CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2145

Heard at Montreal, Wednesday, 15 May 1991

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Contracting out of the painting of various track machinery and equipment in the West Toronto Work Equipment Repair Shop.

BROTHERHOOD'S STATEMENT OF ISSUE:

When various track machinery and equipment require painting, the Company hires a contractor, Tony Andreousvich Inc. to come in to the West Toronto Shop to perform this work.

The Union contends: **1.)** the contracting out of this work was improper and not in accordance with Section 31 of Wage Agreement No. 41: **2.)** the Company violated Section 31.3 and 31.4 by not including this contract in the Company's plan for contracting out work and by not serving notice on the Union of their intention to contract out this work: **3.)** the Company further violated Section 31 of the Agreement by contracting out bargaining unit work, having a material and adverse effect on employees.

The Union requests: **1.)** the employees capable of performing the repairs at the West Toronto Shop, be compensated an amount equal to all hours paid to the contractor: **2.)** the employer advise which employees will be paid, the amount of payment and the pay period they will be paid.

The Company denies the Union's contentions and declines the Union's requests.

FOR THE BROTHERHOOD:

(SGD.) L. M. DIMASSIMO
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. P. Egan	– Assistant Supervisor, Labour Relations, Toronto
D. Cook	– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

L. DiMassimo	– System Federation General Chairman, Ottawa
R. Della Serra	– General Chairman, Montreal

AWARD OF THE ARBITRATOR

The material establishes that until 1985 any repainting of equipment performed at the West Toronto Shop, whether it be overhaul painting or spot painting, was performed by members of the bargaining unit. From 1985 to the present the Company has engaged in the contracting out of overhaul painting work, albeit it continues to be performed within the shop. The material before the Arbitrator discloses that there may have been some errors on the part of the Brotherhood's Local Chairman with respect to the administration of the collective agreement, to the extent that the Brotherhood may not have diligently detected or protested the contracting out. On that basis the Company submits that the instant grievance is untimely and therefore not arbitrable.

The Arbitrator cannot accept that submission. Just as a company may be entitled to correct an error in the interpretation or application of a collective agreement, even where that error has been by its own negligence, so may a union. That is particularly so where, as in the instant case, the alleged violation of the collective agreement is in the nature of a continuing event. In the case at hand it appears that the General Chairman first learned that the painting had been contracted out on June 14, 1990 and proceeded to file a grievance by way of a letter dated June 26, 1990. In the Arbitrator's view the Brotherhood was entitled to grieve the contracting out in the manner that it did insofar as a distinct and separate violation of the collective agreement was perceived to have occurred on June 14, 1990. On the basis of my acceptance of the Brotherhood's representation with respect to the dates involved, I must conclude that the instant grievance is both timely and arbitrable.

Part of the Brotherhood's complaint is that it did not receive notice of the contracting out initially undertaken in 1985. In this regard it refers to Section 31.4 of the collective agreement which provides as follows:

> **31.4** The Company will advise the Union representatives involved in writing, as far in advance as is practicable, of its intention to contract out work which would have a material and adverse effect on employees. Except in case of emergency, such notice will not be less than 30 days.

The Company's response to that position is that when the contracting out was initiated in 1985 it resulted in no adverse effects on any employee. In the absence of any contrary evidence from the Brotherhood, I am compelled to accept the employer's position that it was not under an obligation to advise Brotherhood representatives of its intention to contract out the painting work at the time it was initiated. Needless to say, evidence establishing an adverse effect on employees at that time would have justified a contrary conclusion.

The second, and more important issue in this grievance is whether the contracting out engaged in by the Company is in violation of Section 31 of the collective agreement. The exceptions to the prohibition against contracting out are described in the following terms in Section 31.1:

> **31.1** Work presently and normally performed by employees who are subject to the provisions of this wage 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
> **(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.

The Arbitrator is satisfied that the overhaul painting of equipment at the West Toronto Shop was work presently and normally performed by employees in the bargaining unit within the meaning of Section 31.1 when the Company's decision to commence contracting out was taken in 1985. It is common ground that the painting in question was then done by employees in the bargaining unit, albeit by means of paint brushes rather than through the use of spray equipment, although the Brotherhood's representative suggests that in earlier years spray guns were also utilized by bargaining unit employees in the shop.

The approach of the Company to the language of Section 31.1 in the instant case appears to be limited to the employees regularly assigned to the West Toronto Shop. On that basis it submits that there were no employees qualified to perform the work available from either the active or laid-off employees. The Brotherhood's representative submits that the scope of application of Section 31.1 cannot be so narrowed. Noting that there were at all material times qualified painters laid-off and available from the Building & Bridge Department at Toronto, he submits that the Company could not bring itself within the exceptions of sub-paragraph (ii) of Section 31.1.

In the Arbitrator's view the Brotherhood's position on this aspect of the grievance is well founded. There is nothing in the language of Section 31 of the collective agreement to suggest that the availability of active or laid-off employees is to be restricted to a particular department or gang. Nor can the Arbitrator accept the suggestion of the Company that the equipment, namely a spray gun, was not available to it at the West Toronto Shop. As is apparent from the terms of sub-paragraph (iii), equipment cannot be deemed to be unavailable if it is possible to lease it from independent sources at a reasonable cost. The Arbitrator accepts the submission of the Brotherhood's representative that paint spraying equipment could have been leased by the Company, or indeed purchased, at little or no substantial capital outlay.

In the result the Arbitrator is satisfied that the contracting out of overhaul painting at the West Toronto Shop in June of 1990 was in violation of Section 31.1 of the collective agreement. In the circumstances I am satisfied that the interests of the Brotherhood are sufficiently served by a declaration to this effect. Absent clear evidence of any direct adverse impact on any employee, and having particular regard to the Brotherhood's own oversight in the ongoing application of the prohibition against contracting out I do not deem this an appropriate case for an order of compensation. For the foregoing reasons the grievance is allowed.

17 May 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR