CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1599

Heard at Montreal, Thursday, December 11, 1986

Concerning

CP EXPRESS AND TRANSPORT LIMITED

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

DISPUTE:

Concerns the Company providing warehouse work to Edmonton Personnel Services Limited, employees who do not hold dangerous goods certificates while denying this warehouse work to presently employed bargaining unit employees holding dangerous goods certificates who were available for all such warehouse work at the overtime rate of wages.

JOINT STATEMENT OF ISSUE:

September 10, 1985, Mr. Gerry Sommert from Edmonton Services Personnel was provided eight hours (8) warehouse work from 24:00 a.m., to 08:30 a.m., and again on September 12, 1985, Mr. H. White, C. Cromwell and B. Duncan from Edmonton Personnel Services were provided with eight (8) hours warehouse work each from 24:00 a.m., to 08:30 a.m.

The Union's position is that Brotherhood bargaining unit qualified employee Mr. M. Gelly who holds a dangerous goods certificate was available for this warehouse work in keeping with Articles 13.1, 13.8, 13.9, 13.10 and 13.11 of the CP Express and Transport Collective Working Agreement.

The Company's position is that Part IX - 9.2 (b) of the dangerous goods Commodities rules and regulations covers Edmonton Services Personnel and that Articles 13.1, 13.8, 13.9, 13.10 and 13.11 do not cover an employee to work the following shift on eight (8) hours overtime and declined the claim.

The relief requested is for the payment of sixteen (16) hours at the overtime rate for dates of September 10 and 12, 1985, in the name of qualified employee M. Gelly.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) J. J. BOYCE General Chairman, System Board of Adjustment No. 517	(SGD.) N. W. FOSBERY Director, Labour Relations

There appeared on behalf of the Company:

D. Bennett - Human Resources Officer, CANPAR, Toronto
B. F. Weinert - Manager, Labour Relations, CPE&T, Toronto

And on behalf of the Brotherhood:

J. J. Boyce - General Chairman, BRAC, Toronto
M. Gauthier - Vice-General Chairman, BRAC, Montreal

AWARD OF THE ARBITRATOR

It is not disputed that on September 10 and 12, 1985 a total of four 8-hour shifts of warehouse work at the Edmonton Terminal was performed by persons provided to the Company from Edmonton Services Personnel, an independent Company. These individuals were not treated as employees under the Collective Agreement in respect of such matters as wages, benefits or the deduction of Union dues. The Union's objection is two-fold: firstly it maintains that the individuals in question were employees within the bargaining unit and subject to the terms of the Collective Agreement; secondly it submits that the work assigned to them should have been given to the grievor on an overtime basis.

The first issue is whether there was contracting-out. It is not disputed that the Collective Agreement does not prohibit contracting-out (CROA 850, CROA 1003, CROA 1004, CROA 1022). The Company maintains that the facts disclose a permissible contracting-out. The Union submits that the four persons brought into the warehouse in fact worked as the employees of the Company, so that a true contracting-out is not established. That is the first issue to be resolved.

Recent years have seen a substantial number of arbitral awards addressing both the issue of whether the employer is entitled to contract-out, and the related question of whether the utilization of personnel from an employment service constitutes contracting-out or whether such individuals are in reality employees falling within the bargaining unit. The tests to be applied to resolve these issues were thoroughly, and in my view correctly, reviewed and summarized in Re Maple Leaf Mills Ltd., Grain Elevator Division and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (1986), 24 L.A.C. (3d) 16 (Devlin).

Much of the jurisprudence concerns the application of the traditional "control test" to determine whether a personnel service or the host Company is the "employer" for the purposes of a Collective Agreement. This approach is originally derived from the decision of the Privy Council in Montreal v, The Montreal Locomotive Works Ltd. (1947) 1 DLR 161, where Lord Wright listed the elements of the fourfold test: (1) control; (2) ownership of tools; (3) chance of profit; (4) risk of loss. In the more complex work settings and employment relationships of recent decades greater emphasis has been placed upon the control test and, in some instances, following the lead of tort law, to the still broader concept of an organizational test. In the Arbitrator's view the concept that a person is to be deemed an employee for purposes of liability because his or her activity falls under the general activities of an employer's organization is of

doubtful utility in the labour relations context. The policies of the courts geared to tracing liability to the deep pocket of an employer are of limited value in resolving disputes concerning the intended application of a Collective Agreement. The principles which have evolved in respect of the control test remain, in my view, the most pertinent in determining of issues of this kind.

A succinct summary of the cases is reflected in the following passage from Re Board of Governors of Riverdale Hospital and C.U.P.E., Local 79 (1974), 7 L.A.C. (2d) 40 (Schiff), (at p. 42):

> To weigh the significance of control arbitrators have assessed the degree of the party-employer's right to direct the person's job performance appropriate to the nature of the particular job and the person's skill, In many awards, the party-employer did not choose the person, did not pay him directly and did not purport to discipline him on the spot. Nevertheless, arbitrators defined the person as an employee if he performed the job with the party-employer's materials on the party-employer's premises with the party-employer exercising to a substantial degree the right to direct the job performance.

What are the facts in the instant case? It is beyond dispute that Edmonton Personnel Services exerted no direction, supervision or control whatever over the four persons it dispatched to the service of the Company at the Edmonton Terminal. Nor is this a circumstance where the persons so assigned performed specialized or technical work within a trade not normally employed by the Company. The individuals in question plainly worked as warehousemen in the Company's warehouse operation. Whatever tools, materials and documents they used in their work appear to have been entirely those of the Company. The order of their assignments as well as the time, place and way in which they were to be performed was directed solely by the Company's on-site supervisors. The work which they performed was integral, indeed central, to the core function of the Company's Edmonton Terminal. The persons in question would, to any objective eye, have been indistinguishable from any bargaining unit employees working at that location. Their only link to Edmonton Personnel Services, beyond their initial referral, appears to be the ultimate payment of their wages, made possible only by the payment of a fee to the personnel service by the Company.

By any application of the generally accepted principles of arbitral jurisprudence, it would be difficult, if not impossible, to conclude in these circumstances that the persons in question were anything other than employees of the Company performing bargaining unit work. A review of the cases in Re Royal Ontario Museum and Service Employees Union, Local 204 (1984, 16 L.A.C. 3d (Adams), relates a number of cases in which watchmen, nurses, truck drivers and health care aides supplied by external employment agencies were all found to be bargaining unit employees. At p. 28 Arbitrator Adams makes the following observation:

> All of the cases discussed to this point, place great emphasis on the matter of day-to-day control and utilization of personnel performing work that would otherwise be handled by employees employed in the bargaining unit. These cases explicitly or

> implicitly recognize that many of the other formal aspects of an employment relationship are subject to manipulation and, if given weight, form would triumph over substance. As a result, it is apparent that arbitrators are prepared to make fine distinctions with respect to the appropriate level or degree of control necessary to trigger the finding of an employment relationship.

Applying these principles, and for the reasons elaborated above, I must conclude that the Union is correct in its assertion that the four persons employed at the Edmonton Terminal worked as employees of the Company and were subject to the terms of the Collective agreement.

I turn to consider the second issue. In these circumstances is there an obligation on the part of the Company to assign overtime to bargaining unit employees? I can find no Article in the Collective Agreement which so provides. The Collective Agreement appears to preserve the ability of the Company to hire additional staff as needed, provided they are paid and otherwise treated in a manner consistent with the terms of the Collective Agreement. There is, moreover, no suggestion in the instant case that any regular hours were lost to members of the bargaining unit or that recall rights were violated.

In CROA Case 1004 the Arbitrator found a permissible contracting-out and made the following observations:

> Quite apart from any question as to the propriety of assigning some or all of the work in question to the grievor (which might have led to a violation of the Canada Labour Code - a matter on which I make no determination -), 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.

To the above remarks it may be added that there is nothing in the Collective Agreement which compels the Company to assign bargaining unit work on an overtime basis as opposed to assigning it to bargining unit employees on the basis of regular hours. Article 13, relied upon by the Union contains, in part the following provision:

> 13.1 Except as otherwise provided in this Article, work in excess of 8 hours per day shall be considered overtime and be paid for at the rate of time and one-half time, on the actual minute.basis.
>
> 13.8 Where the work is required by the Company to be performed on a day which is not part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have 40 hours of work that week. Overtime shall be allocated on the basis of seniority wherever possible, in a voluntary manner, within the work classification and shifts, provided the employee is capable of performing the duties; however, upon reaching the bottom of the seniority list, in that classification and shift; the junior employee(s) will be required, in reverse order, to work

the overtime.

13.9 Employees shall be required to work overtime only when absolutely necessary. Owing to the necessities of the business and in the interests of the shipping public it is understood that overtime may be necessary and when necessary will be authorized and performed. It is understood that when employees are held for overtime duty they will be given reasonable opportunity to procure necessary meals. Such overtime shall be allocated on the basis of seniority whenever possible, in a voluntary manner, within the work classification and shifts, provided the employee is capable of performing the duties; however, upon reaching the bottom of the seniority list, in that classification and shift, the junior employee(s) will be required, in reverse order, to work the overtime.

In the Arbitrator's view the foregoing provisions establish the rules to be followed once the Company determines that overtime is to be worked. They do nothing to limit the employer's prerogative to expand the work force, whether temporarily or permanently to satisfy its manpower needs.

For the foregoing reasons the Arbitrator finds that the Company has violated the Collective Agreement by failing to apply its terms to the four individuals employed at the Edmonton Terminal. As the Union seeks no specific redress with respect to the payment of regular wages, benefits or Union dues, the remedy shall be limited to the foregoing declaration. For the reasons expressed, the Union's claim for overtime hours on behalf of Mr. Gelly must be denied.

MICHEL G. PICHER,
ARBITRATOR.