CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3044
Heard in Montreal, Thursday, 15 April 1999
concerning
VIA RAIL CANADA INC.
and
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
EX PARTE

DISPUTE:

Contracting out of Maintenance of Way work on the Alexandria Subdivision.

EX PARTE STATEMENT OF ISSUE:

Commencing on or about I March 1999, VIA Rail Inc. assumed ownership of, and responsibility for the Alexandria Subdivision in Eastern Ontario and Western Quebec. The Alexandria Subdivision was acquired by VIA Rail from the Canadian National Railway Company. The Corporation intends to contract out all of the maintenance of way work an the line to a third party contractor. The Brotherhood objects to this contracting out

The Union contends that: 1) The Corporation's actions are in violation of article 1, article 22.1 and Appendix H of Agreement No. 9. 2) The Corporation has unjustly dealt with the Union involved in accordance with the first paragraph of article 4.1 of agreement no. 9~

The Union requests that the Corporation be ordered to rescind its decision to contract out the maintenance of way work in question, that the BMWE be recognized as the rightful "owners" of this work, that BMWE members alone be utilized to perform the work, that the Corporation be required to fill any and all related positions with new hires if necessary, and that the appropriate bargaining unit members be compensated for all losses (including wages, expenses and seniority) incurred as a result of this matter.

The Corporation denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:
LSGD-) R. A. BOWDEN
SYSTEM FEDERATION GENERAL CHAIRMAN
There appeared on behalf of the Corporation:
E, J. Houlihan - Senior Manager, Labour Relations, Montreal
J. Lafleur - Counsel, Montreal
J. Genest - Labour Relations Officer, Montreal
R- Macdonald - Manager, Planning Montreal
M. Lacombe - Sr. Vice-President, Rail-Term Inc.
And on behalf of the Brotherhood:
P. Davidson - Counsel, Ottawa
R_ A. Bowden - System 'Federation General Chairman, Ottawa

R. ?hilups	- *General* Cbairman, Ottawa
J. Rioux	-Director of 'Education, Ottawa
D. W. Brown	- General Counsel, Ottawa
G. Schneider	- System Federation General Chairman (ret'd), Winnipeg
K. Pride	- Witness
K. Taylor	- Witness

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in dispute. The Corporation has recently purchased a section of main line from the Canadian National Rail-way Company. The line in question, which runs between Coteau, Quebec and Hawthorne, Ontario, near Ottawa, is known as the Alexandria Subdivision. Along with a segment of track from Smiths Falls to Richmond, also near Ottawa, the subdivision in question represents the Corporation's first venture into the ownership of its own main line right of way, road bed and track. While the Corporation has ownership of property surrounding a number of stations as well as yards and maintenance facilities in Canada, the maintenance of which is performed by members of the Brotherhood, the instant grievance involves its first venture in the ownership and maintenance of main line track. The Corporation has contracted out all aspects of the maintenance of the Alexandria Subdivision, commencing March 12, 1999 with an independent contractor, Rail-Term Inc.. The Brotherhood submits that the contracting out is in violation of the provisions of its collective agreement and seeks a declaration to that effect, and such farther remedies as may be appropriate, including the compensation of adversely affected employees.

As a preliminary matter, the Corporation sought an adjournment of the hearing in this matter. It did so by reason of the fact that the Brotherhood is pursuing a parallel application for a declaration in relation to the alleged sale of a business before the Canadian Indus-trial Relations Board (C,I.R.B.). The position of the Corporation, understandably, was that the instant arbitration and the C.I.R.B. hearing could produce inconsistent results. Should the. C.I.R-B. conclude that there has been the sale of a business involving successorship, the Corporation could find itself bound by the terms of the collective agreement between the Brotherhood and CN as members of the Brotherhood performed all maintenance work in relation to the Alexandria Subdivision under the ownership of CN. On the other hand, should the instant grievance succeed, the Corporation would be bound by the determination of this Office that the separate collective agreement between the Corporation and the Brotherhood is the operative document for the purposes of determining the terms and conditions of employment of the employees affected. In light of the possibility of inconsistent results, the Corporation sought an adjournment of the instant grievance pending completion of the application before the C.I.R.B.

During the course of a pre-hearing conference call to deal with the representations of the parties in relation to the requested adjournment, the Brotherhood undertook that should it succeed in the instant grievance

it will not pursue its application before the C.I.R.B. By so doing, in the Arbitrator's view, the Brotherhood has obviated the risk of the parties being met with inconsistent decisions from two separate tribunals. In the circumstances, prejudice to the Corporation in this matter proceeding is avoided. On that basis the Arbitrator ruled that the grievance should proceed, on condition that the undertaking of the Brotherhood be provided in writing, which has since occurred.

By way of background, it is useful to review *the* history 'of the bargaining relationship between the Corporation and the Brotherhood. Since the Corporation's inception it has required a certain number of employees to perform work traditionally associated with the tasks of track maintenance employees. As noted above, such work was generally performed in yards and properties at stations owned and operated by the Corporation at a number of locations in Canada, The Corporation estimates that the bargaining unit workforce so employed numbers approximately ten employees utilized in the Montreal Maintenance Centre, the Toronto Maintenance Centre and W-umipeg Station. The employees fall under collective agreement no. 9 between the Corporation and the Brotherhood. Article 1. 1 of the collective agreement gives recognition to the Brotherhood in the following terms:

> 1.1 The Corporation recognizes the Brotherhood of Maintenance of Way Employees as the sale Bargaining Agent with respect to wages, hours of work, working conditions, and fringe benefits for all classifications of Maintenance of Way employees in VIA Rail Canada Inc.

The collective agreement also contains provisions with respect to contracting out, the terms of which are consistent with such provisions found generally within the railway industry. Article 22 of the collective agreement provides, in part, as follows:

> 22.1 Work presently and normally performed by employees represented by the Brotherhood of Maintenance of Way Employees will not be contracted out except
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> (1) when technical or managerial skills are not available from within the Corporation; or
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> (2) where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees; or
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> (3) when essential equipment or facilities are not available and cannot be made available from the Corporation's property at the time and place required, or
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> (4) where the nature or volume of work is such that it does not justify the capital or operating expenditure involved; or
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> (5) the required time of completion of the work cannot be met with

the skills, personnel or equipment available on the property; or

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

The conditions set forth in Article 22.1 will not apply in emergencies, to items normally obtained from manufacturers or suppliers nor to the performance of warranty work, nor to work performed by Canadian National Railway Company or Canadian Pacific Limited on behalf of VIA Rail Canada Inc.

The issue of contracting out, and of the recognition of the Brotherhood as bargaining agent is further dealt with in an appendix to the collective agreement, Appendix H, which is a letter of understanding issued from the office Mr. C.C. Muggeridge, then Department Director, Labour Relations and Human Resources Services of the Corporation, dated August 16, 1995 which reads as follows:

Gentlemen:

During our contract negotiations, the Brotherhood expressed some concern relative to the wording of Articles 1.2 and 10.1b) of Collective Agreement No. 9. It was the Brotherhood's position that their scope of work extends beyond the maintenance of track,, right of way, buildings and bridges, and includes construction such as renovations, and new track installation such as switches.

It was explained to the Brotherhood that it was the Corporation's desire and intention, to maintain a stable workforce and to avoid employment fluctuations caused by seasonal activities or other cyclical or ad hoc projects. Additionally, the Corporation does not presently own heavy or specialized equipment which could be utilized in such construction or new track installation, It is, however, recognized that members of tile Brotherhood have performed some, or in other instances all, of this type of work while employed at the Canadian National and/or Canadian Pacific Railways.

In recognition that the Brotherhood of Maintenance of Way Employees have performed this type of work in other railways, it is agreed that where such employees are employed by the Corporation, and they are available for such assignments, and that additional manpower and/or specialized equipment are not required, as per the spirit and intent of article 23 (Contracting out of Work), that employees represented by the Brotherhood will be so assigned.

A further concern of the Brotherhood related to the recognition and scope that would be accorded the Brotherhood in the event that VIA Rail Canada Inc. assumed the responsibility for track maintenance between terminals. In this respect the officers of the Corporation agreed that if VIA Rail Canada was to assume the responsibility for

track maintenance between terminals at some time in the future, the Corporation would advise the Brotherhood accordingly.

The purpose of such adyice would be to arrange for meetings, etc., to ensure that Collective Agreement No, 9 contained the Articles, including "Recognition1l) necessary to properly cover such operations.

Yours truly,

(signed) C. C. Muzzeridge
Depm-tment Director,
Labour Relations and Human Resources Services

(emphasis added)

The foregoing letter is a renewal of the terms of an identical letter first signed on November 11, 1987.

At issue in these proceedings is the meaning and import of the *last two paragraphs of* Appendix 1T. The Brotherhood's position is that the letter of August 16, 1995 was given to the Brotherhood in 1987 as a contractual undertaking on the part of the Corporation that should it acquire main line track between terminals the maintenance work in relation to such rights of way, road bed and tack would be performed by members of the Brotherhood's bargaining unit. It submits that the letter contemplates the negotiation of specific terms, including the possibility of classifications of employees, to perform *the work* in question. Most critically, the Brotherhood argues that it was the agreed understanding of the parties at the time that the Corporation would forego what would otherwise be its right to contract out such work at first instance. In support of that position it brought to the hearing negotiators on behalf of both the Brotherhood and the Corporation to give evidence as to the nature of the bargain which was originally struck in 1987.

The representatives of the Corporation submit that the language of Appendix U does not, expressly or implicitly, trump the Corporation's fundamental right to contract out should the exceptions within article 22 be established. Its representative submits that the language of article '12 would manifestly allow the Corporation to contract out the maintenance of road between terminals. Firstly, therefore, the Corporation submits that the work in question is not "presently and normally performed by employees who are members of the bargaining unit. It further stresses that it has no managers or employees knowledgeable in the regular and on-going maintenance of main line track. On that basis it submits that exception number I applies, as it is without any technical or managerial skills to oversee the work. Additionally, it invokes subparagraph 2, arguing that it has no employees, much less qualified employees, available to perform the work. It further argues that the exception of sub-paragraph 3 applies, as it has none of the essential equipment or facilities to perform such work. Citing its own funding constraints, the Corporation further argues that the conditions of sub-paragraph 4, with respect to the capital expenditure

which would be required is equally applicable. It also invokes the exception of subparagraph 5, noting that it is without the skills, personnel or equipment necessary to perform the work in any time frame, and lastly sub-paragraph 6, arguing that the relatively limited length of territory involved would not justify the employment of full-time supervisors and employees, and would result in undue fluctuations in employment.

At the outset it must be said that, in my opinion, if article 22 alone were to apply, it would appear incontrovertible that the Corporation would be in a position which would justify invoking its right to contract out. The *Arbitrator would* be compelled to conclude that exceptions described in sub-paragraphs 1, 2 and 3 would be *satisfied.* The issue that emerges, however, is somewhat different. It involves a determination of whether by the language of Appendix II the parties to the collective agreement grafted an exception onto article 22 *which would, as* the Brotherhood contends, prevent the Corporation from invoking the article in the event that it should undertake the ownership and maintenance of main line between terminals. To that end it is necessary to closely examine the evidence brought by the Brotherhood to support its interpretation that that was the precise intent of the last two paragraphs of Appendix H.

The Brotherhood's System Federation General Chairman, Mr. Ron Bowden, gave evidence of the negotiation of Appendix 11 in 1987, and its subsequent discussion in later rounds of bargaining. According to Mr. Bowden's evidence during negotiations between the Corporation and the Brotherhood, when he was a member of the Brotherhood's bargaining team and the Corporation's chief negotiator was Mr. Keith Pride, the terms of Appendix H were agreed to satisfy the Brotherhood's concern as to the future possibility of VIA Rail becoming -the owner of main line property. The concern of the Brotherhood, as related by Mr. Bowden, was to secure a guarantee that in the event of the purchase of such property the Corporation would give the maintenance of way work to members of the bargaining unit, and that it would not contract out that work, at least upon the initial acquisition of such property.

Mr. Bowden relates his understanding that the last two paragraphs of Appendix H to the collective agreement are specifically intended to give to the Brotherhood the assurance that should the Corporation acquire main line track between terminals the Brotherhood would receive notice of such an acquisition and would thereafter negotiate with the Corporation collective agreement provisions necessary to govern, the terms and conditions of employment of bargaining unit members who would perform the regular maintenance work. Mr. Bowden relates that in the round of negotiations next following the initial insertion of Appendix II into the collective agreement, in 1989, he raised with Mr. Pride his own concern that the language of the two paragraphs might be made more complete or more explicit. Mr. Bowden's evidence, which is not contradicted by Mr. Pride, is that the Corporation's chief negotiator then assured him that his concerns were groundless, and that in the event of the acquisition of

any track between terminals the regular maintenance work, known in the trade as " section work", would become work of the Brotherhood. Mr. Bowden relates that in yet another round of negotiations, in which D&- Ken Taylor was the chief negotiator for the Corporation, in 1994, Mr. Bowden once more raised his concerns as to the language of Appendix H and was again told by Mr. Taylor that he had every assurance that his union was fully protected in respect of work ownership in the event of -the acquisition of main line track by the Corporation.

Both Mr. Pride and NIr. Taylor have since left the service of VIA Rail, After a career of some forty-one years Mi. Pride retired in 1992, to be replaced as chief negotiator with the Shopcraft and the BMWE by Mr. Taylor who, it may be noted, had assisted Mr. Pride in the administration of the Shopcraft and BMWE portfolios. Mr. Taylor, after a thirty-five year career in railroading, ten of which was in the service of the Corporation, left VIA Raii in January of 1996. He was a member of Mr, Pride's bargaining team in 1987 and was the Corporation's chief negotiator with the BMWE in 1994.

Mr. Pride's evidence records that in May of 1986, when it became apparent that the Corporation would become responsible for increasing segments of its operations, some of which had previously been performed by CN and CP, it became necessary to work out a protocol with the Brotherhood in anticipation of the transfer of work and employees from CN to VIA Rail. To that end the parties negotiated a "Recognition Agreement" dated May 22, 1986 which reads, in part as follows:

> 1. It is recognized that it is in the best interests of those concerned to take such practical measures as may be required to contribute to an orderly transfer of certain employees from Canadian National Railways to the Corporation, Therefore, the Corporation agrees to recognize the Brotherhood as the bargaining agent for such employees who were performing work which has traditionally fallen within the scope of the collective agreement with Canadian National Railways known as "Agreement 10.1", including the supplementary agreements thereto.
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> 2. It is further agreed that the collective agreement known as "Agreement 10.1", including the supplementary agreements thereto, will apply to those employees referred to in Item I above. However, before October 1, 1986, either party may give the other written proposals to adapt the collective agreement more closely to VIA's operations. Such proposal may be made in respect of any portion of the Corporation's operation regardless of the date an which the Corporation assumed control of it. Any mutually agreed resolution of such proposals may be given effect prior to the formal expiry date of the collective agreement.

At the hearing Mr. Pride confirmed that the foregoing Recognition Agreement was in furtherance of an understanding that "... all work done

in CN by BMWE forces would be done in VIA by the BMWE." He further elaborated that as the former CN collective agreement contained provisions for classifications of employees which were extraneous to VIA's needs, it became apparent that the parties would need to streamline the CN collective agreement to incorporate terms responsive to their own *specific* needs.

Mr. Pride testified, without contradiction, that he is the author of Appendix II of the collective agreement. He related that the appendix emerged as a means of resolving the interests of both parties. The Brotherhood wanted the assurance that it would have the right to any work previously performed by its members in CN, if such work- was taken over by VIA. According to Mr. Pride the Corporation had no problem with giving to the BMWE any work which would come over from CN, subject to one qualification. He elaborated that VIA had concerns that it not be subjected to overseeing an unstable work force, and for that purpose wished to preserve a certain right to contract out work. For example, he submitted that VIA would not want to be responsible for snow removal, which might involve using a casual or temporary work force for a brief period of time. Similarly the Corporation did not want to assume responsibility for one time construction projects or undertakings, which it also wanted the flexibility to contract out.

By the same token, according to his evidence, it was well understood between the *parties that* the regular maintenance of lines between terminals acquired by VIA in the future would be the work of BMWE members. Mr. Pride was categorical in his understanding of the operation of Appendix II, in conjunction with article 22 of the collective agreement which deals with contracting out. According to his evidence both articles have a certain degree of parallel operation. As he explained, the letter which he authored contemplates that if the Corporation were called upon to build a track, it could contract out such construction work. As he put it " Any one shot deal would be contracted." On the other hand, he states that the parties had no intention that article 22 could be used to circumvent the fundamental obligation in Appendix II whereby regular maintenance work was to be accorded to members of the BMWE. Implicitly, as he noted, that would require VIA to obtain the necessary equipment to do the work. During his evidence in chief Mr. Pride also acknowledged that in a later round of negotiations he did give assurances to the Brotherhood that there was no need to change the language of Appendix II in the event of any future acquisition of main line property, stating that his comment to the Brotherhood was "… if anything comes over you have your recognition," During cross-examination Mr. Pride agreed with the Corporation's representative that Appendix II does not nullify the general application of article 22. He repeated, however, that his understanding of the letter is that it reflects the agreement of the parties that occasional or one time projects such as brush cutting could be contracted out, but that regular maintenance work would go to the BMWE,

The evidence of Mr. Taylor is fully supportive of the testimony of Mr.

Pride and of Mr. Bowden. Mr. Taylor was explicit that the purpose of Appendix H was to guarantee that the BMWE would perform work traditionally performed by their members of any main Line track which might be acquired in the future. Mr. Taylor specifically adverted to a conversation between himself and Mr. Bowden during the course of negotiations in 1994, where it appears that there was some contemplation of the Corporation involving itself in the construction of high speed rail. He relates that he then assured Mr. Bowden that the Corporation would not use the contracting out provisions to circumvent Appendix II According to his understanding, while the contracting out provisions of article 22 would continue to operate within the collective agreement, they could not come to bear until such time as the conditions of Appendix II were satisfied, including the negotiation of terms relating to the performance of the regular maintenance work in question, at the first instance, by members of the Brotherhood. When further pressed on the point, Mr. Taylor confirmed that it was never intended that VIA could invoke article 22 to circumvent the application of Appendix II by contracting out section work.

I turn to consider the merits of the dispute. In doing so the Arbitrator must note the extraordinary circumstance which attends this dispute. Because of a substantial turnover in its own managerial staff, the Corporation is virtually without any managers who were directly involved in the negotiation of the contract language which is here in dispute. Extraordinarily, much of the evidence Of the Brotherhood is through the testimony of two individuals who were chiefly responsible for the negotiation of the collective agreement on behalf of the Corporation, albeit several years ago. In the circumstances I am satisfied that I can properly refer to the extrinsic evidence which has been called. The Arbitrator's ability to have reference to such evidence is justified by what I view as the latent, if not patent, ambiguity which arises in the final two paragraphs of Appendix II. That exercise is, of course, not a matter of simply determining what one individual's understanding of the bargain might have been. Interpretation of collective agreements, particularly collective agreements between large corporations and trade unions administered by a number of officers, does not necessarily resolve itself into drawing the mutual intent of a contractual document from the unilateral understanding or belief as to the document's intent held by one individual Where ambiguity exists, however, the evidence of individual negotiators is admissible as extrinsic evidence and can be accorded significant weight, with due allowance for all other aspects of the evidence, including the text of the document itself.

When the language of Appendix II is examined in light of the evidence of Mr. Pride, I consider it significant that it does appear to reflect the dual nature of the Corporation's concern, coupled with the concern of the Brotherhood, at the *time* the letter was mutually signed. It is clear that the first three paragraphs of the letter expressly and categorically reserve to the Corporation the ability to *contract out* matters such as " construction or new track aistallation7. The paragraphs in question specifically recognize that the Corporation wishes to avoid involving

itself in *the* administration of an unstable work force which might otherwise be caused by activities which are seasonal, cyclical or involve ad hoc projects.

The final two paragraphs of Appendix II are in contrast to the first three. They clearly deal with the very separate subject of regular track maintenance or section work between terminals, In that separate context the Corporation agrees and undertakes that should it acquire such property it would advise the Brotherhood and thereafter negotiate the necessary collective agreement terms to "properly cover such operations." Can it be understood that the Corporation would have, on the one hand adopted such apparently categorical language to indicate that the work in question would be given to the BMWE while, on the other hand, reserving the right to empty the letter of any meaning by simply invoking its pre-existing ability to contract out the work under the terms of article 22, then article 23, of the collective agreement? I think not.

While current conditions may give the Corporation reason to question the wisdom or value of the bargain so made., this Office is compelled to take the collective agreement as it finds it. Bearing in mind that at the time Appendix H was negotiated, both the Corporation and CN were sister crown corporations very much in a hand-in-glove relationship, the evidence of Mr. Pride and Mr. Taylor is fully plausible and credible. The Arbitrator accepts their testimony, as well as the supporting evidence of Mr. Bowden, without reservation. For reasons touched upon in their evidence, it is clear that both the Corporation and the Brotherhood intended in 1987 to enter into an understanding that the Corporation would not, at first instance, contract out the regular track maintenance of main line territory between terminals which it might acquire in the future. As the letter clearly demonstrates, the Corporation reserved to itself the right to contract out one time projects and new construction work, while at the same time acknowledging that regular track maintenance would not be contracted out, and would be assigned to the Brotherhood. It did so notwithstanding the provisions of what was then article 23 of the collective agreement governing contracting out. I am, therefore, satisfied that the parties mutually intended to override the contracting out provisions, to that extent. The fact that they may not have contemplated subsequent changes in the corporate ownership and structure of CN, or later governmental budgetary constraints visited -upon the Corporation, is neither here nor there for the purposes of understanding the contractual bargain then struck between them, and subsequently renewed without change to the present. Indeed, if it were necessary to do so, I would be inclined to conclude that the af1irmative comments made by Mr. Taylor during subsequent rounds of 'bargaining, as late as 1994, would sustain the operation of the doctrine of estoppel against the Corporation, even if it should be found that the strict language of Appendix II would not support the interpretation argued by the Brotherhood.

In summary, the extrinsic evidence adduced before the Arbitrator, coupled with the text of Appendix H itself, confirms that the parties mutually

intended in 1987 that the Corporation would not invoke its right to contract out in the event that it acquired track between terminals in the future,, with respect to the regular maintenance of such track and roadway. That agreement was renewed without change to the present time, and stands as an exception to the application of article 22 of the collective agreement. In the Arbitrator's view, the final two paragraphs of Appendix H make little sense if they were not intended to override the contracting out provisions. If the Corporation took over maintenance of main line track - work for which it had never previously been responsible - clearly it would have no equipment, no employees, no managers, and could obviously invoke article 22 to contract out. In light of the provisions of article 22, these paragraphs are only necessary if they are intended to override the contracting out provisions, and accord "recognition" that the work is to be bargaining unit work of the BMWE. As a result, the Arbitrator is satisfied that the grievance must succeed.

The Arbitrator finds and declares that the contracting out of the maintenance of way work on the Alexandria Subdivision is contrary to the collective agreement, more specifically Appendix H thereof. The Corporation is compelled to give notice to the Brotherhood with respect to the territory in question, to meet and to negotiate provisions of the collective agreement governing the terms and conditions of employment of persons to be assigned to the regular maintenance of the subdivision. For the purposes of clarity, all regular maintenance work to be performed on the subdivision must be performed by members of the Brotherhood's bargaining unit. Nothing in this award, however, should be interpreted as preventing the Corporation from contracting out managerial supervision, in whole or in part, nor from contracting out in respect of leasing or otherwise obtaining the equipment to be utilized. The Arbitrator further directs that any employees in respect of whom it may be established that there has been a loss of wages or benefits flowing from the Corporation's actions shall be compensated appropriately. The Arbitrator retains jurisdiction in respect of the issue of compensation, as well as any other aspect of the interpretation or implementation of this award.

April 28, 1999

MIHEL G. PICHER
ARBITRATOR