

AH900

**IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC*
1985, c L-2.**

BETWEEN:

**CANADIAN SIGNALS AND COMMUNICATIONS SYSTEM COUNCIL NO. 11 OF THE
IBEW**

(IBEW)

-and-

CANADIAN PACIFIC KANSAS CITY RAILWAY

(CPKC)

Grievance re use of non-union fixed term contract employees

Arbitrator: Graham J. Clarke

Date: June 23, 2025

Appearances:

IBEW:

K. Stuebing: Legal Counsel

Y. Jin: Legal Counsel

J. Sommer: Senior General Chairman

G. Badesha: General Chairman

B. Kauk: Assistant General Chairman

L. Hooper: Consultant/Advisor – Retired General Chairman

S. Martin: International Representative

T. Caldwell: Regional General Chairman

CPKC:

L. McGinley: Director, Labour Relations

D. Guerin: Managing Director Labour Relations

K. Ehnes: Director S&C Operations West

R. Araya: Labour Relations Officer

Arbitration held in Ottawa on May 27, 2025 and via videoconference on June 13, 2025.

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BACKGROUND

1. The IBEW grieved CPKC's unilateral decision to start hiring non-union Fixed Term Contract Employees (FTCE) when it could not fill bargaining unit vacancies. From 2012 to 2023, the parties had jointly executed FTCE contracts pursuant to which the IBEW received, *inter alia*, union dues. CPKC benefitted from having highly skilled employees available during periods of understaffing. Retired IBEW members often performed these services.
2. Starting in 2024, CPKC decided to hire the FTCEs directly without any IBEW involvement.
3. The IBEW alleged that the FTCEs performed bargaining unit work for which it had exclusive jurisdiction. It asked for the work to be returned to the bargaining unit.
4. CPKC highlighted its challenges in finding skilled personnel to perform the essential duties that S&C members perform. A considerable number of bargaining unit vacancies existed despite CPKC's efforts to hire and retain qualified personnel. If CPKC had succeeded in filling all these available positions, then it would not have engaged FTCEs.
5. CPKC argued that the IBEW did not have exclusive jurisdiction over the work being performed and that its management rights gave it the right to hire the FTCEs to perform the work. CPKC highlighted its rights under the collective agreement's (CBA) contracting out clause at article 21.
6. For the reasons that follow, the arbitrator upholds the IBEW's grievance. The starting point for this type of case focuses on the IBEW's bargaining unit as certified by the Canada Industrial Relations Board (CIRB). The FTCEs clearly fall within that "all employee" certified unit.

7. Separate and apart from the parties' federal certified bargaining unit, the CBA's contracting out provision does not allow CPKC to hire a parallel non-union workforce for IBEW positions. The IBEW demonstrated that hiring bargaining unit employees, but treating them as non-union, constituted an impermissible "contracting in".

CHRONOLOGY

8. The parties had jointly negotiated FTCE contracts for many years. CPKC's 2024 decision to exclude the IBEW from the process led to this grievance.

9. **2012:** CPKC's template contract¹ for FTCEs noted expressly that the positions fell within the IBEW's bargaining unit and contained these terms and conditions:

Additional Terms and Conditions of Employment

- **This position belongs to the IBEW Union and as such membership by you in the Union will be required.**

- Deductions: Your salary will be paid based on CPR's bi-weekly payroll schedule subject to any statutory deductions made at source as per legislated requirements.

- Benefits: Your vacation pay will be calculated at the rate of 4% of annual earnings in compliance with the Canada Labour Code. After thirty (30) days of continuous employment, you will receive Statutory Holiday pay provided you are entitled to wages for fifteen (15) of the thirty (30) days immediately preceding the statutory holiday. There are no other company benefits offered.

- Probation: The entire term of employment is probationary. The Company can terminate this contract at anytime.

- Camp Rules will apply

- Contract can be terminated with 10 days written notice between the company and the Union with either party initiating the termination of the agreement.

(Emphasis added)

10. **March 16, 2016:** CPKC confirmed² to the IBEW that FTCEs fell within its bargaining unit:

¹ IBEW Documents, Tab 6. See also the 2016 template at Tab 10. The IBEW obtained this type of documentation pursuant to the arbitrator's production rulings in AH900-P and AH900-P2, *infra*.

² IBEW Documents, Tab 8

I'm following up on a comment passed on to me that the fixed term contract employees working in District 3 are not employees, but are contractors. **I have discussed this with Human Resources and am assured that they are employees. Being already retired from CP, there are some differences in the terms of their employment, but they are employees and are considered to be dues-paying IBEW members.** This year's contract was based on the same contracts signed in previous years.

HR has confirmed that we are deducting IBEW union dues from their payroll and will be forwarding the dues to the IBEW.

This is quite recent, the contracts were dated March 1 2016 and signed by at least some of the employees on March 3.

Given how recent the contract is, is the comment about them not being employees simply the result of an administrative delay that has now been cleared up?

(Emphasis added)

11. **March 27, 2024:** In an internal email³ regarding the “FTE Contract Extension - Luigi Bernava”, CPKC commented on its new form of the contract, which no longer involved the IBEW:

FYI – passing this along to keep you in the loop. Lou has not signed yet, but I have reviewed the details of the contract with him as this has a much different look than previous FTE agreements. The offering is essentially the same, however there is a lot of added verbiage as this is now a contract between the company and Mr. Bernava.

12. **March 28, 2024:** In an internal email exchange⁴, CPKC discussed contracting directly with those who had formerly worked under IBEW sanctioned FTCE contracts:

Email 1

John only has 27 days remaining until he starts pre retirement AV, have we seen anything from the union as far as a contract for him? He was told it was sent in.

Email 2

³ IBEW Documents, Tab 20.

⁴ IBEW Documents, Tab 21.

Based on the Union's resistance to renew fixed term contracts in other areas we have worked with LR and HR and decided we are no longer going to involve the IBEW in fixed term contracts.

Please see attached contract for a D4 fixed term.

You can edit it for John (please ensure the terms are consistent with what the IBEW version, i.e. wages, coaching allowance etc.)

(Emphasis added)

13. **April 9, 2024:** The IBEW's Mr. Kauk had written⁵ to CPKC's Mr. Ehnes regarding the latter's proposed fixed term contract extension for Mr. Bernava:

CPKC March 12, 2024 proposal to extend Mr. Bernava's contract:

Gurpal/Brad - As discussed today, please see the proposed Fixed Term Contract Extension for Lou Bernava.

Lou - I believe Jaden has already discussed this with you, but please review and advise whether you are agreeable to the terms stated in this agreement after consulting with Gurpal and Brad.

IBEW April 9, 2024 response:

We have confirmed with Mr. Singh and Mr. Dabrowski that they would both be very receptive to Mr. Bernava continuing in a mentorship role with them as a Fixed Term Contract Employee as indicated within the attachment. At this time we are just awaiting a response to a question which we posed to Mr. Bernava approximately 2 weeks ago regarding the scheduling of his work cycle prior to us being able to finalize this agreement. Once we have this information we will let you know so that an extension may be able to put into effect.

14. **April 12, 2024:** CPKC internal emails⁶ commented further on its decision to exclude the IBEW from the FTCE process:

Email 1

Just following up to our call yesterday regarding excluding the IBEW from fixed term contracts going forward.

Essentially, we are going to apply the same call out rules we do with Third-Party Contractors (TPC). The Fixed Term Contractor (FTC) will be on

⁵ Ex-1, filed during the May 27, 2025 hearing day.

⁶ IBEW Documents, Tab 24

standby, but we will canvas the off-call employees for 7.2C on the weekends. Should nobody accept 7.2c we will pay 7.2b to the adjacent CP employees on the weekends and we will also pay 7.2b for the weekdays. This will provide additional coverage should we need it, but calls will be directed to CPKC employees first.

If the adjacent CP employees request that the FTC cover calls on their own territory, we will document that in writing, in which case the additional standby payments 7.2c or 7.2b will not apply and calls will be first directed to the FTC on their territory.

One follow-up question I have is regarding existing fixed term agreements that were signed with the IBEW. We currently have 2 in place, Bill Duncan, and Earl Korzenoski. Do we want to issue 2 weeks' notice to cancel those agreements and put new agreements in place between the Company and the Union, or should we wait until they expire?

Email 2

I am not sure what you mean by "If the adjacent CP employees request that the FTC cover calls on their own territory". I don't want the S&C employees requesting the FTC cover their calls. I would reframe this to if the S&C employee is not agreeable to extended call periods to their off call weekends/for adjacent territories, this will be documented in writing. Can you let me know if that makes sense? S&C employees don't have the right to "contract out" of their work requirements, but can elect not to take on additional requirements where there is a choice considered by the CBA. In the event they make this choice, then we can call the FTC.

When do the Duncan and Korzenoski agreements expire?

(Emphasis added)

15. **April 18, 2024:** The IBEW's Mr. Kauk asked CPKC⁷ for an update on the draft FTCE agreement for the retiring employee Mr. Rose:

It is my understanding that Mr. Rose will be going on pre-retirement Annual Vacation on April 25, 2024. With that being said, can you let me know several days in advance of this what is happening with the attached agreement regarding him returning as a Fixed Term Contract Employee?

⁷ IBEW Documents, Tab 25.

16. **April 20, 2024:** The IBEW's Mr. Badesha provided⁸ CPKC with an FTCE cancellation notice for an earlier contract provided to Mr. Korzenoski due to the employer filling a vacant Medicine Hat position:

April 20 cancellation notice:

With the Medicine Hat position no longer vacant, please accept this as the 14 day notice to cancel the FTCE regarding Earl Korzenoski.

January 12, 2024 original email re technician agreement:

Please see the attached fixed term agreement for your review in regards to the Technician work based out of Medicine Hat, AB. Once you have had a chance to review with Mr. Badesha and the terms are agreeable, please send a signed copy of the agreement back to me.

I know Dan Villeneuve was looking to get you started as early as next week so I showed the effective date as January 16th, 2024. If this doesn't work for you, just let me know and we will work out an mutually acceptable start date.

17. **April 24, 2024:** CPKC hired Mr. Rose, a recently retired union member, as a fixed term employee⁹ without any reference to or involvement of the IBEW:

I am pleased to offer you the position of Fixed Term Employee (FTE) Maintainer/Mentor within the S&C Operations team for CPKC.

You are joining a team of exceptional railroaders. CPKC is a leader among our Class 1 railroad peers and we have achieved this through the disciplined application of the precision scheduled railroading model. This railroader methodology is rooted in our five foundations: providing service, controlling costs, optimizing assets, operating safely and developing people. Your work at CPKC will involve elements of all of our foundations. I am confident that your skills will complement our team, and your career with CPKC will be challenging and rewarding.

Please review the attached details and contingencies and confirm your acceptance of this offer of employment by completing all portions of this agreement and returning to S&C Director Ops Central Darren Splett by April 30, 2024.

⁸ IBEW Documents, Tab 26.

⁹ IBEW Documents, Tab 27. The contract also had an attachment with various terms including a \$48.61 hourly rate, no benefits and a "coaching allowance" of \$50.00 with the requirement that he coach and mentor others when needed. Mr. Rose later testified at the hearing, *infra*. CPKC provided comparable letters to Mr. Korzenoski on November 26, 2024 and February 10, 2025 (Tabs 34-35).

Today, we are not only a stronger company that is building on our historic legacy; we are creating a future for our shareholders and customers. We are building a stronger more successful company for the long term and changing the expectations of what it means to be great railroaders. We want you to be a part of this story. I look forward to working with you on the many opportunities we have ahead of us.

18. **June 18, 2024:** The IBEW filed a policy grievance¹⁰ contesting CPKC's new process to engage non union employees to do bargaining unit work and noted, *inter alia*, the following:

This policy grievance is filed as a result of the violation of Wage Agreement No. 1 between Canadian Pacific and IBEW System Council No. 11, as well as the violation of the Canada Labour Code, and pertains to the hiring and utilization of non-Union contract employees to perform bargaining unit work. This policy grievance is filed on behalf of employees who come under the scope of the Collective Agreement in all Seniority Districts who have been or will be affected by these violations.

As the Company is aware, previously there has been limited use of Fixed Term Contract Employees (FTCE) to perform S&C Support work for Track Programs. Following this, from 2019 until the present there were approximately 14 FTCE agreements signed for employees to perform the work of S&C Maintainers and/or S&C Technicians. The Union expressly consented to such temporary arrangements and mutually agreed to extend several of these contracts over multiple years. The Company readily remitted dues on behalf of all FTCE individuals—an explicit recognition that these positions fall within the bargaining unit. The FTCE were integrated into vacant Maintenance positions and worked jointly with the existing IBEW Members. The Union, being signatory to these employment contracts, did not take issue with the work arrangements as they were done in conjunction with the Collective Agreement.

On April 22nd, 2024, S&C Director Darren Splett spoke with the Union's Regional Representative Brad Kauk about a proposed FTCE agreement specifically for John Rose who had recently retired from a long career at CP. Mr. Splett indicated at this time that the Company would not agree to the long standing and standard terms for Mr. Rose's FTCE agreement. **Moreover, Mr. Splett stated, under advisement from Labour Relations, that CP would no longer be making any FTCE agreements with the Union, but rather will be making these agreements directly with the individuals.**

...

¹⁰ IBEW Documents, Tab 28.

On May 23rd, 2024, the Union's representatives had a further discussion with S&C General Manager Jeff Switzer. The Union once again raised the prospect of negotiating FTCE agreements for individuals including Luigi Bernava and John Rose. Mr. Switzer indicated that CP would be proceeding with contract employment agreements directly with the individuals, "preferably with, but if not, without the Union." As the Company has refused to respond to the aforementioned proposal to further discuss FTCE agreements for Mr. Bernava and Mr. Rose, it is clear that their actions have resulted in these individuals becoming non-Union contract employees absent any Union involvement in employment terms and conditions.

The Union has recently learned that since on or about April 1st, 2024, a former FTCE named Luigi Bernava has been performing identical bargaining unit work as to what he was doing under his previous FTCE agreement which originally commenced on April 2nd, 2022. However, he now does so under a direct agreement with CP, to which the Union is not signatory. Mr. Bernava is continuing to perform S&C Technician / mentoring work in District #4, which currently encompasses working with IBEW-represented S&C Maintainers and Technicians in Revelstoke, BC. This work is undoubtedly being performed in violation of Article 21.

...

The Union contends that CP's employment of non-Union contract employees to perform scope work is a violation of the Collective Agreement and the Canada Labour Code, and represents a contracting in (or in the alternative, a contracting out) of bargaining unit work to those outside the Collective Agreement. Further, the Company's actions are aimed at undermining the ability of the Union to represent its members.

The Union's members have exclusive jurisdiction to bargaining unit work under their Collective Agreement. The Company is not at liberty to utilize employees outside the bargaining unit to perform bargaining unit work which is plainly within the scope of the Collective Agreement.

...

On precisely the same point, the Company in the present case has now retained contract employees outside the bargaining unit to perform bargaining unit work which is plainly within the scope of the Collective Agreement. The Union argues that the Company's actions are plainly a violation of the applicable Collective Agreement, including Article 1, Article 3, Article 7, and Article 21 as well as other applicable Articles.

For the foregoing reason and those adduced earlier in the appeal, the Union seeks an order that the Company cease and desist using non-Union contract employees to perform bargaining unit work and an order of

damages for CP's bad faith conduct including full compensation to all affected members.

(Emphasis added)

19. **July 15, 2024:** When a need arose to replace someone on a leave of absence, the parties exchanged emails, after which CPKC suggested internally providing notice under CBA article 21¹¹:

Email 1: CPKC advised IBEW and others about the leave

Bill Duncan has requested and has been approved for an immediate and indefinite leave of absence. **Due to this request coming in suddenly we are required to fill this position with a third party contractor right away in order to protect services.**

Email 2: The IBEW's Mr. Kauk proposed using an FTCE rather than a contractor

Will the Union be provided with an opportunity to propose a Fixed Term Contract Employee for this position prior to the Company filling it with a third party contractor?

Email 3: CP responded

yes,

when do I expect to hear back so I can make alternate arrangements if one is not available?

Email 4: The IBEW proposed Mr. Rose as an FTCE

The Union proposes recently retired John Rose as a Fixed Term Contract Employee for the vacancy in the Marathon West position. I have previously supplied Darren Splett with a draft agreement for Mr. Rose that can be referenced if required

Email 5: Internally, CPKC discussed using CBA article 21 rather than an FTCE and suggested a draft email response to the IBEW:

Ideally, we wouldn't have told them we would allow them to find a fixed term contractor as we are no longer using Union endorsed FTC's.

...

Mr. Sommer,

¹¹ IBEW Documents, Tab 30.

As communicated on July 10, 2024, the S&C Mobile Maintainer XXXXXX position is vacant effective July 16, 2024, due to Bill Duncan opting to not continue working under his fixed term contract at this time.

Therefore, please accept this as notice under Article 21.5 to the IBEW that the Company may be required to fill this position immediately with a Contractor in order to protect the service of the operation.

(Emphasis added)

20. **July 18, 2024:** CPKC responded¹² at Step 1 to the IBEW's June 18 policy grievance and referenced its right to contract out work (extract):

The Company maintains that there has been proper notification given to the Union as per Article 21.4 and 21.5 to fill vacant positions that the members of the IBEW Council No.11 bargaining unit have not occupied.

...

The Union contends that they were not signatory to FTCE agreements, however, these individuals are non-unionized contract employees and Union involvement is rightfully absent in relation to their employment terms and conditions.

The Union contends that by signing these non-union contract employees, the Company has violated Article 21 of the Collective Agreement. **The Company maintains the FTCE positions were filled in compliance with Article 21 of the collective agreement.** Article 21 states:

...

The three FTCE's that the Union mention are filling vacant positions in territories where sufficient employees are not available and/or have extensive knowledge to assist in mentoring newer employees.

...

(Emphasis added)

21. **August 6, 2024:** The parties continued to email¹³ about Mr. Rose with the IBEW asking why CPKC did not hire him as an FTCE:

Email 1 (July 26)

¹² IBEW Documents, Tab 40. At the June 13, 2025 hearing, CPKC withdrew a grievance timeliness objection it had originally raised.

¹³ IBEW Documents, Tab 31.

The Union has not received a response to our proposal for Mr. Rose to work as a Fixed Contract Employee in the Marathon West position. We did however receive the message below from you on July 18 stating that a contractor would be filling this position effective August 6. **With that being said, can you provide the Union with the reason why Mr. Rose is not being considered as a Fixed Term Contract Employee for this position as we have previously proposed?**

Email 2

We already have a fixed term contract in place with Mr. Rose and he will be covering the vacant position.

(Emphasis added)

22. **September 3, 2024:** The IBEW filed¹⁴ its Step 2 grievance which adopted its positions from Step 1 and added:

There was nothing vague about the Union's challenge to the Company's direct hire of non-Union contract employees to perform bargaining unit work, and how such individual agreements violate the Wage Agreement. As noted in the Union's original submission, S&C Director Darren Splett advised IBEW Regional Representative Brad Kauk on April 22nd, 2024 that the Company would no longer be making any Fixed Term Contract Employee (FTCE) agreements with the Union, but rather will be making these agreements directly with the individuals.

...

Even though the Company had specifically invited the Union to seek further clarification about the contracts it is negotiating with these non-Union employees on an individual basis, the Company declines to respond to any of the Union's questions regarding the hiring of these non-Union contract employees to perform bargaining unit work. It is self evident that the Company cannot defend its breached of Wage Agreement 1 through the employment of these non-Union employees to perform bargaining unit work.

...

To date, the Company has not provided the Union with any notice under Article 21 since it hired non-Union contract employee Luigi Bernava to commence work on April 1, 2024. Nor has the Company updated us after claiming it would validate the work he was performing in Revelstoke after stating that they were not sure of his scope of work s of May 23rd.

¹⁴ IBEW Documents, Tab 41.

Mr. Bernava is presently performing identical bargaining unit work to that which he had been completing for over two years under a FTCE agreement between the Company and the Union from March 28th, 2022 until March 31st, 2024.

As for non-Union contract employee John Rose, the Company advised the Union on July 18th, 2024 that it would be filling the Marathon West S&C Maintainer position with a Third Party Contractor (TPC) in accordance with Article 21.5 on August 6th, 2024. This notice came several days after IBEW Regional Representative Brad Kauk proposed John Rose as a Union-sanctioned FTCE on July 15th, 2024 (in response to the Company's _____ [DATE?] request for the Union to provide them with the name of a FTCE who could fill the vacancy in the Marathon West position.

The Union was then advised on August 6th that the Company had already agreed to a fixed term contract with (non-Union contract employee) Mr. Rose and that he would be filling this vacancy under this agreement. Upon review of this information, it is quite evident that the Union was not provided with proper notice under Article 21.4 and Article 21.5 in this instance and instead the Company's actions were exercised solely in bad faith.

...

Any FTCE agreement that was previously done without dispute was finalized with both the Company and the Union as signatories to the contract. The Company's proper utilization of Article 21 when hiring a TPC has no bearing on the instant dispute regarding the internal hiring of non-Union contract employees to perform bargaining unit work in either vacant positions or manufactured positions.

...

The non-Union contract employees that the Company is hiring are performing bargaining unit work. If the Union is not a signatory to these agreements, then the work they are performing is being done in violation of the Wage Agreement. The Company's Step One arguments and non-answer to the Union's questions above do not provide any authority by which the Company can circumvent the exclusive bargaining agent for the scope work in question.

...

Again, the Company is hiring these individuals as non-Union contract employees. These non-union employees are performing bargaining unit work. Furthermore, these non union employees are doing so under many of the same terms and conditions of the Wage Agreement.

...

An arbitrator's remedial powers—including the granting of cease and desist order come from the Canada Labour Code's requirement that parties to a CA use arbitration to resolve "all differences". See Arbitrator Clarke's analysis in Ad Hoc 809, in particular his discussion at para 48-57 resoundingly rejecting the same meritless Preliminary Objection. Per Arbitrator Clarke's analysis, there is no provision in Wage Agreement which would otherwise restrict an arbitrator's broad remedial powers.

...

The Company refuses to address the Union's questions and concerns about its use of non-union employees to perform bargaining unit work. The Company refuses to voluntarily desist from this initiative. As such, in addition to a cease and desist order, the Union rightfully claims damages. The damages claimed are both compensatory and damages awarded for breach of the collective agreement (eg., lost union dues), as well as additional damages to act as a deterrent with the intention to ensure the correct application of the Collective Agreement. See Arbitrator Stout's discussion in AH 684.

(Emphasis added)

23. **September 27, 2024:** CPKC ended Mr. Rose's employment contract¹⁵ and stated:

This letter confirms our conversation of today during which you were advised that your employment contract with Canadian Pacific Kansas City Railway Company ("CPKC") is terminated effective October 11, 2024.

Please ensure any remaining CPKC equipment is returned including:

- Laptop and charger
- Credit card
- All training materials
- Employee ID Card

(Emphasis added)

24. **October 18, 2024:** CPKC provided its Step 2 response¹⁶ which noted, *inter alia*:

With respect to disputes 1 above, outside of the bargaining certificate, terms and conditions of employment may be freely negotiated between a Company and an individual. These terms and conditions are often duplicative

¹⁵ IBEW Documents, Tab 33. The letter also referenced Mr. Rose's "Employee ID".

¹⁶ IBEW Documents, Tab 42.

for a variety of reasons, the major one being ease for both parties. For example, it would be rare to see a probationary period of 89 days, instead a 3- or 6-month period with consistent language is the norm. There is nothing within the Wage Agreement that indicates nobody else employed by CPKC can be paid the same rate of pay or be given the same rate for call coverage as outlined in the Wage Agreement. No violation of the Wage Agreement can be made out on this subject. **Moreover, as detailed by Ms. McGinley, the terms and conditions of an employment contract are confidential and subject to PIPEDA. As such, the Company cannot simply just share same with a Union representative who does not represent the individual in question.**

Turning to the second dispute, when the Union signed Fixed Term Contract Employee contracts, this in itself did not make those contracts, nor the work performed by those individuals automatically in compliance with the Wage Agreement. These “FTCEs” were not bargaining unit members and based on the express terms of their contracts, they did not have bargaining unit rights and were not represented by the Union. The Union just didn’t complain about the work the FTCEs were performing because they knew there weren’t sufficient qualified employees available to perform the work and the individuals paid a fee to the Union. If the signing of a FTCE contract didn’t automatically make the work performed in compliance with the Wage Agreement, then the opposite cannot automatically be true either – namely that by not signing their contracts that the work is being done in violation of the Wage Agreement. The Company maintains the Wage Agreement spells out the Company’s obligations with respect to contracting out of “work presently and normally performed by employees who are subject to the provisions of this collective agreement” and that those obligations have been fulfilled. To be abundantly clear, it is not the “hiring of” non-union fixed term employees that would constitute a violation, if any, of the Wage Agreement, but exclusively the utilization of same contrary to Article 21.

...

The Revelstoke Tunnels are unique and therefore, Mr. Bernava’s technical skills within the tunnel are unique. The Union is well aware of Mr. Bernava’s experience and duties within the tunnels. It would not make sense, nor does the Company have an obligation, to have an employee be trained in tunnel duties by unionized employees that do not have the technical skills related to that specific territory.

With respect to Mr. Rose, the Union argues the Company’s actions were in bad faith as well as an alleged violation of the Wage Agreement citing correspondence in July 2023. This only tells part of the story. In April, Mr. Kauk proposed a FTCE agreement for Mr. Rose. In response to this proposal, on April 22, 2024, Director S&C Central Darren Splett spoke with Mr. Brad Kauk to inform him of the Company’s go-forward direction to not enter into FTCE agreements with the Union as signatory, but rather to hire

fixed term employees and comply with its obligations pursuant to Article 21. Mr. Kauk acknowledged this conversation by way of an email to General Manager Switzer on May 23, 2024. There is no question that the Company was clear with the Union as to its intentions well prior to requiring Mr. Rose’s services. On this basis, the allegation of bad faith is baseless and unsupported by fact.

Regarding an alleged violation of Article 21.4 and 21.5 pertaining to Mr. Rose, the Company must first point out that the work was being performed by a contractor – Mr. Bill Duncan. How on one hand can the Union state it was fine (no violation) for one contractor to perform the work and would have been fine for Mr. Rose to perform the work if the Union had signed his employment contract, but on the other hand allege a violation of the Wage Agreement? Both cannot be true. The Company notified the Union on July 10, 2024, of its need to fill Mr. Bill Duncan’s absence due to indefinite leave of absence effective August 6, 2024. On July 15, 2024, Mr. Kauk had proposed Mr. Rose. Taking Mr. Kauk’s recommendation, the Company reached agreement with Mr. Rose on an employment contract and promptly informed the Union on July 18, 2024. While the Company viewed this absence and filling Mr. Duncan’s vacancy as an emergency, it provided the Union with as much advance notice as possible -27 days between July 10 and August 6, 2024. The Union also clearly understood the work to be contracted out, the duration (Mr. Duncan’s absence), reason – insufficient qualified employees and the date it was to commence.

(Emphasis added)

25. **February 28, 2025:** The arbitrator issued AH900-P¹⁷ granting the IBEW’s production request. The arbitrator ordered CPKC, *inter alia*, to produce the documentation relating to its decision to hire Mr. Bernava, Mr. Rose and Mr. Korzenoski as non-union employees.

26. **March 21, 2025:** CPKC offered Mr. Bernava another contract¹⁸ for “the position of Fixed Term Employee (FTE) Technician/Mentor located in Revelstoke, BC reporting to Sean Chouinard”.

27. **May 12, 2025:** The arbitrator issued AH900-P2¹⁹ resolving further production issues, ordering particulars and deciding the issue of legal privilege.

¹⁷ [Canadian Signals and Communications System Council No. 11 of the IBEW v Canadian Pacific Kansas City Railway, 2025 CanLII 16088](#)

¹⁸ IBEW Documents, Tab 44.

¹⁹ [Canadian Signals and Communications System Council No. 11 of the IBEW v Canadian Pacific Kansas City Railway, 2025 CanLII 43169](#)

28. **June 13, 2025:** To avoid the need for yet another procedural decision, the parties, at the arbitrator’s suggestion, agreed on stipulations which allowed the hearing to end on schedule. By email, the parties stipulated:

The parties have agreed to the following stipulations:

Earl Korzenoski

- “utilization of Fixed Term Contract Employee (FTCE) Earl Korzenoski to perform Technician work on District 4, primarily out of Golden, B.C. effective August 17th, 2020 until on or about November 30, 2020.” – IBEW BOD pdf pg. 59
- “utilization of Fixed Term Contract Employee (FTCE) Earl Korzenoski to perform Technician work on the Medicine Hat Territory, effective January 16, 2024 until on or about December 31, 2024.” - IBEW BOD pdf pg. 66

Luigi Bernava

- “utilization of Fixed Term Contract Employee (FTCE) Luigi Bernava to perform Technician/mentoring work in District 4, effective April 2nd 2022 to on or about March 31st 2023.” – IBEW BOD pdf pg. 72
- “utilization of Fixed Term Contract Employee (FTCE) Luigi Bernava to perform Technician/Mentoring work in District 4, effective April 1, 2023 with an agreed upon extension until on or about March 3, 2024 .” – IBEW BOD pdf pg. 70

Bill Duncan

- “utilization of Fixed Term Contract Employee (FTCE) William (Bill) Duncan to perform S&C Maintenance work at mutually agreed upon locations within Districts One through Four, beginning on or about October 1, 2022.” – IBEW BOD pdf pg. 77

Utilization of other Fixed Term Contract Employees (FTCEs) to perform S&C Maintenance, S&C Construction, and/or S&C Foreman work in 2019, 2022, and 2023.

In light of these agreed stipulations, the agreements in Tabs 9, 11-15 and 19 are deemed removed from the record.

VIVA VOCE EVIDENCE

29. On the May 27, 2025 arbitration day in Ottawa, the parties each called a witness to provide additional context.

John Rose (IBEW witness)

30. Mr. Rose, a former IBEW member, had worked for CPKC for 35.5 years as a signal maintainer prior to retiring in April 2024. After his retirement, CPKC hired him directly on a non-union contract (Contract)²⁰ as a “Fixed Term Employee (FTE)” without any IBEW involvement.

31. During that Contract, Mr. Rose had the same manager who continued to assign him work. He kept his CPKC employee number and company email address. He performed the same duties as before. CPKC continued to provide him with a laptop and a company vehicle. He received the same CPKC cheque stub he had received prior to his retirement. He continued to participate in CPKC’s share purchase plan without having to re-enrol.

32. In cross-examination, Mr. Rose agreed that the Contract did not say he would be a part of the IBEW. He understood he would not be an IBEW member. He further agreed that he started receiving his pension payments in early July 2024. He had understood that he needed to sign the Contract prior to retiring to avoid having to undergo a medical. He agreed that he was filling a vacancy which CPKC had been unable to fill despite using the bid system.

33. Mr. Rose further agreed that the Contract had a term of 1 year and that he performed services from August 6 to September 26 at which time CPKC decided to exercise its right to end the Contract. He agreed that he earned a higher hourly rate than prior to his retirement but noted that he received no benefits. He could not recall if he paid CPP premiums but did agree he had not been paying IBEW union dues. For the share purchase plan, Mr. Rose agreed that the Contract said he would receive no benefits.

Kevin Ehnes (CPKC witness)

34. Mr. Ehnes, CPKC’s Director S&C Operations West, had worked as an S&C maintainer under the IBEW CBA. He described generally the territories covered by S&C maintainers and the current challenges CPKC faced in filling all the available positions in the IBEW’s bargaining unit. In Mr. Ehnes’ territory, which went from Saskatchewan to BC, they had 13 S&C maintainer and 3 technician vacancies.

35. He explained CPKC’s various challenges in both recruiting and retaining highly skilled individuals. In some areas, like Vancouver, the cost of living impacted finding

²⁰ IBEW Documents, Tab 27.

skilled employees. He also noted that some employees left CPKC due to the call coverage duties expected of them or because of the remote regions to which they were assigned.

36. Mr. Ehnes preferred having employees, represented by the IBEW, spend their entire career at CPKC. An outside contractor rarely performed as well as a CPKC employee. However, given the current inability to staff all positions, they had no choice but to use contractors.

37. Mr. Ehnes described Mr. Bernava's experience and expertise, particularly for tunnels in the Revelstoke area. Mr. Bernava had retired in 2022 after roughly 37 years experience. Mr. Bernava continued working on contracts. He had worked on contracts involving the IBEW prior to signing another contract²¹ on March 27, 2024.

38. Mr. Ehnes testified he did not know why CPKC involved the IBEW in previous contracts. He believed that CPKC had no legal obligation to do this. Mr. Bernava's contract differed somewhat from his previous ones since he worked just 3 days a week, but the same 14-day cancellation clause remained.

39. Mr. Ehnes also testified about Mr. Korzenoski's November 26, 2024 contract²² which had hired him for the role of "Technician/Mentor". Mr. Korzenoski, who had retired after 31 years with CPKC, worked on fixed term contracts to carry out S&C technician duties. CPKC paid Mr. Korzenoski some standby pay under CBA article 7 and some overtime. He noted that other employees were a significant distance away which impacted the coverage CPKC required.

40. In cross-examination, Mr. Ehnes agreed that certain tasks could not be completed without Mr. Bernava's experience. Other employees did not yet have the requisite qualifications. He agreed that Mr. Bernava received a coaching allowance of \$50 per day, something also found at CBA article 1.9.

41. Mr. Ehnes further agreed that CPKC employed Mr. Bernava. Both Mr. Korzenoski and Mr. Bernava kept their CPKC employee numbers and company email addresses. CPKC paid their salaries and could end the contracts with 14 days notice.

²¹ CPKC Documents, Tab 28.

²² CPKC Documents, Tab 33.

42. In re-exam, Mr. Ehnes confirmed that CPKC directed Mr. Bernava to carry out his duties, including mentoring, and stated “I mean who else would direct him?”.

INTRODUCTORY REMARKS

43. The arbitrator has noted previously that a decision maker does not decide how best to run a railroad. CPKC clearly has that expertise. An arbitrator must instead interpret the parties’ statutory and contractual obligations to ensure each receives the benefit of its bargain²³:

38. This case is not about the most efficient way to run a railroad.

39. CN, as a highly successful railway, knows how to run its business. CN, like other successful operations, continuously strives to improve efficiencies and adapt to client needs and demands.

...

41. **But the need to adapt and improve efficiency remains subject to employment and labour legislation and, for the specific purposes of this case, the parties’ collective agreements. Those agreements balance efficiency and other metrics with the essential employment bargain the TCRC has negotiated on behalf of its members.**

42. **In this case, the arbitrator’s focus is not on how best to run a railway, a subject which would clearly fall outside any presumed expertise. Instead, the arbitrator must examine the parties’ binding legal agreement contained in the PER.** Evidently, the greater that CN can demonstrate compliance with the PER, the higher the likelihood an arbitrator would find any TCRC refusal to consent unreasonable.

(Emphasis added)

44. Similarly, the issue in this case is not how CPKC can best operate its undertaking. Rather, the arbitrator must decide whether CPKC can exclude the IBEW from the recent fixed term employee hiring process.

PRELIMINARY ISSUES

45. CPKC raised certain preliminary or procedural issues.

²³ [Canadian National Railway Company v Teamsters Canada Rail Conference, 2020 CanLII 66692](#)

46. CPKC advised at the hearing that it would not proceed with its timeliness objection²⁴ to the IBEW's policy grievance.

47. CPKC then argued²⁵ that the IBEW could not request a cease-and-desist order on the basis that the CBA did not provide for this type of order. In AH809²⁶ the arbitrator previously rejected this argument given the Canada Labour Code's²⁷ (*Code*) broad remedial powers. The arbitrator will consider whether to issue a cease-and-desist order later in these reasons.

48. CPKC also objected to the IBEW referencing "multiple separate cases" in this arbitration²⁸. The IBEW has filed a policy grievance against CPKC's decision to start hiring directly retired IBEW members rather than involving the IBEW in the process as it had in the past.

49. The arbitrator finds no issue with the IBEW proceeding in this way. Policy grievances address situations which impact the bargaining unit as a whole²⁹. CPKC provided no authority for the suggestion, as the arbitrator understands it, that the IBEW can only contest the current FTCE dispute by filing individual grievances³⁰.

50. Accordingly, the arbitrator will now address the merits of the parties' dispute.

STATUS OF THOSE INDIVIDUALS CPKC HIRED DIRECTLY WITHOUT IBEW INVOLVEMENT

51. In its Brief, CPKC suggested that its management rights allowed it to hire the retired employees without IBEW involvement:

56. The mere act of engaging an individual in a contract, regardless of terms and conditions, does not violate the Wage Agreement. The terms and conditions of the Wage Agreement are not the exclusive right of this Union. Accordingly, having the same or similar rates (i.e. base rate of pay, overtime rate of pay, rate to remain on call, etc.) or working conditions (i.e. minimum 3 hours pay for an overtime call, etc.) cannot be said to violate the Wage

²⁴ CPKC Brief, Paragraphs 4-42.

²⁵ CPKC Brief, Paragraphs 43-54.

²⁶ [Teamsters Canada Rail Conference \(TCRC\) v Canadian Pacific Railway Company, 2023 CanLII 8290](#)

²⁷ [Canada Labour Code, RSC 1985, c L-2](#)

²⁸ CPKC Brief, Paragraph 55.

²⁹ See, for example, AH891 - [Teamsters Canada Rail Conference v Canadian Pacific Kansas City Railway, 2024 CanLII 99591](#).

³⁰ The arbitrator also rejected this CPKC argument in [AH900-P2](#) at paragraphs 10-11.

Agreement. **Absent clear and cogent language negotiated by the parties in the Wage Agreement, negotiating a contract is a management right.**

57. **Regarding the work performed, the Company maintains that each case must be advanced and determined on its own merits.** This is particularly true when looking at Mr. Bernava versus Mr. Rose as an example. While the Company maintains Mr. Korzenoski's and Mr. Bernava's 2025 contracts do not properly form part of this dispute, as the Arbitrator appears to have determined otherwise, the Company maintains these too ought to be advanced on their own merits.

...

120. In their grievance the Union objected to the Company reaching contracts with individuals where the contracts reflect terms and conditions which are the same as or similar to those found in the Wage Agreement. The Company maintains that it has the right to negotiate contract terms, including terms which duplicate others such as Wage Agreement provisions. However, the terms may also differ where appropriate. One such example is Mr. Bernava working a limited (3-day) work week.

121. **The use of wages, terms and/or conditions that are the same or similar to those outlined in the Wage Agreement may be of interest to the Union and members of the bargaining unit; however, absent clear and cogent language to the contrary, this use cannot be said to be a violation of the Wage Agreement nor does such use equate to these contractors being members of the bargaining unit.**

52. On multiple occasions, CPKC in its Brief called the retired former IBEW members "contractors"³¹. Evidently, the terminology used to describe individuals does not determine their legal status.

53. Tribunals and courts regularly must determine whether an individual meets the test for employee status. Employers, sometimes with the concurrence of an employee if they perceive a benefit, may try to characterize a relationship in a different way to avoid certain legal obligations. This occasional subterfuge in those other cases does not impact the legal analysis which prioritizes substance over form.

³¹ CPKC Brief, Paragraphs 2, 50, 63, 84, 85, etc. The cover title of its Brief references "Fixed Term Contractors".

54. In *Thistlexpress Inc*³², the Ontario Labour Relations Board reviewed some of the applicable principles for determining employee status:

24. **The facts of each case determine whether someone is an employee or an independent contractor.** The Board does not look at what could have happened, but rather at what occurred during the period of the relationship: *Iris Blu Event Staffing Limited v Taylor Irwin*, 2016 CanLII 56987 (*Iris Blu*) at paragraph 33.

25. The existence of a written contract determines nothing by itself; both employees and true contractors have contracts. In any event, s. 5 of the Act prohibits parties from contracting out of its protections.

26. **Laypersons often suggest that only contractors have contracts. Employees always have a contract at Common Law, be it oral, written or quite often a combination of the two.** The Board noted the following in *Econome Inc. v Robert Champagne*, 2017 CanLII 14543:

16. A written contract does not determine whether someone is an employee or not. Employees always have an employment contract. Most of the time, the contract is oral or a blend of a written document and practice. Sometimes the parties reduce all the terms and conditions of employment to writing. **The form of the contract does not impact an employee's status, particularly when that individual works full time and exclusively for the employer.**

17. The facts satisfy the Board that Econome hired Mr. Champagne as its employee. The fact he worked in sales does not impact this characterization. **The situation might be otherwise if Mr. Champagne ran his own business as an independent sales representative and represented multiple businesses. But in this case, he worked solely for Econome.**

27. A clause in a written contract stating that an individual is an independent contractor does not determine the issue. The parties' agreement in this regard could be a factor to consider, but only as one element in the overall picture.

28. A spectrum exists with independent contractors at one end and employees at the other. It is easy to categorize as independent contractors service providers, such as lawyers and accountants who work in their own firms. No one would argue that these professionals become employees of every client they serve.

29. But the focus is not on the service being provided. Rather, the analysis examines the situation of the person providing the service. A lawyer

³² [Thistlexpress Inc. v Joshua Dykas and Director of Employment Standards, 2017 CanLII 56931](#)

or an accountant, working exclusively “in house”, is an employee, despite the fact they may provide the exact same services as those external firms provide.

30. **The main distinguishing factor between an independent contractor and an employee is whether the person is in business on his/her own account.** In *Iris blu*, the Board emphasized the proper focus:

63. The propositions advanced by MacGuigan J.A. and approved in the decision of the Supreme Court of Canada in *Sagaz Industries* – that the question “Whose business is it?” is to be addressed with respect to the business of the employee and that “[t]he central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account” – are most apposite.

31. While no test is conclusive, the Board, as noted in *Markovic v 1756982 Ontario Limited*, 2015 CanLII 68892, will consider various questions when deciding whether a worker is in business on his/her own account:

- The level of control of the worker’s activities;
- Who provides the equipment being used to provide the services;
- Whether the worker hires others to assist in providing the services;
- The financial risk the worker takes;
- The worker’s responsibility for investment and management; and
- The worker’s opportunity to profit

(Emphasis added)

55. The courts³³ have also recognized an intermediate category for dependent contractors who, unlike true independent contractors, remain entitled to reasonable notice just like employees.

56. The status issue in the current case poses no complexity. Mr. Ehnes acknowledged that CPKC employed individuals like Mr. Korzenoski and Mr. Bernava. The contracts themselves, while never determinative under the law, clearly described each individual as a “Fixed Term Employee (FTE)”³⁴.

57. Furthermore, the evidence showed that these individuals performed the same types of duties they had carried out during their long careers as IBEW members. That should not surprise anyone since CPKC valued their experience and expertise.

³³ See, for example, [McKee v. Reid's Heritage Homes Ltd., 2009 ONCA 916](#) at paragraphs 24-30.

³⁴ See, for example, CPKC’s Documents at Tabs 28 and 33 and IBEW Documents at Tabs 33-34.

58. In sum, while CPKC occasionally used the term “contractor”, the evidence confirmed it employed all the individuals.

THE RELEVANCE OF EMPLOYEE STATUS TO FEDERAL BARGAINING UNIT DESCRIPTIONS

59. Interpretation principles for provincial bargaining units must be treated with caution when/if applied to a case under the federal *Code*. Federal collective agreements, like the current CBA, may not contain a bargaining unit description.

60. This is not an oversight but rather a reflection of how certification orders work under the *Code*.

61. AH721³⁵, a case the arbitrator sent to the parties prior to final argument³⁶, reviewed the continuing role of the CIRB over its certified bargaining unit descriptions. This allows the CIRB, for example, to merge bargaining units in the interest of healthy labour relations³⁷. Similarly, it can decide whether certain employees fall within a previously certified bargaining unit³⁸ and jurisdictional disputes between bargaining agents³⁹.

62. In other words, the parties’ CBA is not silent on the issue of the scope of the IBEW’s bargaining unit. Instead, the CBA reflects the reality in the federal jurisdiction that the CIRB determines a bargaining unit’s scope, rather than the parties.

63. Federally, parties may ask the CIRB to use its review power⁴⁰ to keep their bargaining unit descriptions up to date, such as when an employer’s name changes or a union merges with another. Regular updating of the bargaining certificate may also incorporate technological or other changes which inevitably occur over the decades.

64. Because of the CIRB’s continuing role over its certified bargaining units, the *Code* at s.65 provides a dispute mechanism if the parties to a grievance dispute whether certain employees fall within an existing bargaining unit:

Questions may be referred to Board

³⁵ [Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2021 CanLII 27309](#)

³⁶ The arbitrator had also referenced this award in an earlier procedural decision for this case - [AH900-P](#).

³⁷ *Code*, s.18.1.

³⁸ [Avant-Garde Sécurité Inc., 2014 CIRB 728](#).

³⁹ [Société Radio-Canada, 2015 CIRB 780](#)

⁴⁰ *Code*, s. 18.

65 (1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for determination.

Arbitration proceeding not suspended

(2) The referral of any question to the Board pursuant to subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless the arbitrator or arbitration board decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding.

(Emphasis added)

65. At the arbitrator's request, the parties provided their longstanding bargaining unit description⁴¹:

"all employees of Canadian Pacific Limited employed in the Signals and Communications Section of the Engineering Department classified as S & C Foreman, S & C Assistant Foreman, S & C Senior Technician., S & C Technician., S & C Leading Maintainer, S & C Maintainer, S & C Maintainer's Helper, S & C Wireman, S & C Fitter, S & C Gang Helper, S & C Labourer, S & C Assistant Shop Foreman, S & C Leading Repairman, S & C Repairman and S & C Junior Repairman".

66. It appears plain and obvious that the CIRB's customary "all employee" bargaining unit description fully answers CPKC's suggestion that the CBA did not prevent it from hiring former IBEW members as non bargaining unit employees. We are not dealing with a new position here, something which might require a reference to the CIRB. Instead, the bargaining unit description includes multiple positions and explicitly references S&C Maintainers (like Mr. Duncan) and S&C Technicians (like Messers Korzenoski and Bernava).

67. Since the employees CPKC hired continued to perform essentially the same functions they had performed throughout their careers, they evidently fell within the IBEW's certified bargaining unit. The fact CPKC decided to exclude the IBEW when hiring

⁴¹ Order 4452-U (Board file 530-1035, November 1984), as later amended in January 1991 for a name change only (Order 5741-U; Board file 580-109).

these individuals cannot deprive the IBEW of its statutory rights as the certified bargaining agent.

68. It appears the parties previously recognized this legal reality for many years. They jointly negotiated FTCE contracts which satisfied their respective needs. CPKC obtained the skill sets it needed during employee shortages. In return, the IBEW remained involved throughout given its obligations as a certified bargaining agent. This continuing involvement ensured the IBEW could fulfill its *Code*⁴² imposed duty of fair representation, among others.

69. The facts satisfy the arbitrator that the employees CPKC hired fell within the IBEW's bargaining unit. CPKC's management rights did not allow it to ignore the IBEW's *Code* certification for its bargaining unit.

70. Even completely setting aside this legal analysis of the IBEW's certified bargaining unit under the *Code*, the same result would occur upon a proper analysis of the parties' CBA.

CAN CPKC RELY ON THE CONTRACTING OUT PROVISION IN ARTICLE 21?

71. CBA article 21 applies to contracting out. Article 21.1 contains the key terms:

21.1 Work presently and normally performed by employees who are subject to the provisions of this collective agreement **will not be contracted out except:**

(i) **when technical or managerial skills are not available from within the Railway;** or

(ii) **where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees;** or

(iii) when essential equipment or facilities are not available and cannot be made available at the time and place required (a) from Railway-owned property, or (b) which may be bona fide leased from other sources at a reasonable cost without the operator; or

(iv) where the nature or volume of work is such that it does not justify the capital or operating expenditure involved; or

⁴² Code, S. 37.

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

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

(Emphasis added)

72. In its Brief, CPKC argued that it had the right to contract out work under article 21:

46. This request is also illogical and contrary to the Wage Agreement which explicitly provides the Company with the right to contract out work under certain conditions (see Article 21 - Tab 15) and no prohibition on the assignment of work. To grant a cease and desist order preventing the contracting out of work would be to effectively amend the Wage Agreement contrary to CROA MOA Rule 15 and Article 13.3 (Tabs 4 and 3).

...

86. The contractors in dispute are retired former CPKC employees with a career's worth of knowledge and experience. They are hired for a specific, predetermined period with a clear start and end date stated in their contract as well as a cancellation clause. Terms are outlined in the contract and agreed upon between the contractor and the Company, without collective bargaining or union involvement, which is not applicable.

(Emphasis added)

73. Conceptually, a massive difference exists between contracting out work to genuine contractors under article 21 and hiring retired employees to do essentially the same bargaining unit work they had performed previously.

74. As CPKC's Mr. Ehnes testified, professional contractors exist in the railway industry. However, due to a severe shortage of individuals with the requisite skills, those third-party contractors cannot currently supply the skilled individuals to meet CPKC's needs.

75. CPKC highlighted⁴³ the work third party contractors performed in the past during employee shortages. It appears the IBEW took no issue with this use of article 21 at that time since the parties also regularly negotiated FTCE contracts.

76. But the arbitrator can find no support in the article 21 language to permit CPKC to ignore the IBEW and hire retirees as employees to perform essentially the same work they performed when bargaining unit members. The arbitrator acknowledges, as noted above, CPKC's legitimate and significant challenges finding enough qualified people. As Mr. Ehnes testified, he would like nothing more than to fill all the vacant positions in the IBEW bargaining unit. CPKC currently pursues multiple initiatives to hire and retain the skilled individuals it requires.

77. But the legitimacy of CPKC's operational challenges cannot justify its failure to recognize the IBEW's role as the certified bargaining agent. The parties' joint process, prior to 2024, seemingly satisfied both parties' interests. CPKC obtained the expertise it needed. For its part, the IBEW, in addition to monitoring whether an FTCE contract should be cancelled after the filling of a vacancy⁴⁴, also received union dues.

78. In summary, since the facts show that CPKC hired employees, rather than legitimate third-party contractors, article 21 has no application to the present scenario. Instead, this case clearly involved a "contracting in" scenario, rather than contracting out, as will be analyzed in the next section.

CONTRACTING IN

79. In CROA 3647⁴⁵, Arbitrator Picher dealt with a somewhat similar situation at CN. In that case, when CN and the union could not agree on hiring retired employees to cover shortages, CN proceeded unilaterally.

80. Arbitrator Picher rejected CN's argument that it had exercised its right to contract out work but concluded instead that it had engaged in "contracting in":

The Union nevertheless insists that the Company acted outside the collective agreement. **It seeks a declaration from the Arbitrator that it was unlawful for the Company to hire employees and negotiate with them individual terms and conditions of employment outside the collective agreement.** It

⁴³ CPKC Supplemental Book of Documents, Tab 7.

⁴⁴ IBEW Documents, Tab 26 (FTCE cancellation after a vacancy had been filled).

⁴⁵ [CROA 3647](#)

further seeks a cease and desist order from the Arbitrator, presumably to prevent the Company from continuing in that course of action.

The Company's response to the grievance is that it was in effect contracting out bargaining unit work, and that the collective agreement contains no prohibition against contracting out. Having considered the Company's argument, the Arbitrator cannot accept it. I am compelled to share the characterization of Union counsel who maintains that what occurred was "contracting in". Rather than make use of the employees of another company, with whom a contract might be made, the Employer simply negotiated with individuals, hiring them to work to all intents and purposes, as employees alongside the bargaining unit employees, but outside the terms of the collective agreement.

(Emphasis added)

81. Arbitrator Picher issued a declaration, but, on the facts of that specific case, declined to issue a cease-and-desist order:

The grievance is therefore allowed. **The Arbitrator declares that the Company's actions in hiring "surge employees" between June and November of 2007 for running trades operations in Western Canada was in violation of the collective agreement and of the Canada Labour Code, to the extent that it disregarded the exclusive bargaining authority of the Union in respect of all employees performing bargaining unit work.** I do not consider it appropriate, for the reasons touched upon above, to issue a cease and desist order, given that it appears that the Company has made every effort to bring itself within the collective agreement and the Code.

(Emphasis added)

82. The arbitrator similarly concludes that the current case involves contracting in. That contracting in, through the hiring of retired former IBEW members as non union employees, essentially ignored the IBEW's statutory rights and obligations as a certified bargaining agent under the *Code*.

83. The IBEW has demonstrated its entitlement to an effective remedy for this ongoing situation.

REMEDIES

84. Expediency requires that this award issue quickly and provide appropriate relief.

85. As noted in AH900-P and AH900-P2, *supra*, this arbitration had already been adjourned when the arbitrator had to issue two awards obliging CPKC to provide the IBEW with relevant documents and particulars about the hiring of non-union employees. The IBEW could not plead this case without that relevant information.

86. Prior to the arbitration commencing, the parties had already exchanged their ex-parte statements in February 2025. Moreover, the parties exchanged briefs on the first hearing day on May 27, 2025.

87. These facts satisfy the arbitrator that bifurcating the hearing would cause undue delay.

88. The IBEW satisfied the arbitrator that a declaration should issue indicating that CPKC had violated the collective agreement, and its implicit CIRB certification order, by ignoring the IBEW and entering into employment contracts directly with individuals who fell within its bargaining unit.

89. The IBEW further demonstrated that it should be compensated for the lost union dues it would have received had CPKC respected the CBA and/or concluded the type of FTCE contract the parties had previously negotiated to each other's benefit.

90. The arbitrator has further concluded that this case requires a cease-and-desist order to make it clear that CPKC's employment contracts with retired employees violated the CBA. This type of order is required since CPKC, for unknown reasons, did not immediately disclose this important change to the IBEW. Instead, while the IBEW continued to propose further FTCE contracts for some of its retired members, CPKC instead acted unilaterally. This conduct justifies a formal cease and desist order rather than just a declaration.

91. The IBEW did not persuade the arbitrator to order damages, at least at this time. The arbitrator fully anticipates that CPKC will comply with the statutory orders being issued in this award.

92. The IBEW also asked for a finding that CPKC violated the *Code*⁴⁶. While the arbitrator has "the power to interpret, apply and give relief in accordance with a statute

⁴⁶ See IBEW Brief at paragraphs 12, 17, 105 and 195.

relating to employment matters⁴⁷, a party seeking such additional relief will need to include an analysis of the specific statutory provisions in question and supporting jurisprudence. These particulars allow the other party to address the specific allegations being made.

DISPOSITION

93. The arbitrator upholds the IBEW's policy grievance, in part.

94. The arbitrator:

1. DECLARES that CPKC violated the CBA, via a "contracting in", when it hired retired former employees as non-union employees to perform many, if not all, of their preretirement duties.

2. DECLARES that CPKC violated the CBA when it stopped recognizing the IBEW's role and responsibilities as the unit's certified bargaining agent.

3. ORDERS CPKC immediately to compensate the IBEW, with interest, for the union dues the latter would have received had CPKC included the individuals in the unit or used the longstanding IBEW-sanctioned FTCE contracts.

4. ORDERS CPKC to cease and desist violating the CBA through its recent "contracting in" practice of hiring non bargaining unit employees without the IBEW's concurrence.

95. The arbitrator remains seized for any implementation issues arising from this award.

SIGNED at Ottawa this 23rd day of June 2025.



Graham J. Clarke
Arbitrator

⁴⁷ Code, s.60(1)(a.1).