CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2164

Heard at Montreal, Wednesday, 10 July 1991

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Contracting out bargaining unit work at Bridge 22.67, Parry Sound Subdivision.

BROTHERHOOD'S STATEMENT OF ISSUE:

The Company hired a contractor, Prepak (sic), to make repairs to pier footings at Bridge 22.67, Parry Sound Subdivision, while there were employees and equipment available to perform these repairs. The Union contends: 1) The Company violated Section 3.3 of Wage Agreement No. 41, by not including this contract in the Company's plans with respect to contracting out for the year, 1990. 2) Lay-offs which occurred during the months of December 1989, to May of 1990, may have been avoided. 3) Lay-off of the B&B Road Gang which occurred December 14, 1990, may have been avoided. 4) This type of work has been performed by B&B forces at other locations, and could have been performed by them at this location. 5) The Company violated Section 31.4 and 31.5 of Wage Agreement No. 41, by not serving notice on the Union of its intention to contract out this work.

The Union Requests: That the B&B employees on the Sudbury Subdivision compensated an amount equal to all hours paid to the contractor and 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 contention 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, IFS, Toronto
G. W. McBurney	– Supervisor, Labour Relations, IFS, Toronto
D. T. Cooke	– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

L. M. DiMassimo	– System Federation General Chairman, Ottawa

On Tuesday, 10 September 1991, there appeared on behalf of the Company:

R. P. Egan	– Labour Relations Officer, Montreal
D. T. Cooke	– Labour Relations Officer, Montreal
S. Rowe	– Assistant Division Engineer, IFS, Sudbury

And on behalf of the Brotherhood:

L. M. DiMassimo	– System Federation General Chairman, Ottawa
J. J. Kruk	– Federation General Chairman, Sudbury
L. Marcoux	– Witness
D. Brown	– Observer, Assistant to the Vice-President, Ottawa

AWARD OF THE ARBITRATOR

The facts giving rise to this grievance are not in dispute. During the summer of 1990 the Company entered into a contract with Intrusion-Prepakt Ltd. to repair piers 15 and 16 on the bridge located at Mileage 22.67 on the Parry Sound Subdivision. While the work was not originally planned to be done during 1990, it appears that inspections revealed a deterioration in the footings of the piers and the Company decided that the work needed to be completed on a priority basis during August and September, when the river was at its lowest flow rate. The greatest portion of the footings being repaired was under water. It does not appear disputed that some eight to ten feet of one of the piers was fully submerged, while the above water repair on the footings varied between one and four feet in height.

It is common ground that underwater concrete work has not been performed by the Brotherhood in the past. In the instant case the process used by the contractor was, in large part, different from any utilized previously by the Company. Rather than dam the area around the footings to establish a dry working area, after the surfaces were prepared and the reinforcing steel inserted, the contractor submerged wooden forms into the water and sealed the base of the forms with concrete grout pumped into specially prepared fabric bags. The process then involved the dumping of washed aggregate into the form, and the subsequent pumping of concrete grout into and through the wet aggregate by a network of pipes to create the finished concrete.

The prohibition against contracting out, and the exceptions which allow it, are found in the following terms of Section 31 of the collective agreement:

> **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:
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> **(i)** when technical or managerial skills are not available from within the Railway; or
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> **(ii)** where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees; or
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> **(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
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> **(iv)** where the nature or volume of work is such that it does not justify the capital or operating expenditure involved; or
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> **(v)** the required time of completion of the work cannot be met with the skills, personnel or equipment available on the property; or
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> (vi) where the nature or volume of the work is such that undesirable fluctuations in employment would automatically result.
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> **31.2** The conditions set forth above will not apply in emergencies, to items normally obtained from manufacturers or suppliers nor to the performance of warranty work.
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> **31.3** At a mutually convenient time at the beginning of each year and, in any event, no later than January 31 of each year, representatives of the Union will meet with the designated officers to discuss the Company's plans with respect to contracting out of work for that year. In the event Union representatives are unavailable for such meetings, such unavailability will not delay implementation of Company plans with respect to contracting out of work for that year.

The principal issue to be addressed is whether the work contracted out can be described as "work presently and normally performed by employees who are subject to the provisions of this wage agreement". In the Arbitrator's view a substantial part of the work performed at the Parry Sound bridge cannot be said to be work of that description. It is common ground before the Arbitrator that the underwater preparation of concrete surfaces, and the

installation and removal of forms underwater has previously been contracted out by the Company and has never been claimed by the Union as its own work. It is also clear that the members of the bargaining unit are not qualified to perform the pouring of concrete by the specialized pumping of grout through a network of pipes into a bed of aggregate which is underwater, or indeed above water. The concrete pouring which has normally been performed by members of the bargaining unit is the traditional "dry pour" of concrete inside a form which is free of any water, and does not contain aggregate. In the circumstances, the Arbitrator is satisfied that the application of the concrete grout by the means of the particular process used by the contractor, using specialized equipment and pressure pipes imbedded in the aggregate, cannot be said to be work presently and normally performed by employees within the bargaining unit, or work which falls within the technical knowledge or qualifications of the members of the union.

That conclusion, however, does not entirely dispose of the grievance. The evidence discloses that substantial portions of the work performed by the contractor did involve work presently and normally performed by members of the bargaining unit. These include the building of the wooden forms used in the operation, as well certain work performed above the water line with respect to their placement and installation. In the Arbitrator's view the evidence does not disclose that the making and handling of the forms, insofar as that work was performed above the water line, would have fallen within any of the exceptions to the prohibition against contracting out found within Section 31.1 of the collective agreement. Nor can the Arbitrator accept the submission of the Company that sufficient employees qualified to perform the building of the forms were not available. It appears indisputable that employees who were then involved in the redecking of the same bridge could have been deployed to do the form work, with the non-emergent redecking work being rescheduled for a later time. In other words, there was nothing in the circumstance which discloses an emergency which could not have been dealt with by recourse to the Company's own employees. The Arbitrator accepts, however, the position of the Company with respect to the Brotherhood's claim that the pouring of the concrete above the water line could not have been contracted out as such work is presently and normally performed by bargaining unit employees. The unchallenged evidence before me is that the entire footing of the two piers had to accomplished in a single pour, thereby avoiding any cold joints that would result from the layering of concrete in separate pours. Consequently, the nature of the operation required that the portions of the footing above the water line be poured in unison with those below. In the circumstance, it would have been neither practicable, nor within the contemplation of Section 31.1 of the collective agreement, for that work to have been carved out to be done separately by members of the bargaining unit. The same cannot be said, however, with respect to the preparation of the surfaces of the above water portions of the footings. That work, like the preparation of the forms, is work presently and normally performed by bargaining unit employees which could, on the basis of the evidence before the Arbitrator, have been performed by members of the bargaining unit without interfering with the technical process being utilized by the contractor.

In the result, the grievance must be allowed in part. The Arbitrator finds that the Company violated Section 31 of the collective agreement by contracting out the construction and above water handling of the wooden forms used in the repair of piers 15 and 16 of the bridge in question, as well as the chipping and cleaning of those portions of the footings which were above water. For the reasons related, the contracting out of the pouring of all of the concrete, by means of the pumping of grout through a wet application of washed aggregate, did not involve work presently and normally performed by members of the bargaining unit, and was not work for which any of the employees had the technical skills or qualifications. That portion of the contracting out was not, therefore, in violation of the collective agreement.

In addition to the above declaration, therefore, the Arbitrator orders that the Company compensate employees whose work season was shortened by reason of the contracting out of the form assembly and handling, as well as the above water concrete preparation work at Bridge 22.67 Parry Sound Subdivision. I retain jurisdiction in respect of any dispute between the parties regarding the amount of compensation payable, or any other aspect of the interpretation or implementation of this award.

September 13, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR