CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2228
Heard at Montreal, Thursday, 16 January 1992
concerning
VIA RAIL CANADA INC.
and
CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS
DISPUTE:
Contracting out of the washroom and office cleaning work at the Vancouver Maintenance Facility.
JOINT STATEMENT OF ISSUE:
It is the Brotherhood's contention that the cleaning of the above premises was formerly performed by the CN CBRT&GW members at the old Maintenance Centre, therefore, that the Corporation is prohibited from invoking any of the exceptions under Appendix ``C'' of the Collective Agreement, as a basis to contract out this work, furthermore that a notice of intent was not provided to the Brotherhood as per the provisions of Appendix ``C'' of Collective Agreement No. 1.
The Corporation rejected the grievance and maintains that the work in question was not previously performed by employees covered by Collective Agreement No. 1, specifically, and that the Corporation's initiative was in fact a ``new venture'', and as such, a notice of intent was not required. Furthermore, the Corporation maintains that the work involved does not justify the creation of a regular position.
FOR THE BROTHERHOOD:
FOR THE CORPORATION:
(SGD.) T. N. STOL
(SGD.) C. C. MUGGERIDGE
NATIONAL VICE-PRESIDENT
DEPARTMENT DIRECTOR, LABOUR RELATIONS
There appeared on behalf of the Corporation:
C. Pollock
Senior Officer, Labour Relations, Montreal
M. St. Jules
Senior Negotiator and Advisor, Labour Relations, Montreal
D. Fisher
Senior Officer, Labour Relations, Montreal
J. Kish
Senior Advisor, Customer Services, Montreal
C. Gould
Senior Advisor, Plant Maintenance, Montreal
And on behalf of the Brotherhood:
P. Askin
Representative, Vancouver

AWARD OF THE ARBITRATOR

In October of 1986 the Corporation took over the operation of the Vancouver Maintenance Centre from CN. At that time all of the maintenance centre employees transferred into employment with the Corporation. Two of those employees were labourers who came to be governed by the collective agreement of the Brotherhood, and whose regular work involved performing all of the general cleaning and janitorial duties in the maintenance centre facility.

On January 16, 1989, the Corporation opened a new maintenance centre in Vancouver which is substantially larger than the former facility. It proceeded to contract out the washroom and office cleaning work in the new centre, which led to the instant grievance.

The Corporation raises a number of points in defence of its action. Firstly it stresses that the two employees who performed cleaning duties in the former maintenance centre continue to be employed in the new maintenance centre, where they perform cleaning duties in the shop area. The Employer argues that the new maintenance centre, which includes larger, more extensive office facilities, is in the nature of a ``new venture'', as a result of which it is under no obligation to give notice to the Brotherhood of its action, or to refrain from contracting out under the terms of Appendix C of the collective agreement. It is common ground that no pre-existing positions were lost to the Brotherhood by the Corporation's action, and indeed the new facility saw the increase of union positions from seven to seventeen.

The Brotherhood's position is that cleaning and janitorial duties in all parts of the maintenance facility is work presently and normally performed by its members, within the meaning of Appendix C of the collective agreement, and that none of the exceptions contained within the appendix can be said to operate so as to relieve the Corporation from its obligations under its terms. In response, in addition to its submission with respect to the facility being a ``new venture'' the Corporation submits that it does not have the material and equipment available to perform the work, that sufficient employees qualified to perform the work were not available from the active or laid off employees' list, that the nature and volume of the work does not justify the expenditure that would be required and that fluctuations in employment would result from acceding to the Brotherhood's position, as reflected in paragraphs 2, 4 and 6 of Appendix C of the agreement.

The pertinent provisions of Appendix C are as follows:

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.

...

(2)
where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees; or
...
(4)
where the nature or volume of work is such that it does not justify the capital or operating expenditure involved; or
...
(6)
where the nature or volume of the work is such that undesirable fluctuations in employment would automatically result.

The case, as pleaded by the Corporation, reduces itself to the proposition that because the cleaning and janitorial work in the new facility grew substantially beyond the requirements of the old facility, it is at liberty to contract out the additional work. Implicit in its argument is the submission that new or additional work cannot be said to be work presently and normally performed by employees represented by the Brotherhood within the meaning of Appendix C of the collective agreement. In the result, as the Corporation would have it, the only protection which the contracting out provisions give to the Brotherhood is the preservation of those job which it had in the old facility, or their equivalent as applied to the new facility.

The Arbitrator cannot accept that submission. It is plainly at variance with the most fundamental principles of bargaining unit integrity, and the concept of natural accretion to a bargaining unit. The position espoused by the Corporation is tantamount to legitimizing the ``runaway shop'', by asserting that a new or expanded location where work similar to that performed by bargaining unit employees is not work governed by the contracting out provisions of the collective agreement.

The material before the Arbitrator establishes, beyond controversy, that members of the bargaining unit represented by the Brotherhood regularly and normally performed the janitorial work in all parts of the Corporation's maintenance facility at Vancouver from the time of its inception in 1986. In that context the work in question, whether it be continued in the old facility or transferred to a new facility, must, apart from the most tortured interpretation, be construed as ``work presently and normally performed by employees represented by the Brotherhood ...'' within the meaning of Appendix C of the collective agreement.

Can it be said that any of the exceptions invoked by the Corporation would apply in this case? The Arbitrator has difficulty in finding that they would. Firstly, I cannot accept that in light of the multi-million dollar capital outlay expended in the construction and equipping of the facility the Corporation cannot justify the marginal expenditure that would be required for the purposes of purchasing cleaning material and apparatus appropriate to the task. Any additional cost that might be incurred in that regard is plainly not prohibitive, as contemplated in the terms of the exceptions of Appendix C. Neither can I accept that the work in question would cause undesirable fluctuations in employment. It does not appear disputed that if the entire facility is taken into account, several additional full time positions could be established within the bargaining unit, without any undue difficulty with respect to deployment and working schedules.

The more difficult question arises with respect to the exception expressed under paragraph (2) of Appendix C. The Corporation submits that as there were no employees laid off from the bargaining unit at the time, or any active employees at Vancouver who were available for assignment, it was at liberty to contract out within the contemplation of that paragraph. That submission, however, must be assessed in light of the overall purpose of the collective agreement, and the concept of bargaining unit integrity which is recognized both in its overall terms, and in the language and spirit of the contracting out provisions handed down by the Honourable Emmett M. Hall in his arbitration award of December 9, 1974. That award, and the content of Appendix C which codifies it for the purposes of the collective agreement, must clearly be construed within the reality of the industrial relations system which operates under the Canada Labour Code. As noted above, one of the principles inherent in that system is the concept of bargaining unit accretion. When a trade union has exclusive bargaining rights for employees who perform the work of a particular classification, if an employer expands its operation to create additional work of the same type, any persons hired to perform that work must be deemed to fall within the bargaining unit.

It is against that reality that paragraph (2) of Appendix C must be construed and understood. If it were otherwise, a trade union could have no claim to bargaining rights in any new or expanded operations of an employer for which it was the certified bargaining agent. In the Arbitrator's view the parties to a collective agreement might, arguably, be free to negotiate a result at such variance with the basic principles of collective bargaining within the terms of their collective agreement. However, they must not be presumed to have done so in the absence of clear and unequivocal language to demonstrate such an intention. On a careful review of the entirety of the instant collective agreement, including Appendix C, the Arbitrator can find no such language or intention. In the circumstances, while I am satisfied that while paragraph (2) of the exceptions to the prohibition against contracting out listed in Appendix C of the collective agreement may have ample scope for application in respect of certain kinds of projects or discrete operations, it cannot be construed as a repudiation of the cornerstone concept of normal bargaining unit accretion so fundamental to collective bargaining under the Canada Labour Code. Such result was plainly not intended by Mr. Justice Hall, nor can it

be inferred from the terms of Appendix C.

This case is to be distinguished from CROA 2042 where the work in question was entirely different from prior bargaining unit work. The facts of the instant case more closely parallel those found in CROA 1948, where the Ontario Northland Railway sought to contract out part of its cleaning work after it expanded its train station at Englehart, Ontario. In that case, which was governed by the same contracting out provisions as in this case, this Office commented, in part, as follows:

On the material before me I cannot but conclude that at the time of the contracting out the cleaning of the Englehart station was ``work presently and normally performed by employees'' within the bargaining unit. The next question is whether the exceptions listed within the letter obtain in the circumstances. The only provision which might arguably be raised is sub-paragraph (4). In the Arbitrator's view, however, that provision can have no application in the instant case. If it could be shown that the use of a part-time bargaining unit employee would force the Company to absorb an exorbitant operating expenditure entirely out of keeping with the value of the services performed, the suggestion that this exception applies might be compelling. That is not the case, however. Putting the employer's case at its highest, and with the fullest understanding for its motives, the most that can be said is that it appears there is a marginal financial saving for the Company to utilize a contractor to provide part-time cleaning rather than to schedule a bargaining unit employee to work part-time for the same hours. That is not the kind of prejudice or dislocation to the employer contemplated in Paragraph 4. If it were otherwise, as the Brotherhood's representative suggests, it would be open to the Company to contract out, for example, all of the running trade work on a newly established rail line, or the maintenance work in a newly built shop whenever it is cheaper to do so. To so conclude would remove the protections of bargaining unit integrity clearly intended by the letter of March 5, 1982.

Nor can the Arbitrator accept the submission of the Corporation that the contracting out can be justified on the basis that the expansion and relocation of the maintenance facility at Vancouver constitutes a ``new venture''. While the Corporation did not substantially elaborate its reasoning in respect of that argument, the notion of the ``new venture'' appears to be rooted in the decision of this Office in CROA 713. In that case Arbitrator Weatherill rejected the argument of the Ontario Northland Railway that the language identical to paragraph (4) of Appendix C justified contracting out. He commented, in part, as follows:

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.

(See also CROA 1956.)

The Arbitrator cannot, however, sustain the submission of the Brotherhood with respect to the obligation of the Corporation to provide notice of the contracting out. Its obligation in that regard is contained in the following paragraph of Appendix C:

In addition, the Corporation will advise the Brotherhood 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.

It is clear on the material before the Arbitrator that no material and adverse effect can be said to have been visited upon any employees by the contracting out which was entered into by the Corporation, insofar as no layoffs or displacements resulted. While that eventuality does not relieve the Corporation from its substantive obligations in respect of the prohibition against contracting out, it does constitute an answer to the Brotherhood's claim with respect to any violation as to the duty to provide notice contemplated within Appendix C.

For the foregoing reasons the grievance is allowed. The Arbitrator finds and declares that the contracting out of cleaning and janitorial work at the Vancouver Maintenance Centre is in violation of the prohibition against contracting out contained in Appendix C of the collective agreement. The Arbitrator directs the Corporation to return the janitorial work at the maintenance centre to the bargaining unit, to be assigned in conformity with the terms of the collective agreement, or any other employment security agreement between the parties.

January 17, 1992

(Sgd.) MICHEL G. PICHER

ARBITRATOR