CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1596

Heard at Montreal, Wednesday, December 10, 1986

Concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS

DISPUTE:

Abolishment of two, four-hour Counter Sales positions, and contracting out of work at Brockville, Ontario,

JOINT STATEMENT OF ISSUE:

Due to a decline in the volume of ticket sales, the Corporation abolished two four-hour Counter Sales positions at Brockville, and contracted out the remaining work.

The Brotherhood contends that in accordance with Appendix C of Collective Agreement No. 1 (letter of Contracting Out re Honourable Emmet M. Hall dated December 9, 1974) the Corporation is not permitted to contract out work.

The Corporation maintains that the low volume of ticket sales at this location does not justify the operating expenses associated with the four-hour positions, and that under these circumstances, it may contract out such work by virtue of paragraph (4) of Appendix C referred to above.

FOR THE BROTHERHOOD:	FOR THE CORPORATION:
(SGD.) TOM McGRATH National Vice-President	(SGD.) A. D. ANDREW Acting Director, Labour Relations

There appeared on behalf of the Corporation:

C. O. White - Labour Relations Officer, VIA Rail Canada Inc. Montreal
M. St-Jules - Manager, Labour Relations, VIA Rail Canada Inc. Montreal

And on behalf of the Brotherhood:

T. N. Stol - Regional Vice-President, CBRT&GW, Toronto

AWARD OF THE ARBITRATOR

The facts are not in dispute. There is no argument that the

Corporation has in fact contracted-out the work previously performed by bargaining unit employees at Brockville, including the opening and closing of the Brockville Station, selling tickets and related duties. The sole issue is whether the contracting-out is prohibited by the Collective Agreement.

Before October of 1984 between midnight and 8:00 A.M., ticket sales and the opening and closing of the Station was done by CN Telegraph Operators represented by the Canadian Railway Traffic Controllers. Three trains arrive and depart Brockville during those hours, and it appears that passenger traffic has never been high. The daily average number of tickets sold was 5.7 in 1981, 4.6 in 1982 and 4.4 in 1983.

In August of 1984 Canadian National,the employer of the Operators, advised the Corporation that the overnight shift Operator's position would be abolished effective August 31, 1984. Subsequently the Corporation and Brotherhood negotiated the creation of two four-hour counter sales Agent positions at Brockville. The shifts established were from 1:00 to 5:00 A.M., daily, to be distributed between two employees. In fact no employee could be found to accept the Saturday and Sunday assignment, in consequence of which five of the four hour shifts were covered on straight time with the two additional shifts being covered by overtime.

The Corporation maintains that ticket sales continued to decline through April of 1986. While full annual figures were not tabled, it does appear that during the first four months of the year ticket sales were lower still than the annual average recorded in 1983. For example, in March of 1986, on a seven day basis the average number of tickets sold was 3.3 per day. The Corporation therefore decided to abolish the two four-hour counter sales Agent positions effective March 26 and April 26, 1986, respectively. During the hours in question the responsibility for ticket sales was transferred to Conductors on the respective trains. It is not disputed that they are employees of the railways and not of the Corporation, and that the transfer of the ticket sales to the Train Conductors, who are in a separate bargaining unit within their respective railways, constitutes contracting-out. The less significant part of the assignment, the opening and closing of the station has also been contracted to a local Brockville company. There is no dispute that these adjustments represent substantial savings to the Corporation.

The Corporation's ability to contract out bargaining unit work is governed by the language of Appendix C to the Collective Agreement which is in the form of a Letter of Understanding dated July 14, 1985 providing, in part, as follows:

> This has reference to the award of the Arbitrator, the Honourable Emmet M. Hall, dated December 9, 1974, concerning the contracting out of work.
>
> In accordance with the provisions as set out on Page 49 of the above-mentioned award, it is agreed that work presently and normally performed by employees represented by the Brotherhood will not be contracted out except.

(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 or 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.

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.

The Corporation submits that its actions were justified by the wording of paragraph (4) of the Appendix. Its representatives argue that in view of the decline of passenger volume at Brockville between 1984 and 1986 the volume of the work does not justify the operating expenditure involved, and that the Corporation is therefore entitled to contract-out the work. The Union objects to that interpretation and relies on CROA Case 713.

CROA 713, decided in 1979, concerns the contracting-out of work by the Ontario Northland Railway. The employees affected were also represented by the Canadian Brotherhood of Railway, Transport and General Workers. In that case the Company pleaded the identical provisions of Appendix C in the instant case, relying in particular on the language of the exception found in paragraph (4). Appendix C in the instant agreement was there incorporated as Appendix B. The Arbitrator rejected the Company's position in the following terms:

> In my view, what occurred was in fact a contracting-out of certain work which had normally been performed by members of the bargaining unit. That work was thereafter performed by others, members of another bargaining unit, employees at least technically, of another employer and represented by another bargaining agent.
>
> It is clear too that the matter does not come within most of the exceptions set out in Appendix "B". There was no emergency or lack of employees or anything of the sort that would normally justify contracting-out where that is prohibited by a collective agreement. The Company argued, however, that if there was a contracting-out, it was because "the nature or volume of the work does not justify the capital or operating expenditures involved". That exception, in my view, does not apply in circumstances such as obtained in this case. What is contemplated by the exception

> is the situation where some new or occasional venture is contemplated which would require, if the employer's own forces were to be used, some capital or operating expenditure beyond those of the existing operations and which would not be justified for the venture contemplated. (emphasis added)

In the Arbitrator's view the foregoing passage has substantial significance for the merits of the grievance at hand. The fundamental reason for the existence of the Canadian Railway Office of Arbitration and the publication of Awards is to permit a measure of certainty and consistency in the application of various Collective Agreements which come under it. If it were otherwise Railways and Unions alike would have little ability to undertake a course of action with reasonable certainty that they act within the terms of the Collective Agreement which governs them. Stability of understanding and expectation is an essential attribute in any sound labour relations system. For that reason Arbitrators have, for many years, consistently expressed the view that the award of a prior Board of Arbitration, particularly on a matter of interpretation, should not be disturbed subsequently by another Board of Arbitration unless it is clear that the prior interpretation is patently wrong or unsupportable. Arbitrators also recognize that when a particular interpretation of Collective Agreement language has been rendered in a final binding manner, and the parties have subsequently renegotiated the Collective Agreement without changing the language in question, absent specific evidence to the contrary they can be deemed to have accepted the Arbitrator's interpretation as part of their Collective Agreement. See, British Columbia Housing Management Commission (1977), 15 L.A.C. (2d)121 (J. M. Weiler), at pp. 129-30; Russelsteel Ltd. (1966), 17 L.A.C. 253 (Arthurs). Canadian Industries Ltd. (1965), 16 L.A.C. 270 (Little); Canadian Raybestos Co. Ltd. (Peterborough) (1952), 3 L.A.C. 1065 (Miller).

How do these principles apply to the instant case? In 1979 Arbitrator Weatherill gave a very specific interpretation of the meaning of paragraph 4 of Appendix C of the Collective Agreement. His determination, which was essential to the disposition of that case, given the argument advanced by the Company, is that the paragraph is not intended to apply to a reduction in the volume of work previously performed within the bargaining unit. As interpreted in CROA 713 the provision is restricted to the undertaking of a new or occasional venture where the use of the employer's own labour force would not be justified given the capital or operating expenditures that would be involved. That interpretation must be deemed to have been known to the parties to the instant Collective Agreement, at least since 1979, through successive renegotiations of the agreement down to the present day. In my view it is not an interpretation which can be described as patently wrong or unsupportable on the language of Appendix C. Moreover it is an interpretation whose effect the parties have not sought to alter by subsequent negotiation of the Collective Agreement.

While the language of paragraph (4) appears to have been differently interpreted by Arbitrator Arthurs in Re Canadian National Railways, and Brotherhood of Railway and Airline Clerks Divisions Nos. 1, 85 (1975) 8 L.A.C. (2d) 185, that conclusion was plainly an alternative observation not essential to the disposition of the case. If it is

necessary to choose, I must prefer the analysis in CROA 713, which was made subsequently. It is, in my view, more consistent with the overall scheme and intention of Appendix C. It would, in my view, require clear and specific language to establish that parties whose agreement expressly prohibits contracting-out intended to effectively abolish that protection whenever a decline in business would make it more profitable to contract out the work of the bargaining unit.

On the whole I must conclude that the Letter of Understanding of July 14, 1985 was written in the knowledge of the interpretation of paragraph (4) of that Letter rendered in CROA 713. In these circumstances I must conclude that the interpresentation of paragraph (4) now advanced by the Company is inconsistent with the intention of the Collective Agreement as previously established.

The Arbitrator therefore finds that the contracting-out of the work of the two four-hour Counter Sales positions at Brockville does not fall within the exceptions established in Appendix C to the Collective Agreement. It therefore constitutes a violation of Collective Agreement No. 1, as alleged by the Union. Accordingly the grievance must succeed. The Corporation is ordered to re-establish forthwith the abolished positions in a manner consistent with the Letter of Understanding dated September 28, 1984, and to assign the work in question to bargaining unit employees. The Corporation shall further compensate any employee or employees adversely affected in respect of any loss of wages or benefits suffered as a result of the abolishment of the positions in question. I retain jurisdiction in the event of any dispute between the parties respecting the interpretation or implementation of this award.

MICHEL G. PICHER,
ARBITRATOR.