CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2249
Heard at Montreal, Tuesday, 14 April 1992
concerning
CANADIAN PACIFIC EXPRESS & TRANSPORT
and
TRANSPORTATION COMMUNICATIONS UNION
DISPUTE:
Policy grievance dated October 2, 1991, with respect to use of Armour Transport (or any other outside carrier) to perform bargaining unit work and the abolishment of two North Shore runs originating from Moncton, New Brunswick.
JOINT STATEMENT OF ISSUE:
The Union asserts that the Company has violated the subcontracting provisions in the collective agreement by using outside carriers to perform bargaining unit work.
In the alternative, the Union asserts that the persons to whom the work is assigned are in effect employees of CPET and ought to be covered by all of the provisions of the collective agreement.
The Company asserts there has not been a violation of the collective agreement and that the persons who perform the work are not employees of CPET.
The Union requests a declaration that the collective agreement has been violated; a direction that the Company cease violating the collective agreement; compensation to the Union and/or the employees affected; reinstatement of the laid-off employees and alternatively a declaration that the employees who performed the work are in fact employees of CPET; and such further or other relief as is appropriate.
FOR THE UNION:
FOR THE COMPANY:
(SGD.) J. CRABB
(SGD.) B. F. WEINERT
EXECUTIVE VICE-PRESIDENT
DIRECTOR, LABOUR RELATIONS
There appeared on behalf of the Company:
M. D. Failes
Counsel, Toronto
B. F. Weinert
Director, Labour Relations, Toronto
B. D. Neill
Vice-President, Human Resources, Toronto
W. Marriott
Manager, Rates & Billing, Moncton
And on behalf of the Union:
H. Caley
Counsel, Toronto
J. Crabb
Executive Vice-President, Toronto
M. Gauthier
Assistant Vice-President, Montreal

AWARD OF THE ARBITRATOR

The facts in the instant case are not in dispute. For a number of years the two North Shore runs originating from Moncton, New Brunswick, chiefly servicing the Bathurst area, were done by the Company by the assignment of owner-operators. In 1990, for a period of time, the Company tried to service the runs by assigning them to employees within the bargaining unit at Moncton. This, it is not disputed, proved uneconomical. As a result, in or about October of 1991 the Company ceased providing any direct service to the North Shore area, and thereafter contracted with an independent carrier, Armour Transport Ltd., to deliver its North Shore freight on what is generally known as an ``interline'' basis. The arrangement which the Company has made with the interlining carrier for servicing the New Brunswick North Shore is similar to arrangements which it has with other companies throughout Canada, in areas where it has found that direct delivery service is not economical to operate. It is not disputed that within Canada, the Company delivers directly to some 4,306 communities, while its deliveries to some 3,877 other smaller or more remote communities are made pursuant to interline arrangements.

Counsel for the Union stresses that interlining is a form of contracting out. For the purposes of this grievance, the Arbitrator does not deem it necessary to disagree with that proposition. The question also remains open, however, as to whether the Company is prohibited from closing any part of its operations pursuant to the kind of operational or organizational change contemplated within the terms of its job security agreement with the Union. These questions need not, in my view, be resolved in the instant case.

The case before the Arbitrator can be disposed of on the basis of the Union's assertion that the provisions in respect of sub-contracting which appear at page 84 of the collective agreement are a comprehensive code in respect of that question, and that the Company must, therefore, be viewed as prohibited from sub-contracting the delivery work which it previously performed on the New Brunswick North Shore. The provisions in question read as follows:

SUBCONTRACTING

The Company and the Union acknowledge that the Company has a practice of using both Owner-Operators and Bargaining Unit employees as appropriate in its operations.

While the Company intends to continue its present practice, there is no intent on the part of the Company to establish Owner-Operators in any growth of Company operations where it would be practical and economic to use Bargaining Unit employees.

The Company agrees that there will be no permanent reduction in the present number of Bargaining Unit employees as a result of the use of Owner-Operators or Brokers in any area.

The Company and the Union agree that, in the event of a violation of this understanding, the Union may rely upon any rights it may have under the Collective Agreement.

The foregoing shall have no application to any operations in the Province of Saskatchewan; however, in the Province of Saskatchewan, the Company will not use Owner-Operators to perform work that could be performed by an employee who is in the employ of the Company on the date of ratification and who is laid off and has not had 40 hours of work in that week.

The issue becomes whether the collective agreement prohibits contracting out, other than by the use of owner-operators, in the manner and circumstances disclosed. As noted above, Counsel for the Union argues that the agreement should be construed as containing a comprehensive prohibition against contracting out, the terms of which are qualified only in respect of the use of owner-operators as reflected in the provisions reproduced above. The Arbitrator has substantial difficulty with that proposition.

It is well settled, within Canadian labour law, that an employer who is party to a collective bargaining relationship is deemed to have the right to contract out work which might otherwise be performed by members of a bargaining unit, unless there is clear and unequivocal language within the collective agreement which would prohibit the employer from doing so. The leading statement of this principle was expressed by Professor Arthurs is his decision in Russelsteel Ltd. (1966), 17 L.A.C. 253. At pp 256-7 Professor Arthurs expressed what has become the universal approach of boards of arbitration to this issue in the following terms:

The wide notoriety given to labour's protests against this practice, the almost equally wide notoriety, especially amongst experienced labour and management representatives, of the overwhelming trend of decisions, must mean that there was known to these parties at the time they negotiated the collective agreement the strong probability that an arbitrator would not find any implicit limitation on management's right to contract out. It was one thing to imply such a limitation in the early years of this controversy when one could not speak with any clear certainty about the expectations of the parties; then, one might impose upon them the objective implications of the language of the agreement. It is quite another thing to attribute intentions and undertakings to them today, when they are aware, as a practical matter, of the need to specifically prohibit contracting out if they are to persuade an arbitrator of their intention to do so.

In the instant case Counsel for the Union stresses that the collective agreement contains no management's rights clause, and submits that the absence of such a provision should weigh in favour of the Union's argument that the provisions appearing on page 84 constitute a comprehensive code with respect to the larger issue of contracting out. By way of analogy, he draws the Arbitrator's attention to a number of arbitral awards, including Re Toronto Star Newspapers Ltd. and Southern Ontario Newspaper Guild, Local 87, (1983) 10 L.A.C. (3d) 1 (P.C. Picher).

While the Arbitrator does not dispute the principles contained in the jurisprudence cited by Counsel for the Union, in this case, as in any grievance, the fundamental question to be determined is the mutual intention of the parties as expressed within their specific collective agreement. In approaching that question regard may be had to bargaining history, including the effect of prior arbitral awards. A number of decisions of this Office which predate the provisions of page 84 of the collective agreement made it clear that, prior to that amendment, the agreement could not be construed as containing any prohibition against contracting out.

In CROA 850 Arbitrator Weatherill rejected the contention of the Union that the contracting out of a linehaul run between Sault Ste. Marie and Thunder Bay to a broker was contracting out in violation of the terms of the collective agreement. In that award he commented, in part, as follows:

Whether this arrangement was wise or unwise is not for an arbitrator to say. The only issue before me is whether or not it is contrary to the Collective Agreement. It is not, for the reasons I have given, a violation of Article 1.1, which merely sets out the classifications of persons in the employ of this Company who come within the bargaining unit. There appears to be no other provision in the Collective Agreement bearing on the matter, and there is no express prohibition of contracting out. It has been held in many cases that such a prohibition would require clear language.

Arbitrator Weatherill came to identical conclusions in a number of subsequent cases between these same parties (see CROA 1003, 1004, 1022).

In the circumstances at hand, in light of the decisions of this Office, it is difficult to give substantial weight to the submission of the Union that the collective agreement is silent as to management's rights. The arbitrated awards are not silent on the preexisting right of the Company to contract out work, in the absence of any clear and unequivocal prohibition within the terms of the collective agreement. Clearly, prior to the amendment of the collective agreement by the addition of the terms found at page 84, in accordance with the settled cases, the Company enjoyed the prerogative to contract out work, as there was no prohibition against such a practice within the terms of the collective agreement.

The issue then becomes whether the language added to the agreement, as contained on page 84, has introduced a blanket provision against contracting out, as argued by the Union. With respect to this issue the Arbitrator finds the submissions of Counsel for the Company to be more compelling. Notwithstanding the generality of its title, the substance of the provision found upon page 84 of the collective agreement is confined to the single issue of the use of owner-operators by the Company. There is, very simply, no other subject addressed within the provision negotiated between the parties. The Company and Trade Union before the Arbitrator in this case are sophisticated and experienced in the ways of collective bargaining. The issue of contracting out, as reflected in the comments quoted from Russelsteel, above, is a matter of critical importance to them. They must be taken to have appreciated the thrust of the general arbitral law of Canada in this area, as well the import of the four decisions of this Office in respect of the general rights of the Company in that regard.

The Arbitrator finds it difficult to conclude that by addressing the limited subject of the use of owner-operators within the Company's operations the Company and Union should be taken to have impliedly agreed upon a blanket prohibition of the Company's preexisting right to contract out, whether through interline arrangements or otherwise. With the fullest respect to the able submission made by the Union, the Arbitrator cannot conclude that so fundamental an alteration of the overall bargain between the parties would have been left to the indirect expression and conclusion by inference which the Union seeks to draw from the language appearing on page 84 of the collective agreement. On the contrary, I am satisfied that the parties appreciated, in keeping with the law as expressed in Russelsteel, and reiterated by Arbitrator Weatherill in this Office, that a general prohibition against contracting out must be evidenced by clear and unequivocal language within the terms of their collective agreement. The provisions in respect of the use of owner-operators added to the collective agreement and now contained at page 84 thereof do not, in my view, constitute such clear and unequivocal provisions. They fall well short of expressing a blanket prohibition against contracting out, nor do they bear the hallmarks of the kind of comprehensive code alluded by the Union. Collective agreements in Canada, including a number of collective agreements which are subject to the jurisdiction of this Office, contain clear language restricting the right of employers to contract out and delineating well-defined exceptions to that rule. The very narrow provisions of the owner-operator rules expressed on page 84 of the collective agreement do not achieve that result and, in my view, were plainly not intended to do so. Nor is there any evidence to establish that the employees of the contracted carrier can be viewed as employees within the terms of the instant collective agreement. The facts in this case are readily distinguishable from those in CROA 1599.

For the foregoing reasons I am satisfied that the parties have not added to their agreement, whether expressly or by implication, a prohibition against contracting out which would have prevented the assignment of the delivery work on the North Shore of New Brunswick to Armour Transport Ltd. as disclosed in the material before the Arbitrator. There is, therefore, no violation of the collective agreement established. For these reasons the grievance must be dismissed.

April 16, 1992

(Sgd.) MICHEL G. PICHER

ARBITRATOR