CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1173

Heard at Montreal, Tuesday, January 10, 1984

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

A claim by the Union that the Company violated the letter on Contracting Out dated March 5, 1982, when a contractor was employed to carry out renovations to the Profit Analysis Department, "C" Floor, St. Antoine Street Extension Building, Windsor Station, commencing on March 11, 1983, instead of recalling 16 B&B employees laid off on December 17, 1982.

JOINT STATEMENT OF ISSUE:

The Union contends that: **(1.)** The B&B employees laid off were qualified to do this work in Windsor Station. **(2.)** The Company violated the letter on Contracting Out, Appendix B-12, Wage Agreement 41. **(3.)** That all sixteen employees be paid 8 hours per day at their regular rate of pay from March 11, 1983, and onward.

The Company contends that none of the 16 grievors were unable to hold work as a result of the contracting out which commenced on March 11, 1983; therefore, pursuant to the final paragraph of the letter on Contracting Out, there is no grievance under the terms of the collective agreement and the dispute is not arbitrable. The Company further contends that even if the dispute were determined to be arbitrable, exceptions No. 1 to 6 of the letter on Contracting Out, Appendix B-12, Wage Agreement 41, applies.

FOR THE BROTHERHOOD: FOR THE COMPANY:

(SGD.) H. J. THIESSEN (SGD.) C. McGaw

System Federation General Chairman Director, Building Services

There appeared on behalf of the Company:

J. A. Edge – Manager, Building Services, Montreal

C. McGaw – Director, Building Services, Montreal

P. E. Timpson – Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen – System Federation General Chairman, Ottawa

R. Gaudreau – Vice-President, Ottawa

G. Valence – General Chairman, Sherbrooke

E. J. Smith – General Chairman, London

L. DiMassimo – Federation General Chairman, Montreal

AWARD OF THE ARBITRATOR

As the joint statement indicates this case deals with the issue of whether the Company violated the Letter of Contracting Out dated May 5, 1982 when a General Contractor was retained in lieu of sixteen bargaining unit employees on lay off to carry out certain renovation work to the Profit Analysis Department, "C" Floor, St. Antoine Street Extension Building, Windsor Station. It suffices to say, for the purposes of this decision, that the Company treated this project as a "major" work requiring the assistance of a Contractor to co-ordinate the trades in accomplishing the project's task within the prescribed deadline.

In having regard to the Letter of Contracting Out (which I will not repeat herein) and the past CROA cases that have interpreted that document the following issues appear to be consistently raised at arbitration:

1) Was the Company obliged to give notice to the Trade Union of the contracting out of the work?

Emergency situations do not require notice. A planned contracting out of work imposes an obligation on the Company to notify the Trade Union and to engage it in appropriate consultation. The issue of notice was not a problem in this case.

2) Is the contracting out of work grievance arbitrable?

Two problems regularly arise in resolving this question. The first pertains to whether the work that is the subject of the contracting out "is work presently and normally performed" by bargaining unit employees. The second problem pertains to whether the contracting out of the work directly "results in an employee being unable to hold work". If the Trade Union satisfies these two requirements then it may process a grievance "in respect of such an employee".

3) If the grievance is arbitrable, does the work contracted out fall within any of the six (6) exemptions provided for in the contracting out letter?

In this regard, the issue turns on the presentation of information on the Company's part that is sufficiently persuasive to bring the contracted out work within one or all of the exemptions.

In this case, the Company has argued (without prejudice to the work in question being exempted) that the grievance is not arbitrable because the work contracted out did not directly result in a bargaining unit employee "being unable to hold work". In essence it was submitted that the sixteen grievors who were on lay off at the material time of the contracting-out of the work were not directly affected as a result and thereby were not "being unable to hold work". In this regard the Company relied on an ad hoc arbitration case involving the **Company and Canadian Council of Railway Shopcraft Employees and Allied Workers** where in like circumstances, the Arbitrator stated:

> Under this provision, even where work is contracted-out which does not come within the exception described in the agreement, a grievance may only be brought in respect of an employee (or employees) unable to hold work as a result of the contracting-out. Whether or not there were employees already on layoff does not appear to be a material consideration. The question is whether or not the contracting-out itself has resulted in an employee being unable to hold work. In the instant case, the contracting-out of the work in question has not led to any change in the number of carmen employed at Windsor. It is not, in these circumstances, a case of the Company's "chipping away" at the Union's jurisdiction or at the scope of carmen's normal work.

The Trade Union has adduced no evidence or argument in this case to convince me to distinguish, qualify or reject the above authority. Indeed, I must conclude that, in having regard to the Trade Union's failure to attempt to do so the precedent must be "correct". Indeed, I am so persuaded and intend to follow its reasoning in the circumstances described in this case. That is to say, this grievance, in accordance with the terms of the Letter of Contracting-Out, is not arbitrable.

I might also add that it serves absolutely no useful purpose for the Trade Union to argue that the aggrieved employees are qualified to perform the contracted out work or that they have performed such work in the past or that the Company is unfair in denying them this work. An Arbitrator is duty-bound to interpret the language of the collective agreement that has been placed before him. He cannot amend, alter or change any of its terms based solely on a party's perception of the intention of its provisions. In this particular case, I am quite satisfied that the job security objective intended by the Letter of Contracting-Out from the Trade Union's perspective has not been achieved. I can do nothing about that disappointed expectation except to recommend that the provisions of the letter be changed at the next round of negotiations.

For the foregoing reasons, the grievance is denied.

(signed) DAVID H. KATES

ARBITRATOR