CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2159

Heard at Montreal, Wednesday, 12 June 1991

concerning

CANADIAN PACIFIC LIMITED

and

UNITED TRANSPORTATION UNION

DISPUTE:

Whether or not the abolishment of assignments 208 and 213 and the revised days of operation for assignment 209 all at Gatineau, Quebec constitute a material change(s) in working conditions within the purview of Article 45 of the collective agreement.

JOINT STATEMENT OF ISSUE:

Previous to January 15, 1990 CP Rail crews and equipment performed switching operations on the property of Canadian Pacific Forest Products (CPFP) at Gatineau, Quebec. CPFP owns most of the track on its property; the remainder of the trackage is owned by Canadian Pacific Ltd. and is subject to various siding agreements between CP Ltd. and CPFP. CPFP is related to company CP Ltd. of which CP Rail is a division.

The switching operations were traditionally performed by regular assignments which at the time of the change were known as Assignments 208--209--213 on the Quebec Division.

Sometime in 1989 CPFP decided to utilize the services of another company, Railserve, to perform the switching operations on the property in question. CP Rail was asked and therefore effected changes in the equipment, track and its operations to facilitate this change in operations at CPFP at Gatineau. These changes thereafter enabled CPFP to engage the services of Railserve. CP Rail thereafter (by way of Bulletin 361) advised the Union and its members that Assignments 208 and 213 would be abolished and that Assignment 209 would be abolished and rebulletined to operate 6 days a week, Sunday to Friday.

The Union contended that this situation involved a material change in working conditions within the meaning of Article 45 of the collective agreement and therefore the Company was obligated to serve a Notice of Material Change under Article 45 (and all that is required in respect of such).

The Company maintained that these circumstances did not amount to a material change within the purview of Article 45 and therefore no notice of such was required pursuant to Article 45. The Company maintained that such changes involved operational changes initiated by the customer (CPFP) on the customer's property all of which was

beyond the control of CP Rail. The Company further contends that the changes in roadswitcher assignments at Gatineau were merely a response to the reduced switching required to be performed by CP Rail. CP Rail, refused to and has not given notice or participated in meetings under Article 45. The changes have remained in effect.

| FOR THE UNION: | FOR THE COMPANY: |
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| (SGD.) J. R. AUSTIN | (SGD.) E. S. CAVANAUGH |
| GENERAL CHAIRPERSON | GENERAL MANAGER, OPERATION & MAINTENANCE |

There appeared on behalf of the Company:

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| G. W. McBurney | -- Supervisor, Labour Relations, Toronto |
| R. LaRue | -- Counsel, Montreal |
| B. P. Scott | -- Labour Relations Officer, Montreal |
| W. B. Binda | -- Assistant Manager, IFS Pulp & Paper, Montreal |
| G. F. Barker | -- Marketing Representative, IFS Pulp & Montreal |
| J. J. Worrall | -- Assistant Supervisor, Labour Relations, Toronto |
| R. Hunt | -- Labour Relations Officer, Montreal |
| G. Chehowy | -- Labour Relations Officer, Montreal |

And on behalf of the Union:

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| H. Caley | -- Counsel, Toronto |
| J. R. Austin | -- General Chairperson, Toronto |
| B. Marcolini | -- National President, UTU--Canada, Ottawa |
| D. Warren | -- Vice-General Chairperson, Toronto |
| L. Davis | -- Local Chairperson, MacTier |
| J. No‰l de Tilly | -- Local Chairperson, Gatineau |

AWARD OF THE ARBITRATOR

The issue in this grievance is whether a reduction in switching assignments at Gatineau, following changes in the industrial switching operations at that location, involved a material change within the meaning of article 45 of the collective agreement. That article provides, in part, as follows:

45.1(a) The Company will not initiate any material change in working conditions which will have materially adverse effects on employees without giving as much advance notice as possible to the General Chairman concerned, along with a full description thereof and with appropriate details as to the contemplated effects upon employees concerned. No material change will be made until agreement is reached or a decision has been rendered in accordance with the provisions of Section 1 of this Article. ...

45.1(l) This Article does not apply in respect of changes brought about by normal application of the Collective Agreement,

changes resulting from a decline in business activity, fluctuations in traffic, traditional reassignment of work or other normal changes inherent in the nature of the work in which employees are engaged.

The purpose of article 45 is to permit the parties to negotiate terms and conditions to minimize the adverse impact of a material change on the employees affected. In the event that they are unable to negotiate an agreement, provision is made for the processing of their dispute, firstly to a Joint Board of Review and, if necessary, to final and binding arbitration.

The material in the instant case discloses an indirect corporate relationship between CP Rail and Canadian Pacific Forest Products. It is common ground, however, that the Forest Products company is a separate entity and, unlike CP Rail, is not a division of CP Ltd. For the purposes of this grievance the Union did not advance the position that CP Rail and Canadian Pacific Forest Products are a single employer for the purposes of the collective agreement. On the agreement of the parties at the hearing, the grievance went forward on the basis that Canadian Pacific Forest Products can be treated as an entirely unrelated company, no different than any other company dealing at arm's length with CP Rail.

The position of the Company is that the facts disclosed fall within the purview of sub-paragraph (l) of article 45.1 of the collective agreement, and that consequently no material change is established. It does not deny that there have been adverse effects upon employees, and that the changes in assignments, including the abolishment of two of the three road switcher assignments at Gatineau, were initiated by the Company. However, it argues that the changes were caused by a decline in business activity and fluctuations in traffic within the meaning of sub-paragraph (l) of article 45.1. It submits that its customer at Gatineau, Canadian Pacific Forest Products, formerly operating under the name of CIP Inc., made a unilateral and independent decision to perform all industrial switching on its own paper mill property by contracting out that service to a third party, Railserve Inc., a railway service company originally based in Georgia, and now apparently incorporated to do business in Canada. In the Company's submission the decision of its customer to revert to a private contractor to perform all rail switching within its industrial operations is tantamount to a withdrawal of its business or the assignment of its business to another carrier. This, it maintains, can be characterized as a decline in business activity or fluctuation in traffic which ultimately required the Company to abolish two of three road switcher assignments at Gatineau.

In the Arbitrator's view the evidence leaves the merits of that submission in some doubt. It appears that, upon the advice of an external consultant, on April 14, 1988 Canadian Pacific Forest Products decided that it could realize savings by performing its own yard switching on its property, and by a letter of that date it so advised the Company. Part of the customer's overture to the Company was to the effect that such an arrangement would involve cost savings to CP Rail as well. During a series of discussions between itself and its customer, the Company took the position that there

would not be savings advantages for CP Rail because it would continue to be required to switch out the industrial traffic of two other small local industries, an industrial fibre plant and a plywood manufacturing facility on industrial property adjacent to the Canadian Pacific Forest Products mill at Gatineau. Savings could only be realized for CP Rail if the industrial switching for all three customers at Gatineau could be performed by Canadian Pacific Forest Products, thereby relieving the Company of all industrial switching within the yards in question. The response of Canadian Pacific Forest Products to that suggestion was negative, as it had no interest in providing industrial switching services to other businesses.

In an attempt to resolve the problem the marketing representatives of the Company suggested to Canadian Pacific Forest Products the alternative of contracting out the industrial switching work for all three industries to a single independent switching service contractor. In furtherance of that suggestion it identified three such contractors, one in Canada and two in the United States, and put Canadian Pacific Forest Products in touch with them to pursue the viability of that option. The result was the negotiation of a service contract for industrial switching involving Canadian Pacific Forest Products and Railserve which covered the industrial switching for the paper producer, as well as for the two smaller plants adjacent to it. The evidence before the Arbitrator does not indicate whether or in what way the two smaller industries were privy to those negotiations or to the contract concluded between Canadian Pacific Forest Products and Railserve.

The evidence further discloses, however, that for the contracting arrangement to come to fruition it was necessary for the Company to enter into an agreement with Railserve. Railserve needed access to part of some four tracks owned by the Company, located immediately north of the Gatineau mill, for the purposes of marshalling cars to and from Canadian Pacific Forest Products as well as the two smaller plants being serviced. The ability to marshall the cars necessitated an arrangement whereby Railserve could utilize the wye located on the property of the paper mill to move consists of cars without encroaching on the Company's main line immediately north of the marshalling tracks. In the result, the Company was required to enter into a contract with Railserve Inc., which was executed on January 8, 1990. That agreement provides for the use of two of the Company's marshalling tracks, referred to in the agreement as ``the siding'' for the purposes of facilitating switching cars to and from the industrial properties for furtherance by rail on the Company's Lachute Subdivision.

The agreement recites the nominal consideration of one dollar paid to the Company for granting that right to Railserve Inc. The evidence further discloses, however, that CP Rail incurred additional expense. In addition to remaining liable for the maintenance of the siding during the currency of the occupancy license granted to Railserve Inc., the Company was required, at its own expense, to effect extensive changes to the siding, including the addition of a lead, estimated by the Union to be some three thousand feet in length. It is common ground that the construction of the lead was necessary to permit use of the wye by the private

contractor without encroaching on the Company's main line.

When all of the above evidence is examined, the Arbitrator finds it difficult to characterize what has transpired as little more than the unilateral decision of a customer to terminate part of its business with the Company. It is not disputed before the Arbitrator that the subcontracted industrial switching by Railserve put into effect at Gatineau involved certain business gains for the Company. While one obvious factor is the maintenance of business relations with an important customer in a competitive market, under cross-examination it was conceded that, insofar as operations at Gatineau were concerned, the arrangement concluded resulted in an overall cost/benefit advantage for the Company. Moreover, as counsel for the Union submits, the evidence discloses the instrumental involvement of the Company in suggesting, identifying and facilitating, both by physical works and by a legal contract, the transfer to Railserve Inc. of the industrial switching work at Gatineau which previously belonged to it. As the matter was fairly described by one of the Company's marketing officers who was a witness at the hearing, ``We were making a commercial deal amongst three parties.''

In the Arbitrator's view the facts of the instant case are plainly to be distinguished from those disclosed in CROA 849 and 1675. In both of those cases the loss of a major customer was found to have occasioned the abolishment of positions in circumstances which the arbitrator characterized as involving a fluctuation of traffic. In both cases it was emphasized that the change was not within the control of the company or, as was expressed in CROA 1675, the outcome was entirely uninfluenced by any action on the part of the company, and was due solely to the independent decision of the principal industrial user of its services.

While the matter before me is not without some difficulty of characterization, I am compelled to conclude, on the balance of probabilities, that the changes implemented at Gatineau with respect to the substitution of an independent contractor for the services of the Company in industrial yard switching can not be said to have been achieved (and could not have been achieved) without the active involvement of the Company at a number of levels. It suggested the contracting out as a solution to the customer's needs, identified sources of independent contract service, became privy to a contract with Railserve Inc. which was essential to facilitate the contracting and, lastly, made substantial physical alterations, at its own expense, to its own siding and yard facilities at Gatineau to allow for the final realization of this project. In light of all of these factors the Arbitrator must accept the submission of counsel for the Union that what has transpired cannot be characterized as a change occasioned solely and exclusively by a decline in business or a fluctuation in traffic. The business and the traffic remain, save that the Company used its best efforts, partly for its own advantage, to transfer that business and traffic into the hands of an independent contractor. While, as the Union submits, there is no objection taken to the Company's actions in all of the circumstances, it cannot escape the consequences of its obligations under article 45 of the collective agreement. Quite legitimately, and for good business reasons, the Company became an

active participant in a joint project for its own gain, thereby becoming instrumental in causing material change to the working conditions of the employees on whose behalf this grievance is filed.

For the foregoing reasons the Arbitrator finds and declares that the abolishment of assignments 208 and 213 and the revision of the days of operation for assignment 209 at Gatineau, Quebec, constitute a material change in working conditions within the contemplation of article 45 of the collective agreement. It follows that the material change was put into effect contrary to the provisions of the agreement, and the employees adversely affected have been deprived of such protections as might otherwise have been available to them under the terms of article 45. As requested by the Union, the Arbitrator retains jurisdiction in respect of the ultimate disposition of those rights, and remits the matter to the parties for the purposes of remedial redress, while retaining jurisdiction in the event of any dispute with respect to the interpretation or implementation of this award.

June 14, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR