CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3197

Heard in Calgary, Thursday, May 10, 2001

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

DISPUTE:
The contracting out of bunkhouse at Jasper, B.C.

UNION'S STATEMENT OF ISSUE:
In 1999, the Company constructed a new facility in Jasper for the purpose (among others) of housing away-from-home train crews from Edmonton and Kamloops. From that date, the work normally performed at such facilities by bunkhouse attendants has been performed by an outside contractor.

On September 13, 1999, the Union filed a grievance contending that this practice constituted a violation of the provisions of article 35.1 of the collective agreement, and contending also that the Company was in violation of the notice and disclosure provisions of articles 35.2, 35.3 and 35.4, as well as Appendix XI. The Company has not replied to date.

The Union requests a declaration to the same effect as the contentions made in its original grievance, an order that the work in question be forthwith returned to the bargaining unit, and an order that all employees who suffered any losses in this connection, including lost overtime opportunities, be made whole.

The Company denies the Union's contentions.

FOR THE UNION:
(SGD.) A. ROSNER
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:
S. Blackmore - Labour Relations Associate, Edmonton
D. S. Fisher - Director, Labour Relations, Montreal
S. Michaud - Human Resources Business Partner, Vancouver
R.Reny - Human Resources Associate, Vancouver
S. Ziemer - Human Resources Associate
And on behalf of the Union:
A. Rosner - National Representative, Montreal

B. Kennedy- Regional Representative, Edmonton
S. Tash -

PRELIMINARY AWARD OF THE ARBITRATOR

This matter came on for hearing solely for the purpose of dealing with two preliminary objections to arbitrability raised by the Company. The grievance concerns the Union's claim that the Company has violated article 35 of the collective agreement by contracting out the work of bunkhouse attendants at its new bunkhouse facility in Jasper.

The first objection taken by the Company relates to the timeliness of the Union's filing of its separate statement of issue with this Office. It is common ground that the Union filed its notice with the Company at or about 16:50 hours on April 4, 2001. In accordance with CROA rules, it was to await a period of forty-eight hours before then filing the same statement with this Office. In fact, the statement was filed with the CROA at 11:25 hours on April 6, 2001, some four hours in advance of the requisite forty-eight hour period contemplated in paragraph 8 of the memorandum of agreement establishing the Canadian Railway Office of Arbitration.

The preliminary objection so presented is identical to the preliminary objection argued in CROA 3196. For all of the reasons related in that award, the Arbitrator rejects the first preliminary objection argued by the Company.

The second ground of objection raised by the employer concerns the alleged failure to comply with article 35.6 of collective agreement 5.1 which provides as follows:

35.6 Where the Union contends that the Company has contracted out work contrary to the provisions of this Article, the Union may progress a grievance commencing at Step 3 of the grievance procedure. The Union officer shall submit the facts on which the Union relies to support its contention. Any such grievance must be submitted within 30 days form the alleged non-compliance.

The Company takes the position that the Union knew, or reasonably should have known, of the contracting out of the work in question as of July of 1998. It stresses that the local chairman of the Union was located in the same building as the bunkhouse which was then operative, with the contracting out in effect. Its representative maintains that the Union failed to respect the requirements of article 35.6 by first raising the grievance formally at a joint conference in July of 2000.

There is an apparent dispute with respect to the facts which emerges between the parties. The Union maintains that it forwarded a grievance to the attention of the Company's labour relations

officer on or about September 14, 1999. The Company denies having received the grievance in question, and it is not clear whether it went astray by the error or inadvertence of either party. In any event, a subsequent copy of the grievance was provided to the employer on July 14, 2000. The Company nevertheless maintains that even if the grievance had been received, as the Union contends, in September of 1999. It still would be out of time under the requirements of article 35. On that basis it submits that the progressing of the grievance does not conform to clause 7 of the memorandum of agreement establishing the CROA , which reads as follows:

7. No dispute of the nature set forth in Section (A) of Clause 4 may be referred to the Arbitrator until it has first been processed through the last step of the Grievance Procedure provided for in the applicable collective agreement. Failing final disposition under the said procedure a request for arbitration may be made but only in the manner and within the period provided for that purpose in the applicable collective agreement in effect from time to time or, if no such period is fixed in the applicable collective agreement in respect to disputes of the nature set forth in Section (A) of Clause 4, within the period of 60 days from the date decision was rendered in the last step of the Grievance Procedure.

No dispute of the nature set forth in Section (B) of Clause 4 may be referred to the Arbitrator until it has first been processed through such prior steps as are specified in the applicable collective agreement.

In support of its position the Company cites a number of prior decisions of this Office, including CROA 871, in which the arbitrator commented, in part, as follows:

As is said in Case No. 837 (between the same parties, and involving the same Collective Agreement), the provisions of this agreement with respect to time limits are mandatory and not directory. Under the Memorandum establishing the Canadian Railway Office of Arbitration, the Arbitrator's jurisdiction is conditioned upon the submission of the dispute in strict compliance with its terms, which prohibit the Arbitrator from modifying or disregarding the terms of a Collective Agreement. The Canada Labour Code confers no exceptional powers on an Arbitrator in this regard.

The Union's representative submits that there is no basis to sustain the objection advanced by the Company. Firstly, he stresses that the grievance was filed by way of the fax transmittal of the grievance on September 14, 1999. In support of that contention he draws to the Arbitrator's attention a copy of the fax transmittal confirmation report which indicates that the message was sent successfully between 09:00 and 09:11 hours on

September 14, 1999 to the fax number of the Company's labour relations office in Edmonton.

The grievance was next referred to in correspondence from the successor regional representative of the Union, Mr. Barry Kennedy, to Labour Relations Associate Susan Blackmore on July 7, 2000 in contemplation of a joint conference to deal with a number of grievances, including CAW file no. J001-ADM-99, relating to the contracting out of bunkhouse duties in Jasper.

The record indicates that the Company communicated to Mr. Kennedy some uncertainty as to the status of the grievance in question, as it had no file on the matter. Further information was provided by Mr. Kennedy. In a letter dated July 28, 2000 Mr. Kennedy indicated to Ms. Blackmore that his understanding of the conclusion of the joint conference was, in respect to the grievance in question: "Company to review matter and respond at step 3 pursuant to article 24.5". It does not appear disputed that the Company never replied to the Union's grievance, whether to object with respect to timeliness or otherwise, prior to the matter being filed by the Union with this Office. On April 19, 2001, after the submission of the Union's grievance to arbitration, a reply in the form of a letter from the Company's Director, Labour Relations was filed with this Office, and copied to the Union. That letter took issue with the arbitrability of the grievance by reason of the alleged failure of timeliness in contravention of the terms of article 35.6 as well as article 25.3 of the collective agreement, which mandates that a request for arbitration is to be made within forty-five calendar days following the Company's decision at step 3 of the grievance procedure.

The Union's representative submits firstly, that there was no dilatory failure on the part of the Union in the filing of its grievance, and that the best evidence of the communication of the grievance to the Company is the fax transmittal receipt filed in evidence, indicating that the matter was raised with the Company on September 14, 1999. The Union's representative maintains that the contracting out was in the nature of an on-going daily breach of the collective agreement which the Union was entitled, in any event, to raise at any time, and in particular in a timely fashion after the issue came to the attention of the officer properly charged with dealing with the issue of contracting out. He stresses that local union representatives do not, in any event, have such jurisdiction. The Union's representative further argues that the Company's failure to reply at step 3 cannot, in any circumstance, frustrate the ability of the Union to progress the matter to arbitration. Lastly, he draws to the Arbitrator's attention recent amendments of the Canada Labour Code which confer to the Arbitrator a discretion to relieve against time limits.

I turn to consider the merits of the Company's objection to arbitrability. Firstly, it is clear to the Arbitrator that there

is no substance to the argument of the Company with respect to the alleged failure of the Union to comply with article 25.3 of the collective agreement because the Union did not await the Company's response at step 3 before making its request for arbitration. The collective agreement obviously does not contemplate that the employer can frustrate access to arbitration by simply refusing to reply at step 3. In the face of no timely reply from the employer the Union is free to proceed to arbitration, as is specifically acknowledged within the terms of the collective agreement:

24.5 ...

Step 3

Within forty-five (45) calendar days of receiving decision under Step 2, the Designated National Representative of the Union may appeal to the:

Senior Vice-President, Eastern Canada
Senior Vice-President, Western Canada
Senior System Functional Officer, System

Note:Each party will notify the other of any changes in designated officers.

A decision will be rendered within forty-five (45) calendar days of receiving appeal. The appeal shall include a written statement of the grievance and where it concerns the interpretation or alleged violation of the collective agreement, the statement shall identify the article and paragraph of the article involved.

...

24.8 Where a grievance other than one based on a claim for unpaid wages is not progressed by the Union within the prescribed time limits the grievance will be considered to have been dropped. Where a decision with respect to such a grievance is not rendered by the appropriate officer of the Company within the prescribed time limits the grievance shall be progressed to the next step in the grievance procedure.

...

25.2 A grievance concerning the interpretation or alleged violation of this agreement or appeals by employees that they have been unjustly disciplined or discharged and which are not settled at Step 3 may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work in accordance with the regulations of that Office.

(emphasis added)

(See also CROA 3196.) In the circumstances disclosed, the Union was obviously entitled to proceed to arbitration.

The Arbitrator is also satisfied that the characterization of the alleged violation of the collective agreement, a matter upon whose merits the Arbitrator makes no comment at this time, would indeed involve an ongoing breach of the collective agreement which the Union would be at liberty to grieve. In that circumstance the filing of the grievance, as I am satisfied occurred on or about September 14, 1999, would have been within thirty days of the ongoing alleged violation of article 35 of the collective agreement, and would not, therefore, be out of time. I am also satisfied that thereafter the Union acted with reasonable diligence in the furtherance of the grievance, progressing it as it did, without any apparent objection to its timeliness until the Company's letter of April 19, 2001. On the whole of the material filed, the Arbitrator cannot sustain the position of the Company that in the circumstances there was a violation of time limits by the Union, and that the grievance is not arbitrable on that basis. I am compelled to share the perspective of the Union that, in fact, if there was a failure of timeliness in this matter it was on the part of the Company which never in fact replied to the Union at step 3 of the grievance procedure prior to the matter being filed with this Office.

For all of the foregoing reasons the Arbitrator rejects the submissions of the Company with respect to the issue of arbitrability. The General Secretary is directed to list the grievance for a continuation of hearing on its merits.

May 31, 2001 (SIGNED) MICHEL G. PICHER
ARBITRATOR