

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2875

Heard in Montreal, Thursday, 10 July 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE – BROTHERHOOD:

Appeal of crushed rock being hauled by the contracting firm of Cambrian Excavators.

BROTHERHOOD'S STATEMENT OF ISSUE:

On both the 7th and 14th of October, 1993, the Company utilized a contractor to haul crushed rock from Symington Yard to Pine Falls.

It is the contention of the Brotherhood that the Company is in violation of article 33 of Agreement 10.1 and all other applicable rules by utilizing a contractor to perform this work.

The work in question is normally and historically performed with a Company truck utilizing a BMW driver.

As well, the work in question was not emergency work but was simply planned work to provide gravel for crossing rehabilitation which in the past has been performed by BMW employees.

The Brotherhood has therefore requested reimbursement for the senior laid-off employee.

The Company has denied the Brotherhood's contention and declined the Brotherhood's request.

DISPUTE – COMPANY:

The alleged violation of article 33.1 of collective agreement 10.1 when the Company contracted out the work involving the hauling of crushed rock from Symington Yard to Pine Falls, to Cambrian Excavators on October 7 and 14, 1993.

COMPANY'S STATEMENT OF ISSUE:

On both the 7th and 14th of October 1993, the Company utilized a contractor to haul crushed rock from Symington Yard to Pine Falls.

The Brotherhood contends: 1.) The Company is in violation of article 33 of agreement 10.1 and all other applicable rules by utilizing a contractor to perform this work. 2.) The work in question is normally and historically performed with a Company truck utilizing a BMW driver. 3.) The work in question was not emergency work but was simply planned work to provide gravel for crossing rehabilitation which in the past has been performed by BMW employees.

The Brotherhood has therefore requested reimbursement for the senior laid-off employee.

The Company has denied the Brotherhood's contention and declined the Brotherhood's request.

FOR THE BROTHERHOOD:

(SGD.) G. SCHNEIDER

SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. TORCHIA

FOR: VICE-PRESIDENT, CN WEST

There appeared on behalf of the Company:

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| S. Blackmore | – Labour Relations Officer, Edmonton |
| J. Torchia | – Manager, Labour Relations, Edmonton |
| G. Neave | – B&S Operations, Engineering, Edmonton |

And on behalf of the Brotherhood:

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| D. Brown | – Sr. Counsel, Ottawa |
| R. F. Liberty | – System Federation General Chairman, Winnipeg |
| P. Davidson | – Counsel, Ottawa |
| J. Brar | – General Chairman, Vancouver |
| J. J. Kruk | – Canadian System Federation General Chairman, Ottawa |

AWARD OF THE ARBITRATOR

The Brotherhood objects to the contracting out of the hauling of rock from Symington Yard in Winnipeg to Pine Falls. The material in question was being utilized for certain level crossing repairs at Pine Falls. It is not disputed that Company trucks are utilized, on occasion, for hauling rock for purposes similar to those involved in this case. The Brotherhood's representative draws to the Arbitrator's attention the fact that within the general area of Winnipeg the Company was, at the material time, in possession of a number of trucks, including two double-axle trucks which would have been reasonably suited to the purpose.

In the circumstances of this case I must find that the grievance is made out, on a *prima facie* basis. While the Company could escape the prohibition against contracting out if it could establish, in conformity with article 33.1 of the collective agreement, that the essential equipment or facilities were not available at the time, it has brought forth no meaningful evidence to demonstrate that it could not, in the circumstances, have had reasonable recourse to its own equipment, and its own employees, whether laid off persons or persons who could be assigned on an overtime basis, to complete the work in question. On the whole, therefore, I am satisfied, on the balance of probabilities, that the Company did transgress the limitations in respect of its ability to contract out, as contained in article 33.1 of the collective agreement. As the work in question is work of a type normally and historically performed by bargaining unit employees, and could, as appears from the evidence, have been completed utilizing Company equipment and employees, the exceptions to article 33.1 do not apply in the circumstances.

The grievance is therefore allowed. The Arbitrator declares that the Company violated article 33.1 by not providing the notice contemplated within that provision in respect of the proposed contracting out, declares that the contracting out was in violation of article 33.1 and directs that the employees affected be compensated at appropriate rates for all hours worked. Should the parties be unable to agree on the issue of compensation the matter may be spoken to.

July 16, 1997

(signed) MICHEL G. PICHER
ARBITRATOR