CANADIAN OFFICE OF ARBITRATION

CASE NO. 654

Heard at Montreal, Tuesday, February 14, 1978

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim of the Union that laid off Carpenters R. Lapierre, M. Vachon, G. Lacombe, T. Jarvis, and G. Lefebvre and Bridgemen S. Dunaz and R. Couchouron each be allowed pay at their respective rates for an equal proportionate share of the number of man-hours expended by outside forces (Contractor Richard and Ryan) in performing Bridge and Building work at Windsor Station beginning 60 days retroactive from March 2, 1977.

EMPLOYEES' STATEMENT OF ISSUE:

The grievors have established and held seniority as either Carpenters of Bridgemen within the Bridge and Building Department. Because of a reduction in staff, they were laid off as of February 8, 1977.

The Union contends that the Company violated the December 9, 1974, Arbitration Award concerning the contracting out of work as set forth within its letter of March 3, 1975 when it assigned outside forces (Contractor Richard and Ryan) to perform Bridge and Building work (dismantling and constructing partitions and related work) at Windsor Station during the period the grievors were laid off and when it did not advise the General Chairman in writing of its intention to contract out said work.

The Union further contends that the claim should be paid under the provisions of Section 18.10 because the Company did not render a decision at Step IV within twenty-eight days as required by Section 18.6 of Wage Agreement No. 17.

FOR THE EMPLOYEES:

(SGD.) A. PASSARETTI
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

C. McGaw	– Manager, Building Services, Montreal
J. E. Cameron	– Labour Relations Officer, Montreal
T. E. Vulcano	– Labour Relations Assistant, Montreal

And on behalf of the Brotherhood:

A. Passaretti	– System Federation General Chairman, Ottawa
H. J. Thiessen	– Federation General Chairman, Calgary
L. DiMassimo	– General Chairman, Montreal

AWARD OF THE ARBITRATOR

This is a claim on behalf of seven employees for compensation for loss of earnings said to have occurred as a result of the improper contracting-out of certain work. At the hearing of this matter the Company raised a preliminary objection to the arbitrability of the question. There had been unofficial notice to the Union a short time before the hearing that such objection would be made, but the objection was not taken during the course of the grievance procedure. Nevertheless, this particular objection is one going to the fundamental jurisdiction of the arbitrator, and was not subject to being waived.

The objection is that the provision on which the Union bases its case (a letter from the Company to the Union dated March 3, 1975) does not form part of the collective agreement. There is no provision in the collective agreement proper (that is, exclusive of the "Miscellaneous letters of understanding" and "Memoranda of Agreement" which are bound together with it) to prohibit the contracting-out of work. Arbitrability of the present claims depends on whether the letter referred to may properly be said to form part of the collective agreement.

It is acknowledged that letters of understanding and Memoranda of Agreement have, in the past, been treated by the parties as conferring rights and creating obligations which may be the subject of grievance and arbitration proceedings. In some cases these letters or memoranda may be signed by both parties, and may clearly represent some negotiated agreement between the parties intended to be relied upon. Some letters may be in the nature of "letters of intent" and may not in fact create binding obligations. Where a binding obligation appears to be created in a document of that type, appended to the collective agreement, then it may well be that the document is properly read as forming part of or an amendment to the collective agreement. The effect of the document must be determined having regard to the facts in each case.

In the instant case the letter of March 3, 1975 is signed by the employer only. This, in my view is not fatal to the letter's being considered part of the collective agreement since it is the employer alone who subjects himself to any obligation thereunder. The letter was sent as the result of a finding set out in the award of the Hon. Emmett M. Hall on December 9, 1974, under the **Maintenance of Railway Operations Act, 1973**. The material portion of the award in effect adopts certain proposals of the Company which, according to the Arbitrator, "should suffice and provide the basis for a mutually satisfactory operation in the period to December 31, 1976". The Company then sent the letter of March 3, 1975, incorporating the proposals referred to. On March 18, 1977, the two parties agreed to extend the provisions of the letter to December 31, 1977.

It is my view that in these circumstances the letter of March 3, 1975 is properly read as creating obligations of the same nature as those set out in the collective agreement proper. Questions as to the interpretation, application or alleged violation of the letter are, in my view, arbitrable in the same way as any other provisions of the collective agreement. Accordingly, the preliminary objection is dismissed.

A second matter which may be dealt with at the outset is the Union's claim that the grievance should be allowed because of a violation of Article l8.10. That article is as follows:

> **l8.10** Where, in the case of a grievance based on a claim for unpaid wages, a decision is not rendered by the designated officer of the Company as outlined in Clause 18.6 within the prescribed time limits specified, the claim will be paid. The application of this clause shall not constitute an interpretation of the collective agreement.

The time limit, under Article 18.8, is twenty-eight days. The matter was progressed by the Union at Step IV in a letter dated June 15 , 1977 to the General Manager, the "designated officer" under the collective agreement. The General Manager replied on July 7, 1977, which was within the replied time limits. The substance of his letter was to the effect that there was "an oversight in the collective agreement" and that it should be the Director, Corporate Premises, who decides that matter at Step IV. Whether or not the collective agreement reads as it does because of an oversight is not for the arbitrator to say. The fact is that it quite clearly does call for the General Manager to render a decision at Step IV. Nevertheless, it is clear from the letter that the grievance is rejected, since it is proposed that the matter proceed to arbitration. In any event, I doubt whether this case is really one to which Article 18.10 applies since although it involves a claim for compensation, that claim is based on an allegation of improper contracting-out, and it is not in my view, a "claim for wages" within the meaning of Article 18.10. The claim based on that article must therefore fail.

As to the merits of the case, the letter dated March 3, 1975 provides that the Company will not contract out work "presently and normally performed by employees" with certain exceptions. In the instant case the Company contracted with a firm of general contractors for the alteration of partitions and electrical systems in part of B Floor in the Accounting Building at Windsor Station. The work, there is no doubt, involved the effort of a number of trades, and while there is no definite material before me on the point, there can be no point that this included carpenters. The Company itself employs persons in various trades classifications in its maintenance and repair staff at Windsor Station, and while it does not appear regularly to employ persons there in the classification of Carpenter, it does employ Bench Carpenters, a higher level of the trade. The Company does, of course, employ Carpenters and Bridgemen, such as the grievors, elsewhere. The grievors had not been on the staff at Windsor Station but had been laid off from their work elsewhere, and were entitled to exercise seniority rights, subject to qualifications, at Windsor Station.

The work which was contracted out has not been shown to be work "presently and normally performed by employees" of the Company. No doubt, in the past, the staff at Windsor Station have dismantled and erected partitions and have done work not unlike that performed by the general contractor in this case. For the purposes of this decision it may be assumed that the work was work which employees would have been capable of doing. That the staff "presently and normally" were engaged in relatively substantial jobs of building alteration, however, is a proposition that would need to be clearly established, and that has not been done in this case.

It may be observed that this claim involves certain individuals who had a right to exercise seniority to displace others. They themselves had certainly not "presently and normally" performed building alterations. If the work was properly contracted-out, there would be no scope for employees to displace some portions of the contractor's staff. As a practical matter, that would be disruptive of the contractor's operations and perhaps contrary to the contractual undertaking, but in any event the question of the propriety of the contracting-out is to be determined having regard to the practice at Windsor Station, and not the availability of the grievors.

The letter of March 3, 1975 sets out an undertaking by the Company to advise the Union in advance of its intention to contract out work which would have "a material and adverse effect" on employees. There is no suggestion that the regular employees at Windsor Station were affected by the contracting-out in this case. No one was laid off as a result of the contract. The grievors, being on lay-off, were not successful (two of them found work at another of the Company's operations) in their attempts to exercise seniority, but that was not because of the contracting-out of the work in question.

What occurred in this case, then, was a contracting-out of certain work which was not within the scope of the restriction placed on the Company by the letter of March 3, 1975. This contracting-out could not properly be regarded as a cause of any loss of earnings to the grievors. There has been no violation of the collective agreement, and the grievance must therefore be dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR