CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 243

Heard at Montreal, Wednesday, October 14th, 1970

Concerning

CANADIAN PACIFIC RAILWAY COMPANY (CP TRANSPORT)

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

DISPUTE:

Claim of one hour at pro rata rate on behalf of senior available warehouseman who did not receive eight hours work on July 10, 1970.

JOINT STATEMENT OF ISSUE:

On Friday, July 10, 1970, Foreman J. Wheelhouse operated a forklift to the extent of one hour. The position of Foreman is outside the scope of the collective agreement.

The Union contends Article 6.4 of the Collective Agreement was violated.

The Company contends there was no violation of the Collective Agreement.

FOR THE EMPLOYEES:

(SGD.) R. WELCH
GENERAL CHAIRMAN
TRANSPORT

FOR THE COMPANY:

(SGD.) C. C. BAKER
DIRECTOR PERSONNEL AND INDUSTRIAL RELATIONS, CP

There appeared on behalf of the Company:

C. C. Baker	– Director, Personnel & industrial Relations, Vancouver

And on behalf of the Brotherhood:

R. Welch	– General Chairman, Vancouver
L. M. Peterson	– General Chairman, Toronto
M. Peloquin	– Administrative Assistant to International Vice-President, Montreal
R. Spooner	– Assistant General Chairman, Vancouver

AWARD OF THE ARBITRATOR

Article 6.4 of the collective agreement, on which the union relies, is as follows:

> **6.4** Where work is required by the Company to be performed on a day which is not part of any assignment, it may be performed by an available extra or unassigned employee, who will not otherwise have forty hours of work that week; in all other cases work shall be performed by the regular employee.

For the purposes of this case it may be assumed that the work in question was required to be performed on a day which was not part of any assignment, although that does not appear from the joint statement of issue. Whether the "senior available warehouseman", on whose behalf the claim is brought, was an "extra or unassigned employee" who would "not otherwise have forty hours of work that week" has not been established. Again, it may be assumed that such was the case.

In my view, article 6 deals generally with the matter of assigned rest days, as the heading of the article states. Article 6.4 makes it possible for an extra or unassigned employee to perform work which is usually performed by a "regular employee". It provides for the distribution of certain work as between employees covered by the agreement. It does not amount to a prohibition against the performance of work by persons other than members of the bargaining unit, whether by supervisors or by employees of a sub-contractor.

The collective agreement does not contain (as many agreements do) a prohibition against contracting-out, or against the performance of work by supervisors. It has been held in many cases that in the absence of an express provision in the collective agreement, there is nothing to prevent a company from contracting-out work formerly performed by its own employees , and **Cases 138** and **151** may be referred to in this connection. In **Case No. 177** it was held that the same reasoning applied to cases of the performance of work by employees outside of the bargaining unit. In such cases, it was said, the question which really arises is whether the person performing the work is, by reason of the sort of work performed, in fact a member of the bargaining unit regardless of his ostensible job classification. As to that, reference may be made to the **Fittings Ltd**. case, 20 L.A.C. 249. In the instant case the Foreman did not, by his operating a forklift to the extent of one hour, lose his classification of Foreman and become an employee subject to the provisions of the collective agreement.

As in **Case No. 151**, it must be said that if the parties had meant to include such an important and widely debated provision as a prohibition against contracting-out, or against the performance of "bargaining unit" work by supervisors, they would have done so in clear terms. Article 6.4, particularly as it appears in the context of article 6, does not have that effect.

(signed) J. F. W. WEATHERILL
ARBITRATOR