allegedly improper contracting out actions in the final paragraph of the Letter of Understanding. That is to say, where the trade union contends that there has been non-compliance with the Letter it must submit a grievance, as prescribed, within 30 days from the alleged non-compliance. And, in that regard, presumably the 30 day time limit would commence to run as of the date of the implementation of the company's contracting out proposal. Quite clearly, failure to adhere to that mandatory time limit would result in the abandonment of any alleged compliance with respect to the validity of the contracting out of the work.

In the final analysis the trade union's failure to respond promptly to the company's notice will deprive it of the opportunity to meet with the company and consult with it with respect to cushioning the adverse effectsof the contracting out on its members. It cannot later be heard to argue, where the company has acted properly, that it has been denied the benefits of these procedures.

But, the company need not rely upon an estoppel argument to make that particular point. Surely a trade union that drags its heels and fails to direct its mind in a prompt fashion with respect to a timely response to the company's notice is in violation of both the letter

and spirit of the Letter of Understanding. In that circumstance it will be prevented from requesting a meeting or further information with respect to the company's proposal, not because of any estoppel, but because it has contravened the letter.

But save for the requirements for adherence to the 30 day time limit such belated challenges to the validity of the contracting out proposal will not deprive the trade union of the standing to forward a grievance to arbitration.

Accordingly, the instant grievance is arbitrable.

DAVID H. KATES,
ARBITRATOR.

On Tuesday, May 13th, 1986, there appeared on behalf of the Company:

D. A. Lypka	- Supervisor, Labour Relations, CPR, Winnipeg
W. C. Tripp	- Regional Engineer, Prairie Region, CPR, Winnipeg
R. E. Noseworthy	- Asst. Supervisor, Labour Relations, CPR, Winnipeg
R. A. Colquhoun	- Labour Relations Officer, CPR, Montreal
R. T. Bay	- Observer
G. Ewenson	- Observer

And on behalf of the Brotherhood:

H. J. Thiessen	- System Federation General Chairman, BMWE, Ottawa
L. M. DiMassimo	- Federation General Chairman, BMWE, Montreal
E. J. Smith	- General Chairman, BMWE, London

AWARD OF THE ARBITRATOR

The issue in this case relates to the propriety of the company's decision to contract out the disposal of railway ties at the Arcola Subdivision pursuant to the Memorandum of Settlement with respect to Contracting Out as amended on May 23, 1985.

Several questions were raised in the company's brief with respect to the defence of its actions. These matters pertained principally to the company's arguments with respect to its claim to exemption in the circumstances described from being caught by the Memorandum scope.

In resolving this dispute I will not have to deal with all the issues that have been raised. I do this purposely because it appeared to me throughout the hearing that the parties were raising significant issues with respect to the amended Memorandum that had not been subjected to their joint deliberation as would normally be expressed in a Joint Statement of Issue. As a result their respective briefs did not appear ad idem with respect to those issues.

Accordingly, there are two issues that I feel that are of sufficient importance that they should be dealt with in this decision.

The first relates to the employer's challenge to arbitrability as it might relate to the alleged untimeliness of the grievance. In this

regard the Memorandum provides that a grievance impugning the propriety of the contracting out of work "shall commence at the last step of the grievance procedure and "must be submitted within thirty days from the alleged non-compliance".

It is clear from the evidence that the company's contracting out commenced on August 26, 1985. The grievance was filed on September 25, and received by the company on October 1, 1985. Accordingly the company alleges that the grievance is out of time by seven days.

This might be a sound argument had the company been able to establish that the trade union, particularly the General Chairman, knew of the implementation of the contracting out on the day the contract commenced. The trade union insists it only became aware of that situation on September 24, 1985. The only evidence that the company could advance that would suggest the trade union might have known of the contracting out as of August 26, 1985 was by word of the employees who would have observed the commencement of the contract.

It is trite law to state that the onus rests with the party who makes a challenge to arbitrability to establish its allegation. Here, the company had it within its discretion the ability to notify the trade union of the commencement date of the contract, for it was knowledge peculiar to it, but elected not to do so. As a result the trade union has asserted that, in fact, because of its unawareness it could not have complied with the 30 day time limit as alleged by the company. And, given that the burden of proof rests with the company to establish the trade union awareness as of the commencement date of the contract, I am compelled to rule that the employer's challenge with respect to arbitrability must fail.

The second and more substantive issue that should be dealt with relates to the issue of the appropriateness of the grievance with respect to the contracting out that occurred. In this regard, I wish to assume without necessarily finding that the contracting out of the work in question is work that would "presently and normally" be performed by the employees and that none of the exemptions releasing the employer from the scope of the Memorandum applied. The question that must then be asked is whether the remedy sought by the trade union in its grievance is appropriate. And, of course, what the trade union has requested as a remedy is compensation for employees on the Arcola Subdivision for the work that was otherwise performed by the contractor.

It must be borne in mind that the main objective of the Memorandum of Settlement is to preserve the job security of incumbent employees with respect to the performance of work that is normally performed by them. In other words, its purpose is to protect the jobs of employees from non- employees save and except as permitted in the exempting circumstances that are expressly delineated. In this regard the Memorandum specifically contemplates that the contracted out work should have "a material and adverse effect on employees".

What the evidence has established is that the contracted out work occurred at a time of optimum employment of the work force at the Arcola Subdivision. There was no material, adverse effect with respect to employees in service or indeed with respect to employees

who were out of service due to previous redundancies. In that context the notion of protecting the entitlements of hitherto redundant employees to job security but who may not have been directly or adversely affected by the contracting out of work represents the foremost objective of the May 1985 amendment. I this case, no such prejudice has been shown.

In short, what the trade union is requesting is an additional premium, whether as overtime or otherwise, for employees who at the time of the contracting out were already engaged in full employment. In other words a benefit is sought that is not necessarily contemplated by the Memorandum relating to contracting out of work.

As CROA Case #1004 properly states:

> "...nothing in the collective agreement entitles an employee to claim as of right certain work which is done for the company's account by persons other than its own employees. There are provisions relating to the assignment of overtime work, but nothing allows a full time employee such as the grievor to require the company not to contract-out the work, but to assign it to him on an overtime basis."

For like reasons I have concluded that the claim made by the trade union on behalf of the grievors is not appropriate to the Memorandum. As a result the grievance is denied.

DAVID H. KATES,
ARBITRATOR.