CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2887

Heard in Montreal, Thursday, 11 September 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

EX PARTE

DISPUTE:

The Company's utilization of Mississauga Intermodal Service Centre for the storage of empty intermodal containers.

EX PARTE STATEMENT OF ISSUE:

On 1 November 1996, the Company sub-contracted the storage of empty containers to the Mississauga Intermodal Service Centre.

The Union contends that the Company, in sub-contracting the said bargaining unit work, violated the provisions of article 20 of the supplemental agreement, specifically in that there was a permanent reduction in full-time staff. The Union seeks a declaration to this effect, that work be returned forthwith to the bargaining unit, that any employees affected be made whole, and such other remedy as may be required.

FOR THE UNION:

(SGD.) A. ROSNER
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:

F. O'Neill	– Labour Relations Officer, Toronto
S. Grue	– Manager, Labour Relations, Montreal
A. E. Heft	– Manager, Labour Relations, Toronto
S. MacDougald	– Manager Stretgic Deployment, Montreal
D. Smith	– Director Intermodal Operations, Mississauga
L. J. Podgurny	– Financial Planning Officer, Mississauga

And on behalf of the Union:

A. Rosner	– National Representative, Montreal
R. O'Reilly	– Bargaining Committee, Toronto
M. Allum	– Bargaining Committee, Toronto

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that the Company maintained two intermodal terminals in the Toronto area: the Conport Terminal, at MacMillan Yard, and the Brampton Intermodal Terminal, the two being some twenty-four kilometres apart. The Brampton Intermodal Terminal (BIT) was the larger of the two, handling a substantially higher volume of traffic. Eventually the Company resolved to consolidate the two terminals for administrative and operational purposes. A notice issued to the Union under article 8 of the Employment Security and Income Maintenance Agreement (ESIMA) on August 16, 1995 with respect to the closure of the Conport terminal effective December 16, 1995. The Union was also advised that the Company intended to continue to utilize Conport solely as an empty storage facility which would be utilized for the storage of overflow empty containers from BIT. This, it indicated, would occasion the creation of five positions to handle the storage of empty containers at Conport. Some twelve other employees were to remain at Conport to handle transhipment activities related to the operation of a bond office at that location. Subsequently the parties concluded an agreement pursuant to article 8.4 of the ESIMA. In the result, some thirty-nine positions were transferred from Conport to BIT, the whole occasioning a net reduction of twenty-two positions, achieved largely through the offering of retirement benefit packages pursuant to the ESIMA. Later, in May of 1996 the Company issued a further article 8 notice to the Union to terminate the twelve positions at Conport related to the transhipment activity, in addition to a lead hand clerical position dedicated to that purpose. At the same time the Company indicated that it was contemplating alternatives to the storage of empty containers at the Conport facility, including the possibility of purchasing a property near highway 7 to be utilized for that purpose.

The evidence further indicates that the purchase of the property never materialised. On June 17, 1996 the Company gave the Union notice of its intention to contract out the storage of the empty containers to the Mississauga Intermodal Service Centre. It then took the position that the transfer of the storage work to the private contractor would not result in the reduction of any permanent full-time positions at BIT. The Union grieves the contracting out on the basis of article 20 of the agreement, referred to as the "supplemental agreement", which reads as follows:

> **20.1** The Company may, from time to time, sub-contract work to other parties as required. There shall be no permanent reduction in the number of full time employees as a result of sub-contracting work.
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> **NOTE:** Appendix 2 to this collective agreement will govern the manner in which trucking services may be contracted.

The Company argues that there has been no violation of the foregoing provision, as there was no permanent job loss caused by the contracting out. It submits that its actions are in conformity with the principles articulated in **CROA 2749**, an award of this Office issued in June of 1996 dealing with the contracting out of work at the Montreal CargoFlo facility.

The Company rests its position on the impact of attrition. It notes that during the period of implementation of the contracting out, which, it does not appear disputed, involved the elimination of the five positions described above, there was an overall decrease in staff from 151, as calculated in the month of November, 1996 to a figure of 142 active full-time staff positions, in May of 1997. Stressing that some ten employees either retired, were promoted, resigned or transferred from BIT during the period in question, the Company takes the position that there has, in these circumstances, been no permanent reduction in the number of full-time employees resulting from the sub-contracting of the work. It maintains that in the circumstances it was entitled to contract out the work of the five positions, while not filling vacancies which would have resulted in an equal or greater number of positions, by reason of normal attrition in the work force.

The Union's position is that there has, in the circumstances disclosed, definitely been a permanent reduction in the number of full-time bargaining unit employees, directly attributable to the sub-contracting of the work relating to empty containers previously handled by its members. Its representative argues the ability of the Company to manipulate the complement of part-time and full-time employees, noting that since November of 1995 the complement of part-time employees at BIT has increased from twenty to a count of sixty-seven part-time employees in May of 1996. On the other hand, as noted above, there has been a net decline in full-time positions, part of which the Union

maintains is attributable to the contracting out of the empty container storage work. The Union's representative acknowledges that a number of employees at BIT either retired or were promoted out of the bargaining unit. Estimating the container handling work to be the equivalent of some 10,000 hours per year, relating to five full time positions, the Union argues that the alleviation of the work load occasioned by the contracting out made it operationally feasible for the Company not to replace the full-time employees who left. This, it submits, is in violation of the intention of article 20.1 of the agreement.

The Arbitrator had occasion to consider the intent and scope of the prohibition contained in article 20.1, as noted, in **CROA 2749**. It was there concluded that the Company violated the provision by purporting to contract out certain bargaining unit work in the CargoFlo operations, where the Company proposed to simultaneously reduce the complement of employees by offering early retirement incentives. In the result, the suggestion that individual employees were not negatively impacted was not persuasive, as the proviso for contracting out found within article 20.1 was simply not framed in those terms. In coming to that conclusion the Arbitrator commented as follows:

> The Arbitrator appreciates the legitimacy of the business motivations which underlie the Company's position. As a privatized employer it has every reason to seek to rationalize its operations, minimize its costs and maximize its profitability. It must, however, do those things within the limitations of the law. In this context, the law includes federal and provincial statutes and regulations and, significantly, the private law of contract, in the form of the collective agreement, to which the Company has bound itself. The issue in this case is whether the private law fashioned in article 20.1 of the supplemental collective agreement allows the Company to sub-contract in the circumstances described.
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> After careful consideration of the issue, the Arbitrator is unable to agree with the Company. The parties before the Arbitrator are sophisticated and experienced in collective bargaining. If it had been their intention to limit the Company's ability to sub-contract where, for example, employees could not be laid off by reason of such action, they could easily have formulated language to that effect, such as is commonly found in other collective agreements. The language of article 20.1, however, is different. It does not speak to or address the consequences of contracting out on individual employees. Rather, it prohibits any permanent reduction "in the number of full time employees" by reason of sub-contracting work. That would suggest an undertaking not to disturb the *status quo* as to the number of employees in the bargaining unit by sub-contracting.
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> In the instant case the Arbitrator is not persuaded that the above prohibition is avoided by the Company's proposal to reduce its complement of employees by offering early retirement incentives in numbers equal to the number of employees in the CargoFlo operations, thereby absorbing any remaining CargoFlo employees into Intermodal operations, as part of an overall reduced complement of employees. Very simply, as the result would be a reduction in full time employees, for the Company to do that would be to achieve indirectly that which, by the clear language of article 20.1, it cannot do directly.
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> The foregoing analysis is not to suggest that the Company is without legitimate options. It can, as it has elsewhere, sell its CargoFlo operation outright. Also, it might arguably, in another circumstance, be able to transfer the CargoFlo employees into Intermodal operations, increasing the complement of Intermodal employees, thereby maintaining the number of full time employees, notwithstanding that the CargoFlo operation is contracted out. In the instant case, however, it is pursuing neither of those alternatives. The approach which it proposes clearly will result in a reduction in the number of full time employees who fall under the supplemental collective agreement. That is precisely what the language of article 20.1 of that agreement prohibits.

As the foregoing passage indicates, by the language of article 20.1, which is relatively novel in the railway industry, the parties have agreed that contracting out can occur provided that there is no change in the *status quo* with respect to the number of full-time employees in the bargaining unit. It is notable that the language is not framed in terms of adverse impacts on individual employees. In that regard it is to be contrasted with provisions long-established within the industry relating to contracting out which make certain rights and obligations conditional on contracting out causing an adverse impact on individual employees. For example, article 35 of collective agreement 5.1, between the Company and the Union reads, in part, as follows:

> **35.5** The Company will advise the Union 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 not less than 30 days.

As is implicit from the foregoing provision, if the Company can demonstrate that the contracting out of work has no material or adverse effect on employees, presumably because no employees have lost jobs or job opportunities, it would be under no obligation to give notice of its intention to contract out to the Union. As noted in **CROA 2749**, however, the proviso found within article 20.1 is substantially different. For reasons which they best appreciate, by that language the parties effectively agreed that contracting out cannot result in a reduction in the overall number of full-time employees in the establishment.

During the course of argument the Company's representatives conceded that if the employer's interpretation of this provision is to carry the day it could, in a given situation, for example, contract out the work of a particular shop of some ten employees if, by coincidence, all ten employees left the shop at the same time, whether by retirement, promotion or otherwise. Obviously, the thrust of the Company's position is that attrition, and not contracting out, would occasion the reduction of full-time positions in that circumstance.

The Arbitrator cannot agree. In any large corporate operation attrition of the workforce, by reason of retirements, promotions, extended leaves of absence or death are part of the normal ongoing reality of business. Absent collective agreement provisions to the contrary it is, of course, open to an employer to reduce its operations by opting not to fill vacancies caused by normal attrition. An employer will normally follow that course of action if there is simply no job of work to be performed, or if the reorganization of work permits it to do so, absent any collective agreement provision to the contrary.

The facts presented in the case at hand, however, involve a substantially different scenario. There is no dispute that the work previously performed by bargaining unit employees, involving the storage of empty containers, continues to be performed, albeit by an independent contractor. At the same time, there has been a clear reduction in the number of full-time employees employed at the Brampton intermodal terminal. When close regard is had to the facts, it is clear to the Arbitrator that but for the contracting out of the container work, at least five of the full-time positions which have disappeared would still be filled. In my view the logic is inescapable: if the work in question had not been sub-contracted, the work would have necessitated the maintaining of a corresponding five full-time employees in the complement of operations at BIT. In the result, it is solely the sub-contracting which has caused the Company not to fill five of the positions vacated by reason of attrition. By following that course, no less than in **CROA 2749**, the Company has improperly sought to do indirectly that which it cannot do directly. To conclude otherwise would render the proviso contained within article 20.1 virtually meaningless.

For the foregoing reasons the grievance is allowed. The Arbitrator finds and declares that the Company has violated article 20.1 of the Supplemental Agreement by contracting out the handling of the empty containers in circumstances which did cause a permanent reduction in the number of full-time employees. The Arbitrator further directs that the Company cease and desist from the contracting out in question, and that the work be returned to the bargaining unit, with compensation to be paid to the Union for any lost dues, as well as compensation and benefits to any employees on whose behalf the Union may be able to show a loss of work or work opportunities. Should there be any dispute between the parties with respect to the interpretation or implementation of the remedy herein, the matter may be spoken to.

September 19, 1997

(signed) MICHEL G. PICHER
ARBITRATOR