CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1964

Heard at Montreal, Tuesday, 14 November 1989

Concerning

CANADIAN PACIFIC LIMITED

And

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

The use of Office Overload personnel to work a bargaining unit position without the application of the provisions of the Collective Agreement.

UNION'S STATEMENT OF ISSUE:

Due to the permanent employee being on leave, the Company placed personnel from Office Overload to work the temporary vacancy of Production Systems/Training Centre Clerk at Weston Shops, Winnipeg, for a period of time beginning September 14, 1988.

The Union submitted a grievance claiming that Mrs. M. Allen from Office Overload must come within the terms of the Collective Agreement with respect to payment of regular wages, benefits, union dues, etc. and that the Company had not advised the Union that the position was being filled from outside the Company.

The Company declined the claim stating that the employee was not hired by and remunerated by the Company and that outside personnel used for short term jobs are not covered by the Collective Agreement.

FOR THE UNION:

(SGD) D. D. DEVEAU
GENERAL CHAIRMAN

There appeared on behalf of the Company:

A. Y. Montigny	- Supervisor, Personnel & Labour Relations, Montreal
J. P. Lotecki	- Personnel Development Officer, Winnipeg
P. E. Timpson	- Labour Relations Officer, Montreal

And on behalf of the Union:

D. Deveau	- General Chairman, Calgary
J. Covey	- General Secretary/Treasurer, Vice-General

Chairman, Medicine Hat
C. Pinard - Vice-General Chairman, Montreal
J. Germain - General Chairman, Montreal

AWARD OF THE ARBITRATOR

The material establishes that for a period of time between July and September of 1988, due to an injury to the incumbent in the position, the Production Systems/Training Centre Clerk job at Weston Shops, Winnipeg was contracted to Drake Office Overload, which provided Mrs. M. Allen to perform the work. It is common ground that there were no qualified laid off employees available to fill the position, notwithstanding that it was bulletined as a temporary vacancy. The material further establishes that on September 26, 1988 the Company's employment bureau notified Weston Shops that a qualified employee about to be laid off would be available the following day. As of September 27, therefore, the contract with Drake was terminated and the work was reassigned to a bargaining unit member.

The Master Agreement signed on July 29, 1988 provides that contracting out work normally performed by employees is permissible in certain circumstances, including "... where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees;". The Arbitrator is satisfied that that is what transpired in the instant case. It does not appear substantially disputed that employees on the active list that might have had the qualifications to perform the work of the temporary vacancy were themselves at all material times productively occupied elsewhere. The Arbitrator is satisfied that in the circumstances disclosed the Company was entitled to contract the work in question, and no violation of the Collective Agreement is disclosed in that regard.

An alternative issue arises with respect to the position of the Union that Mrs. Allen should in fact be viewed as an employee within the bargaining unit who is subject to the terms of the Collective Agreement, including the collection of dues. Whether a person is an employee within the meaning of a collective agreement is a question of fact to be determined having regard to all of the circumstances. In this case it does not appear disputed that the day-to-day routine of Mrs. Allen's work was established and directed by the Company. In that sense, if control were the only factor examined, the Union's argument might be compelling. Other realities, however, must also be considered. In my view substantial weight must be given to the fact that the contracted office help was clearly understood to be for a defined temporary period which, in any event, would be at an end as soon as a bargaining unit employee became available to fill the position. In other words, this is not a circumstance where an individual was brought in on an indefinite or long term basis to essentially fill a position which normally would have been occupied by a bargaining unit member. If it could be shown that the Company effectively sought to avoid its obligations under the Collective Agreement by establishing a long term arrangement for the performance of bargaining unit work by contracted office help, the case for finding that person to be an employee might be more compelling. In

all of the circumstances of this case, however, I am satisfied that Mrs. Allen did not have a sufficient employment attachment to become an employee of the Company, either within the meaning of the Collective Agreement nor as contemplated in the Master Agreement of July 29, 1988. I am satisfied that the use of temporary office help from an outside contractor is, subject to the conditions described in the Master Agreement, within the contemplation of the parties' agreement.

For the foregoing reasons the grievance must be dismissed.

November 17, 1989 (Sgd.) MICHEL G. PICHER
ARBITRATOR