CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3109
Heard in Calgary, Tuesday May 9, 2000
concerning
CANADIAN PACIFIC RAILWAY COMPANY
and
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
EX PARTE

DISPUTE:

Claim on behalf of Messrs. T. Crain, B. Kaiser, C. Vuong and S. Pangia.

EX PARTE STATEMENT OF ISSUE:

On August 20, 1997, the Brotherhood learned that the Company intended to contract out the construction of a drainage system for the Cirque Lake on Cathedral Mountain in Alberta. During construction, it would be necessary to drain the lake completely arid keep it free of water for the duration of construction. The work specifically in question, i.e. the draining of the lake, is, by agreement of the parties, work presently and normally performed by the Compan3es Calgary R&B forces. The grievors are members of these B&B forces-

The Brotherhood contends that the Company's contracting out of the work in question is in violation of section 31.1, 8.1 *and 9.1 of* agreement no. 41.

The Brotherhood requests that the Company be ordered to cease contracting out the work in question and to assign the work to the grievors. If this is no longer possible, the Brotherhood requests that the grievors be compensated in an amount equal to all hours worked, including overtime, by the contractor.

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

FOR THE BROTHERHOOD: J. KRUK - SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

E. J. Maclsaac	- Labour Relations Officer, Calgary
R. Andrews	- Manager, Labour Relations, Calgary
D. Freeborn	- Labour Relations Officer, Calgary
G. Hughes	- Manager, CPR

And on behalf of the Brotherhood:

D. W. Brown	- General Counsel, Ottawa
P. Davidson	- Counsel, Ottawa
J. J. Kxuk	- System Fed,(-ration General Chairman, Ottawa
Win. Brehl	- General Chairman, Pacific Region, Revelstoke
T. Crain	- Grievor
B. Kaiser	- Grievor

AWARD OF THE ARBITRATOR

The facts pertinent to this grievance are not in dispute. For years the Company has been required to utilize the services of bargaining unit employees to regulate the level of Cirque Lake, situated on top of Cathedral Mountain, in Alberta. The reduction of the

level of the lake by pumping, generally conducted *in the* period of June to September, has been necessary as a means to protect a segment of the Company's Laggan Subdivision from water erosion. Over the years that project involved considerable cost, as the employees who did the pumping were taken to and from the lake daily by helicopter. It is not disputed that the pumping which was performed by the bargaining unit employees was limited to the period of their tour of duty and did not usually extend to fully draining the lake, but rather to maintaining it at a safe level, although it was fully drained on occasion.

In the summer of 1997 the Company decided to undertake a construction project to install a permanent and self-regulating draining system for Cirque Lake. To that end the Company retained the services of a construction contractor. It is not disputed that the expertise of the contractor was not available *within* the ranks of the bargaining unit, and the Brotherhood takes no objection to that aspect of the contracting out. To facilitate the construction work, however, it was necessary to fully drain the lake for the entire period of the project, scheduled in September and October of 1997. To that end it was necessary to maintain pumping operations on the mountain top twenty-four hours a day, seven days a week. Although initially the Company considered utilizing bargaining unit employees to perform the work in question, it determined that it would be inappropriate and inefficient to do so from the standpoint of productivity. Rather, it concluded that it could utilize the services of the contractor-s employees, who were already on site, to maintain the pumping system on a twenty-four hours a day basis, as part of the construction project, at a cost which it characterizes as roughly one-third of what it would have cost to utilize bargaining unit employees to perform the same work.

The Brotherhood submits that in the circumstances the Company has violated the prohibition against contracting out found in section 31.1 of the collective agreement. That provision reads as follows:

> 31.1 Work presently and normally performed by employees who are subject to the provisions of this wage *agreement will not* be contracted out except:
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> (i) when technical or managerial skills are not available from within the Railway; or
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> (ii) where sufficient employees, qualified to perform the work are not available from the active or laid-off employees, and such work cannot be delayed until such employees are available; or
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> (iii) when essential equipment or facilities are not available and cannot be made available at the time and place required (a) form the Railway owned property, or (b) which may be bona fide leased from other sources at a reasonable cost without the operator; or
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> (iv) 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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> (V) the required time of completion of the work cannot be met with the skills, personnel or equipment available an the property; or
>
> (vi) where the nature or volume of the work is such that undesirable fluctuations in employment would automatically result.

The Brotherhood submits that the work in question should have been assigned to the employees who were already involved in the pumping operations at Cirque Lake in the

summer of 1997, with recourse to overtime if necessary, as a means of performing the work which it characterizes as presently and normally performed by bargaining unit employees.

The Company argues that it was entitled to contract out the work in the circumstances by reason of the application of exceptions (ii) and (iv) of section 31.1 of the collective agreement. It notes that the grievors were in fact given work assignments elsewhere, assignments which involved overtime work and on which their services were clearly required. Stressing that there were no laidoff employees in the Calgary B&B department, and only fifteen employees who might be given the assignment, it submits that it was excused from the obligation against contracting out by reason of the insufficient availability of employees qualified to perform the work.

Secondly, the Company submits that the provisions of sub-paragraph (iv) apply. Its representatives stress that the draining of the lake was not for the normal purpose of simply protecting the adjacent road bed but, rather, as part of a one-time construction project. In the Company's submission the excessive cost of utilizing bargaining unit employees, at arguably three times the rate which would be incurred by utilizing the contractor's employees who were already on site, constituted an operating expenditure in relation to the *project* which was unjustified in the circumstances.

After careful consideration the Arbitrator is compelled to agree, in part, with the position of the Company. Firstly, I am not persuaded that its argument based on the exception of paragraph (ii) is persuasive. As to the availability of employees, it is common ground that the very individuals who were engaged in maintaining the pumping operations at Cirque Lake remained on that work until the commencement of the contractor’s operations. Indeed, some of the same employees were utilized to instruct the contractor's workers in the proper operation of the pumping equipment. While there may be no doubt that the Company was able to productively use *the grievor's in* other parts of its maintenance operations, the Arbitrator finds it difficult to conclude, on the balance of probabilities, that it could not, for the temporary period of the project in question, have continued to assign the pumping work to the very employees who had been doing it over the course of the same season.

In my view, however, the operation of paragraph (iv) is determinative of the merits of the instant case. Clearly, if the Company had attempted to contract out the normal on-going pumping of Cirque Lake to protect its roadbed, the provisions of section 31.1 would have prevented it from doing so. Maintaining the lake at reduced levels to *safeguard* the Laggan Subdivision from erosion was clearly work presently and normally performed by bargaining unit employees, as contemplated by section 31.1. However, what transpired at the end of the summer of 1997 was something different, a one-time construction project which exceptionally required twenty-four hour, seven day a week Pumping to maintain the lake at a fully drained level, a condition essential to the construction of the permanent drainage system. Arbitration awards of this Office have previously noted that sub-paragraph (iv) has application in the case of discrete or one-time capital projects, where it can be shown that the nature of the work or the amount of work to be performed does not reasonably justify the operating expenditures which would be incurred by utilizing bargaining unit employees. In that case contracting out is permitted, even though the work might otherwise be work presently and normally performed by bargaining unit employees, as exceptionally contemplated in sub-paragraph (iv). (See ***CROA 713, 1596 and 1966.)***

When the substance of -what transpired in the late summer of 1997 is examined, it is clear that the Company became involved in a- project which differed significantly from the previous ongoing pumping operations maintained in the summer months for the

protection of its adjacent road bed. The purpose of the project in the late summer and fall of 1997'was to permanently install an automatic drainage system, precisely for the purpose of eliminating the need to maintain ongoing pumping operations during *the* summer season. Exceptionally, an essential aspect of the construction project was that the lake must be maintained in a fully drained state, twenty-four hours a day, seven days a week, for the duration of the construction work, which otherwise could not be accomplished. In that context, in my view, the expenditure incurred was in the nature of a one-time expense intrinsic to the accomplishment of a discrete, capital improvement project. It was, therefore, appropriate for the Company to consider whether -utilizing bargaining unit employees would involve a capital or operating expenditure *which would* not be justified in the circumstances. While it is obvious that such a determination can only be made on a case by case basis, the Arbitrator is satisfied that it was not unreasonable for the Company to conclude that to utilize bargaining unit employees, on a twenty-four hour a day, seven days a week basis, with the associated burden of transportation costs and overtime payments, was not reasonably *justified as* compared to having the on-site pumping work done by the employees of the con-tractor who were, in any event, working at that location.

While it is undeniable that the nature of the work, i.e. draining Cirque Lake, was indistinguishable from the work performed by the bargaining unit employees in maintaining the level of the lake over the previous years, it was, in its essence, a different kind of work, being intrinsic to the construction project undertaken by the Company and requiring permanent twenty-four hour a day pumping operations. This was, I am satisfied, an undertaking of the kind contemplated in sub-paragraph (iv) of section 31A of the collective agreement, and it was open to the Company to consider the financial viability and justification of assigning the work to bargaining unit employees. Given the dramatic difference in cost which it would have incurred for the relatively short term of the project, the Company was within its rights under sub-paragraph (iv) to conclude that the nature and volume of the work did not justify the expenditure *which* would have been involved by utilizing bargaining unit employees on a twenty-four hour a day, seven day a week basis- I am satisfied that when the labour costs, coupled with the additional cost of daily helicopter transportation for the employees who would be involved, are compared to the substantially lower costs *associated with* utilizing the construction contractor's employees, the Company *has shown that* the additional expense was not justified, having regard to the nature and volume of the work involved.

It should perhaps be stressed that this award is not based on the *notion that contracting out* can be resorted to merely to save costs to the Company. A *critical and* distinguishing factor in the instant case is that *the work in* question was associated with a one-time capital project falling within the exception of sub-paragraph (iv) of section 31.1 of the collective agreement.

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

May 12, 2000

MCHEL G. PICHER
ARBITRATOR