CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2869

Heard in Montreal, Thursday, 12 June 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

DISPUTE:

Whether or not the Company was in violation of articles 14.1 and 35 of Agreement 5.1 when it abolished the positions of bunkhouse attendants in Rivers, Manitoba and Watrous, Saskatchewan and entered into various contracts for crew accommodation on the Prairie Region.

JOINT STATEMENT OF ISSUE:

As the result of the Company's Extended Run Initiative, Article 8 notices were issued abolishing the positions of bunkhouse attendant at both Rivers, Manitoba and Watrous, Saskatchewan. Due to the extended run initiative, train crews now lay over predominantly at Melville, Saskatchewan. It is the Union's position that the Company has leased the entire Melville Inn and the Wayside Inn at Watrous; that these leases constitute contracting out; and that the affected employees should have been allowed to maintain their work at Watrous and Rivers and/or relocate to Melville.

The Union further alleges that the Company cannot issue an article 8 notice for the purpose of contracting out the work. The Union seeks reinstatement of these positions at the locations best suited to the Company's purposes. The Union alleges a violation of articles 14.1 and 35 of Agreement 5.1

The Company denies the Union's request and any violation of the collective agreement.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. OLSHEWSKI	(SGD.) D. S. FISHER
FOR: NATIONAL COORDINATOR	FOR: SENIOR VICE-PRESIDENT

There appeared on behalf of the Company:

D. Lanthier	– Labour Relations Officer, Edmonton
S. Michaud	– Assistant Manager, Labour Relations, Edmonton
P. Payne	– Manager Administration, Edmonton
F. Metcalfe	– Engineering Officer, Edmonton

And on behalf of the Union:

D. Olshewski	– National Representative, Winnipeg
A. S. Wepruk	– National Coordinator, Montreal

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that prior to the extended runs initiative implemented by the Company in early 1995 and early 1996, the running crews home-terminalled at Winnipeg, Manitoba and Melville, Saskatchewan used Rivers as a turn-around point or away-from-home terminal. Similarly, crews home-terminalled at Melville and Biggar, Saskatchewan used Watrous as their away-from-home terminal. The Company maintained bunkhouse facilities at both Watrous and Rivers, with a room capacity of seventy-two bedrooms and fifty-four bedrooms, respectively. It does not appear disputed that the bunkhouses were in fact well under-utilized, with approximately twenty rooms being actively used at either location.

Following an agreement made in late 1995 with the Canadian Council of Railway Operating Unions (CCROU), the Company implemented extended runs, as a result of which Melville became the turn-around point for crews home-terminalled in Biggar and Winnipeg, as well as Saskatoon. In furtherance of that initiative, the Company made arrangements for the away-from-home housing of running crews in Melville at the Melville Inn. It is common ground that the Inn is privately owned, and that the Company leases all twenty-three rooms, pursuant to a two-year contract expiring January 31, 1998. The Company has never previously owned or operated bunkhouse facilities at Melville. Further, as a result of the extended runs, the bunkhouses at both Rivers and Watrous were closed. It appears that at Watrous the bunkhouse was in fact demolished and a trailer, previously used as a booking-in room, was removed. In the end, however, the Company found that it still had a need to handle some crews, albeit on a reduced basis, at Watrous. To accommodate that need, a new booking-in trailer was set up, and the Company entered into an agreement with the Wayside Inn at Watrous whereby ten rooms of a twelve room motel would be exclusively available to the Company. More recent information indicates that the Wayside Inn is being expanded to eighteen rooms, and that it will continue to accommodate a mix of railway clientele as well as the general public.

By letters dated November 3, 1995 the Company provided to the Union two article 8 notices with respect to the abolishing of the positions of four bunkhouse attendants at Watrous, effective March 3, 1996 and four bunkhouse attendants at Rivers, effective the same date. Following negotiations, some of the bunkhouse attendants voluntarily elected to sever their employment with an enhanced separation package, while at least one employee took a bridging opportunity and one relocated to Winnipeg.

The Union asserts that the Company has violated the contracting out provisions of the collective agreement, firstly by its arrangement with the Melville Inn and, secondly, by its arrangement with the Wayside Inn at Watrous. It cites violations of article 35.1, which is the prohibition against contracting out, as well as articles 35.2, 35.3, 35.4 and 35.5 which relate to the obligation of disclosure to the Union of any proposed contracting out, with the opportunity for the Union to make a "business case" to have the work in question performed by its members. The Union also maintains that the Company has failed to honour what it argues is the right of its members at Watrous and Rivers to move with their work to Melville, pursuant to the transfer of work provisions of article 14 which provides as follows:

> **14.1** When through an unusual development it become necessary to transfer work from a group to another seniority group, not more that a sufficient number of employees to perform such work shall, in seniority order be given the opportunity to transfer, carrying their seniority rights with them. The proper officer of the Company and the designated National Representative of the Union shall cooperate to determine the number of employees who shall transfer.

The Company denies that there has been any contracting out of bargaining unit work, in the circumstances disclosed. Alternatively, it maintains that if it can be said to have been contracting out of bargaining unit work at Watrous, the circumstances would fall within the exception to the prohibition to contracting out found in article 35.1(d) which provides that contracting out is permitted:

> "where the nature or volume of work is such that it does not justify the capital or operating expenditure involved;"

Article 35.1 of the collective agreement reads as follows:

> **35.1** Effective February 3, 1988, work presently and normally performed by employees who are subject to the provisions of this collective agreement will not be contracted out except:

(a) when technical or managerial skills are not available from within the Railway; or

(b) where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees; or

(c) when essential equipment or facilities are not available and cannot be made available at the time and place required (a) from Railway owned property, or (b) which may be bona fide leased from other sources at a reasonable cost without the operator; or

(d) where the nature or volume of work is such that it does not justify the capital or operating expenditure involved; or

(e) the required time of completion of the work cannot be met with the skills, personnel or equipment available on the property; or

(f) where the nature or volume of the work is such that undesirable fluctuations in employment would automatically result.

The conditions set forth above will not apply in emergencies, to items normally obtained from manufacturers or suppliers nor to the performance of warranty work.

The Union draws the Arbitrator's attention to an award issued by Arbitrator Weatherill in a grievance between **Canadian Pacific Limited and the Canadian Council of Railway Shopcraft Employees and Allied Workers**, referred to as **SHP-156**, dated July 10, 1984. In that case the Union grieved the contracting out of four bunkhouse attendant positions at the locations of Brandon, Broadview and Swift Current. The facts related disclose that the Company merely contracted out the maintenance of company owned bunkhouses at each of those locations invoking, in part, the exception to the prohibition against contracting out whereby the nature or volume of the work was allegedly such that it did not justify the capital or operating expenditure involved. The Arbitrator rejected that contention on the facts of the cases then before him. At pp 2-3 the following comments appear:

> There is no doubt that the work performed by the incumbent Bunkhouse Attendants at the locations in question was work "presently and normally performed by employees" within the meaning of the letter of understanding. This is so notwithstanding that at other locations the company has contracted-out similar work apparently without objection being taken by the bargaining agent involved. The union in the instant case is entitled to rely on the provisions of the collective agreement, and there is no suggestion of any circumstances which would estop it from doing so.
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> The work involved is that of changing bed linen, making beds, sweeping and washing floors, fixtures, walls and windows, emptying garbage, replenishing paper supplies, mowing lawns and shovelling snow. In addition the Bunkhouse Attendants may be available to perform some other functions relating to railway operation, and it appears that they may do so to some extent.
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> There can be no doubt that the work in question is of a sort which cannot be contracted out unless it comes within one or more of the exceptions set out in the letter of understanding. The employees concerned were adversely affected, and it is not suggested that the union was not entitled to grieve on their behalf pursuant to the provisions of the letter of understanding set out above.
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> It is the company's position that the matter comes within exception number (4), in that the nature or volume of work is such that it does not justify the capital or operating expenditure involved. There is no question of any significant capital expenditure being required. The company simply determined, no doubt correctly, that it could have essentially the same work performed at considerably less cost if it replaced its own employees by outside contractors. It may be that the contractors would be in a position to take advantage of any efficiencies arising out of their servicing a broader market, or it may be that their wage scales were different. In any event, there is no doubt the company could save money by contracting-out this work. The question is whether or not, by reason of that, the company has brought itself within exception (4) to the prohibition against contracting-out.

In allowing the grievance, the arbitrator noted the following conclusion at p.4:

> In the instant case, the "nature or volume" of the work at the locations in question would appear to have justified the operational expenditure involved for many years. There were no new or special considerations involved beyond the realization that persons other than the company's own employees could be arranged for to do the work more cheaply. Such is not, in my view, a case coming within the contemplation of exception (4) to the general prohibition of contracting-out set out in the letter of understanding.

The first question to be addressed in the case at hand is whether it can be said that the maintenance of facilities to house the Company's train crews at Melville, is "… work presently and normally performed by employees who are subject to the provisions of this collective agreement". The Arbitrator has some difficulty in seeing how it can be so described. It is not disputed that the Company has recourse to both bunkhouses and hotel and motel accommodations at various locations across its system to accommodate running crews at away-from-home terminals. For many years crews have been required to lay over at Melville, and have always been housed in hotel or motel accommodations. For as long as can be recalled the Company has consistently contracted out the lodging of its employees at Melville, Saskatchewan, and has never operated a bunkhouse facility at that location. The Arbitrator fails to see how, in that particular circumstance, the Union can assert that any work in relation to the lodging of running crews in Melville can fairly be said to be work presently and normally performed by employees of the bargaining unit. The evidence is squarely to the contrary, as no such work has ever been performed by the Union's members at Melville.

The Arbitrator appreciates that the Union's grievance in respect of the Melville housing arrangement is predicated on a shift of a certain amount of work in relation to lodging from Rivers and Watrous to Melville. While it is true that in some circumstances the reorganizing of work from one location to another, coupled with contracting out, may be found to be in violation of the contracting out provisions, each case must fall to be determined on its own particular facts. In the case at hand there is a long-standing practice of housing the Company's train crews at Melville in hotel or motel accommodations. The decision to implement the extended runs pursuant to the agreement made with the CCROU in late 1995 had the incidental effect of substantially increasing the number of crews required to be housed in Melville as an away-from-home terminal. In that situation, which I am satisfied is merely the expansion of a pre-existing method of doing business at that location, it cannot fairly be said that the Union has lost work at Melville presently and normally performed by its members.

The Company brings to the Arbitrator's attention a substantial number of other bunkhouse closures occasioned by the implementation of extended runs. For example, bunkhouses were closed and either sold or left vacant at McBride, Endako, Terrace, Wainwright, Rainy River and Atikokan. In all cases the crews previously housed at those locations are now lodged in hotels or motels whose locations are more convenient to the new away-from-home terminals, apparently without grievance.

What the evidence discloses is that the Company has for many years handled the accommodation of its running crews through a combination of means across its system, including both bunkhouses and private hotels and motels, depending on the location and circumstances. It has never operated a bunkhouse at Melville. While the impact of the extended runs may substantially increase the number of train crews now lodged at Melville, the Union cannot claim that it ever performed work in relation to the lodging of employees at that location. Consequently, I am satisfied that there has been no violation of the contracting out prohibition found in article 35.1 as regards the lodging of employees at the Melville Inn.

In the Arbitrator's view the same cannot be said of the situation at Watrous. It is not disputed that for many years the Company operated a substantial bunkhouse at that location, most recently to accommodate train crews home-terminalled at Melville and Biggar at their turnaround point. It is obvious that over the years the bunkhouse at Watrous has declined in importance. It appears that in a by-gone era it had need of a total complement of seventy-two bedrooms. Prior to the implementation of the extended runs, its use had declined to the utilization of only twenty bedrooms. Finally, following the implementation of the extended runs, it appears that only ten rooms per night, on average, are utilized at Watrous, that being the rooms presently booked at the Wayside Inn.

As a first proposition, it must be acknowledged that the operation of lodging facilities at Watrous was at all times work presently and normally performed by the bargaining unit employees, within the meaning of article 35.1 of the collective agreement. I must conclude that that work was contracted out by the Company in the circumstances disclosed. The issue then becomes whether the Company's action can be justified on the basis of sub-paragraph (d)

of article 35.1, namely that the nature and volume of work at Watrous simply does not justify the capital or operating expenditure of maintaining its bunkhouse at that location. In approaching that question the Arbitrator accepts the principles reflected in the decision of Arbitrator Weatherill in **SHP-156**. The fact that the Company might be able to find cheaper accommodation in a local motel, on a contract basis, than would be the case by maintaining its bunkhouse operation does not, of itself, bring the situation within the ambit of the exception articulated in sub-paragraph (d) of article 35.1.

On a close examination of the facts, however, the Arbitrator is compelled to conclude that the situation in the case at hand is substantially different from that which was before Arbitrator Weatherill. As can be noted from the passages quoted above, the learned arbitrator in that case found that there was no operative change in the situation of the bunkhouses which he was called upon to examine. As he put it: "There were no new or special considerations involved beyond the realization that persons other than the company's own employees could be arranged for to do the work more cheaply." In the case of the bunkhouse at Watrous there is more to consider. At that location the Company found itself obligated to maintain, on a year round basis, a seventy-two room bunkhouse facility which, even before the changes implemented, had declined to the point where it was being used at between twenty-five and thirty per cent of its capacity. That, it seems, the Company had been prepared to tolerate for some years. However, with the still greater reduction in crews laying over in Watrous, as a result of the implementation of extended runs, the utilization of the bunkhouse at that location would have declined still further, to approximately fourteen per cent of capacity.

The Company has tabled figures before the Arbitrator which establish, beyond serious discussion, that substantial capital and operating costs, calculated on an annual basis, attached to the continued operation of the bunkhouse at Watrous. It estimates that the costs associated with maintaining the bunkhouses at both Watrous and Rivers exceeded $500,000.00 per year. It compares that figure with the cost of $135,000.00 per year to house its crews at the Wayside Inn, in Watrous, pursuant to the two-year contract negotiated.

Needless to say, a board of arbitration must exercise great caution in considering a submission by an employer that a particular body of work, previously performed by bargaining unit members, is no longer justified given the nature and volume of the work involved, and the related capital or operating expenditures. While no general rules can be established for the purposes of the analysis which attaches to such a claim, I am satisfied that in the instant case the Company's position is made out, with respect to the application of the exception found within article 35.1(d). To find otherwise would, in my view, be tantamount to condemning the Company unreasonably to continuing to operate a bunkhouse which would largely be a ghost facility, incurring extensive capital and operating expenditures which bear little or no practical relationship to the utilization of the facility's capacity, at a level of less than fifteen per cent. This is truly a case where the Company has demonstrated, in my view compellingly, a significant change of circumstances whereby the diminished number of crews laying over at Watrous, and the work associated with lodging them, does not justify the capital or operating expenditure which would attach to maintaining a seventy-two room bunkhouse facility any longer at that location.

For the above reasons the Arbitrator is satisfied that the Company was entitled to contract out the work in relation to the lodging of train crews at Watrous, Saskatchewan, and that no violation of article 35.1 is disclosed in the circumstances. Nor can I find that there has been any violation of the transfer provisions of article 14 of the collective agreement, in relation to the increase in the housing of train crews at the Melville Inn. That provision is intended to deal with the transfer of certain work from one seniority group to another. The case at hand simply does not involve that kind of transfer, and the article can have no application.

The Arbitrator must now consider the submission of the Union with respect to the alleged violation of article 35.2. At first blush it would seem that the Union's case for a failure on the part of the Company to provide disclosure and an opportunity to the Union to make a business case as contemplated within that article has some merit. Upon a close examination of the facts, however, that perception is not sustained. It is not disputed that the parties met and attempted to negotiate an agreement in relation to the article 8 notice which involved the closure of a number of bunkhouses. Although no agreement was reached in relation to the Watrous and Rivers bunkhouses, it appears to the Arbitrator that the Union had every opportunity at that point to assert its rights under article 35.2. However, as the record reflects, there was no attempt on the part of the Union to argue the issue of contracting out or otherwise attempt to dissuade the Company from the course of action it was pursuing. It may be noted, as stressed by the Company, that the issues at those two locations were essentially no different from the contemporaneous closing of a

number of other bunkhouses, referred to above, with train crews being transferred to lodging in hotels in motels, without apparent objection from the Union. On the whole, while it may be technically argued that the Company did not follow the formal process of notice contemplated within article 35, the course of conduct pursued by the Union in the article 8 negotiations was tantamount to a waiver of those provisions, in the circumstances.

For all of the foregoing reasons the grievance must be dismissed.

June 20, 1997

(signed) MICHEL G. PICHER
ARBITRATOR