CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2005

Heard at Montreal, Wednesday, 14 March 1990

Concerning

CANADIAN PACIFIC LIMITED

And

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Contracting out of work on the Bromhead Subdivision.

JOINT STATEMENT OF ISSUE:

The employer utilized a contractor to distribute materials for installation by the R-4 Ballast Gang.

The Union contends that the employer violated the letter of understanding concerning the contracting out of bargaining unit work, Article IV of the Master Agreement signed on the 29th day of July, 1988, by contracting out bargaining unit work having a material and adverse effect on the employees and by failing to provide the union with the necessary notification prior to contracting out bargaining unit work, and by failing to establish that the contracting out of bargaining unit work fell within one of the exceptions cited in the letter of understanding.

The Union requests that the employer compensate the employees who normally perform these duties an amount equal to all hours paid the contractor.

The Company denies the Union's contention and declines payment.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD) M. L. MCINNES	(SGD) J. M. WHITE
SYSTEM FEDERATION GENERAL CHAIRMAN	GENERAL MANAGER, OPERATION & MAINTENANCE, HHS

There appeared on behalf of the Company:

M. E. Keiran	– Assistant Supervisor, Labour Relations, Vancouver
D. A. Lypka	– Supervisor, Labour Relations, Vancouver
B. Mittleman	– Counsel, Montreal
L. G. Winslow	– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

M. Gottheil	– Counsel, Ottawa
M. L. McInnes	– System Federation General Chairman, Vancouver
K. Deptuk	– General Chairman, Winnipeg

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that in July and August of 1988 the Company hired a private contractor to pick up and distribute ties along the Bromhead Subdivision near Minton, Saskatchewan. The R-4 Ballast Gang was then working on the subdivision, and the ties were being redistributed for its use.

It is not disputed that the pick up and distribution of railway ties is normally performed by section crews in the Company's track department. Where, for any reason, there is a subsequent need to redistribute the ties along any part of the road, it is not uncommon to use ballast gang employees to perform that function.

At the time of the events giving rise to this grievance the R-4 Ballast Gang consisted of 70 employees who were fully engaged in their normal work assignments. There were then no available employees on layoff, and it is not disputed that the hiring of the contractor, whose work appears to have been performed by one individual over a two week period, resulted in any loss of normal work opportunities to bargaining unit employees. The thrust of the Brotherhood's position, however, is that the work in question is of a type normally performed by bargaining unit members, and that it could have been performed by reorganizing the work force and assigning overtime to some of the ballast gang employees. It submits that in the circumstances the Company was under an obligation to give specific notice to the Brotherhood of its intention to contract out the work, and that the work should have been assigned to its members.

Counsel for the Brotherhood submits that the language of Appendix B-15 to the Collective Agreement, which governs the obligations of the parties in respect of contracting out, stipulates that the Brotherhood was entitled to notice of the contracting out, regardless of whether employees would be adversely affected or not. In this regard he points to the change in language in the Appendix as it appeared in 1985, as compared with its original formulation in 1978. He points in particular to the language of the final paragraph of the Appendix which now reads as follows:

> Where a Union contends that the Company has contracted out work contrary to the foregoing, the Union may progress a grievance by using the grievance procedure which would apply if this were a grievance under the collective agreement. Such grievance shall commence at the last step of the grievance procedure, the Union officer submitting the facts on which the Union relies to support its contention. Any such grievance must be submitted within 30 days from the alleged non-compliance.

By contrast Counsel points to the language of the prior version of the Appendix which provided, in part:

> Where a Union contends that the Railway has contracted out work contrary to the foregoing and this results in an employee being unable to hold work, the Union may progress a grievance ...

Counsel submits that that change in language makes a material difference in the Brotherhood's entitlement to notice. Secondly, he contends that the decision of this Office in **CROA 1490** is wrong to the extent that it finds that the concept of "adverse effect" does not extend to depriving employees of possible overtime opportunities.

The Arbitrator has difficulty with that submission. Firstly, it is less than clear that the deletion of the threshold requirement of employees being unable to hold work from the language of the final paragraph of Appendix B-15 must necessarily be taken to mean that the Company is in all cases obliged to assign overtime prior to exercising its right to contract out. The language of that paragraph, as rewritten, is equally consistent with the possibility that the parties contemplated a heightened obligation to recall laid off employees, or hire new staff, before the employer can avail itself of its right to contract out. I am not persuaded that the difference in the language of that paragraph justifies a conclusion that the decision of this Office in **CROA 1490**, which followed the earlier award in **CROA 1004**, is patently erroneous. In my view the decision reflected in that award has not been shown to be incorrect and therefore should not be departed from in the instant case.

The Arbitrator is, moreover, satisfied that the circumstances disclosed bring the facts within the contemplation of Appendix B-15. I am satisfied that in the circumstances neither sufficient employees nor the equipment or facilities necessary to perform the work were available to the Company, within the contemplation of sub-paragraphs 2 and 3 of the Appendix. Consequently an exception to the prohibition to contracting out is made out on the facts.

For the foregoing reasons the grievance must be dismissed.

March 16, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR