

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3013

Heard in Montreal, Wednesday, 9 December 1998

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE - BROTHERHOOD:

Claim for all wages at punitive rates for all time CNR contracted out work to Whiting Contractors on CN Track Mobile Unit 4333-15 for A Mechanics K. Henry and R. Tetrault, or the senior qualified available A Mechanic at Transcona Shops.

DISPUTE - COMPANY:

The alleged violation of article 33.1 of collective agreement 10. 1 when the Company contracted out the repairs on Track Mobile 43315 to Whiting Contractors.

BROTHERHOOD'S EX PARTE STATEMENT OF ISSUE:

On Friday, January 24, 1997, Whiting Contractors were retained by Canadian National Railways to perform repairs to CN Track Mobile Unit 433-15.

The Union contends that: (1) The Company is in violation of article 18.6 of agreement 10. 1 in that Mr. K. Henry and Mr. R. Tetrault were unjustly dealt with in that work they were qualified to perform was contracted out to Whiting Contractors. (2) The work to be performed on Mobile Unit 433-15 is work normally performed by members of the BMWE. (3) That members of the BMVVE were available to perform the work. (4) The Company is in violation of article 33.1 of agreement 10. 1.

The Union requests that: the two qualified applicants, Mr. K. Henry and Mr. R. Tetrault, or the senior qualified A Mechanic from the Transcona Work Equipment Shop be compensated at punitive rates of pay for all hours the contractor, Whiting Contractors, worked on CN Track Mobile Unit 433-15. It is further requested that the Company be ordered to cease and desist from violating the

collective agreement.

The Company denies the Union's contentions and declines the Union's requests.

COMPANY'S EX PARTE STATEMENT OF ISSUE:

On 25 and 26 of January 1997, the Company utilized a contractor to repair Track Mobile CN 43315.

The Brotherhood contends in their ex parte statement: (1) The Company is in violation of article 18.6 of agreement 10. 1 in that Mr. K. Henry and Mr. R. Tetrault were unjustly dealt with in that work they were qualified to perform was contracted out to Whiting Contractors. (2) The work to be performed on Mobile Unit 433315 is work normally performed by members of the BMW. (3) That members of the BMW were available to perform the work. (4) The Company is in violation of article 33.1 of agreement 101. (5) The Company denies the Union's contentions and denies the Union's requests.

The Union requests that the two senior applicants, Mr. K. Henry and Mr. R. Tetrault, or the senior qualified A Mechanic from the Transcona Work Equipment Shop be compensated at punitive rates of pay for all hours the contractor, Whiting Contractors, worked on CN Track Mobile 43315. It is further requested that the Company be ordered to cease and desist from violating the collective agreement.

The Company contends that there is no violation of article 33.1 as there was no material or adverse effect on the employees and furthermore it fell within the exceptions contained in items 2 and 5. Additionally, the Company contends that the Brotherhood has added to the initial grievance in their ex parte statement of issue by including: (1) That Messrs. Henry and Tetrault were unjustly dealt with, which the Company maintains is not arbitrable and (2) An additional claim for the senior qualified A Mechanic from Transcona Work Equipment and finally (3) Requesting punitive rates for all hours worked by the contractor, instead of requesting compensation for an equivalent number of hours.

FOR THE BROTHERHOOD:

(SGD.) R. F. LIBERTY

SYSTEM FEDERATION GENERAL CHAIRMAN

CHIEF ENGINEER

FOR THE COMPANY:

(SGD) J. TORCHIA

FOR: ASSISTANT

There appeared on behalf of the Company:

F. Metcalfe - Labour Relations Associate, Engineering Field Operations, Edmonton

S. Michaud - Human Resources Associate, Edmonton

N. Dionne - Manager, Labour Relations, Montreal

And on behalf of the Brotherhood:

R. F. Liberty - System Federation General Chairman, Winnipeg

D. W. Brown - Sr. Counsel, Ottawa
P. Davidson - Counsel, Ottawa

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that the grievors, Mechanics K. Henry and R. Tetrault, were available to perform work which was contracted out. The work, which involved the repair of Track Mobile Unit 43315, which operated in the Transcona Engineering Yard, was contracted out to Whiting Contractors, which performed the work on Saturday and Sunday, January 25 and 26, 1997.

It is not disputed that work of this type is regularly done by bargaining unit employees. In the Arbitrator's view the work in question cannot fairly be characterized as being an emergency, given that the unrepaired equipment apparently sat some eleven days in the yard and shop at Transcona before it was sent to the contractor. Nor can the Arbitrator accept the argument of the Company that sufficient employees and equipment were not available, by reason of the fact that employees in the Work Equipment Shop were themselves overburdened with overtime. There is nothing in the collective agreement which limits the Company's consideration of available employees to a particular department or facility, particularly where another department or facility with available employees is adjacent or nearby.

That was the situation in the case at hand. There is no dispute before me that both Mr. Henry and Mr. Tetrault were fully qualified to perform the work in question, which involved a transmission repair. I am also satisfied that cranes and other equipment were available within the Transcona rail yard, and that arrangements could have been made for Mr. Tetrault and Mr. Henry to perform the work either in the yard, or within the Work Equipment Shop. It appears that the Company operated under the assumption, which the Arbitrator considers to be incorrect, that it need not look beyond the availability of employees in the Work Equipment Shop. The evidence discloses that during the entire week prior to Saturday, January 25 neither of the grievors worked overtime after their regular hours, and would have been available to perform the work at that time, as well as on substantial segments of the weekend.

In the result, I am satisfied that the Company cannot properly invoke the provisions of article 33.1 of collective agreement 10. 1 which allows for contracting out in the following three conditions which it seeks to apply:

Where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees; or

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

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.

For the reasons related, none of the above exceptions has been proved to apply in the case at hand. Nor is the fact that there was no adverse effect on employees pertinent to this dispute as that is a factor which bears only on the failure of the Company to give written notice of its intention to contract out.

The grievance is therefore allowed. The Arbitrator directs that the grievors be compensated, at overtime rates, for the amount of time expended in labour by the contractor.

December 14, 1998

MICHEL G. PICHER
ARBITRATOR