# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 2272

Heard at Montreal, Thursday, 16 July 1992

concerning

## CANADIAN PACIFIC EXPRESS & TRANSPORT

and

## TRANSPORTATION COMMUNICATIONS UNION

## EX PARTE

### DISPUTE:

On or about November 11th, 1991, the Company issued an article V notice of the Job Security Agreement in light of operational changes to the Vancouver to Prince George Linehaul runs.

### UNION'S STATEMENT OF ISSUE:

The Union's review of this specific case matter clearly illustrates that the Company had arbitrarily and unilaterally decided to have this linehaul work, that presently being performed by bargaining unit employees, operated by an outside contractor.

The Union maintains that the Company has countenanced the continued erosion of the bargaining unit's work in lieu of seeking other feasible alternatives.

The Union asserts that this form of "contracting out" of bargaining unit work is a direct violation of the present terms of the collective agreement.

The Union further asserts that subcontracting out of this specific work is understood in the trucking industry as "contracting out" and not "interlining of traffic" as the Company implies.

To date, the Company has denied any wrongdoing, and that this form of "contracting out" is not a violation of the present collective agreement.

### FOR THE UNION:

**(SGD.) M. W. FLYNN**
**FOR: EXECUTIVE VICE-PRESIDENT**

There appeared on behalf of the Company:

P. A. Young – Counsel, Toronto
B. F. Weinert – Director, Labour Relations, Toronto
B. D. Neill – Vice-President, Human Resources, Toronto
J. H. Barrett – Regional Manager, Western Canada Linehaul, Vancouver

And on behalf of the Union:

M. Church – Counsel, Toronto
J. Crabb – Executive Vice-President, Toronto
M. Gauthier – Vice-President, Montreal

M. Flynn – Vice-President, Vancouver
J. Marr – Vice-President, Saint John

*At the request of the Union, the hearing was adjourned to September 1992.*

On Wednesday, 11 November 1992, there appeared on behalf of the Company:

P. A. Young – Counsel, Toronto
B. F. Weinert – Director, Labour Relations, Toronto
B. D. Neill – Vice-President, Human Resources, Toronto
J. H. Barrett – Regional Manager, Western Canada Linehaul, Vancouver

And on behalf of the Union:

H. Caley – Counsel, Toronto

## AWARD OF THE ARBITRATOR

The facts are not in dispute. On or about November 11, 1991 the Company gave notice of the abolishment of the Prince George to Vancouver linehaul run. The work in question was contracted to Highland Transport. It is common ground that Highland Transport and the Company are both wholly owned subsidiaries of Canadian Pacific Express and Transport Ltd. As a result of the change two bargaining unit positions were lost.

The Union alleges a violation of the sub-contracting provisions of the collective agreement, found at page 86 of that document. They are as follows:

> **SUBCONTRACTING**
>
> The Company and the Union acknowledge that the Company has a practice of using both Owner-Operators and Bargaining Unit employees as appropriate in its operations.
>
> While the Company intends to continue its present practice, there is no intent on the part of the Company to establish Owner-Operators in any growth of Company operations where it would be practical and economic to use Bargaining Unit employees.
>
> The Company agrees that there will be no permanent reduction in the present number of Bargaining Unit employees as a result of the use of Owner-Operators or Brokers in any area.
>
> The Company and the Union agree that, in the event of a violation of this understanding, the Union may rely upon any rights it may have under the Collective Agreement.
>
> The foregoing shall have no application to any operations in the Province of Saskatchewan; however, in the Province of Saskatchewan, the Company will not use Owner-Operators to perform work that could be performed by an employee who is in the employ of the Company on the date of ratification and who is laid off and has not had 40 hours of work in that week.

It is common ground that the drivers employed by Highland Transport are owner-operators. They are, in fact, represented for collective bargaining purposes under the terms of a separate collective agreement between that employer and the Union. Counsel for the Union submits that what has transpired is the violation of the undertaking in the third paragraph of the subcontracting provision reproduced above. He submits that there has been a reduction in the number of bargaining unit employees by two, and that that reduction has come about as the result of the use of owner-operators. Stressing that Highland Transport is another arm of the corporate organization of which the Company is a part, the Union maintains that the Company cannot do indirectly what it could not do directly. In other words, if it cannot use owner-operators within CPET operations to eliminate bargaining unit positions, the Union submits that it cannot do so by indirectly retaining the services of owner-operators who work for a related company.

The Arbitrator has some difficulty with that submission. The first paragraph gives some indication of the scope and purpose of the subcontracting clause. It speaks in specific terms of recognition of the fact that the Company utilizes owner-operators "... in its operations." The second paragraph addresses the contingency of growth in Company operations, providing that the Company has no intention to expand owner-operator functions at the expense of bargaining unit employees where it is practical and economic to retain the latter.

Against that background, what interpretation is to be given to the third paragraph? In the Arbitrator's view the language of the third paragraph must be interpreted in concert with that of the first two. All references within the subcontracting clause to owner-operators appear within the context of the use of owner-operators within the Company's operations. It cannot be said, in the instant case, that the Company has resorted to the use of owner-operators within its operations to eliminate bargaining unit positions. This is not a case where the Company has sought to avoid its collective bargaining responsibilities by creating a new corporate entity as an *alter ego*. Highland Transport is a *bona fide* company of prior standing, with which the Union has itself concluded a separate collective agreement for the representation of owner-operators.

The purpose and meaning of the subcontracting provisions reproduced above was thoroughly reviewed in **CROA 2249**. The grievance in that case concerned an allegation of a violation of a rule against contracting out. In rejecting the grievance, the Arbitrator reasoned, in part, as follows:

> The issue then becomes whether the language added to the agreement, as contained on page 84, has introduced a blanket provision against contracting out, as argued by the Union. With respect to this issue the Arbitrator finds the submissions of Counsel for the Company to be more compelling. Notwithstanding the generality of its title, the substance of the provision found upon page 84 of the collective agreement is confined to the single issue of the use of owner-operators **by the Company**. There is, very simply, no other subject addressed within the provision negotiated between the parties. The Company and Trade Union before the Arbitrator in this case are sophisticated and experienced in the ways of collective bargaining. The issue of contracting out, as reflected in the comments quoted from *Russelsteel*, above, is a matter of critical importance to them. They must be taken to have appreciated the thrust of the general arbitral law of Canada in this area, as well the import of the four decisions of this Office in respect of the general rights of the Company in that regard.
>
> (emphasis added)

In the Arbitrator's view it cannot fairly be said that what has transpired is the contracting out work by the use of owner-operators by the Company. The owner-operators employed by Highland Transport have no privity of relationship with the Company. They are hired, paid, directed and otherwise governed by Highland Transport independently, and presumably in keeping with the terms of a separate collective agreement negotiated and administered by the Union. The relationship so characterized cannot be described as a sham or a resort to the use of owner-operators in the Company's own operations, as that concept is understood within the subcontracting provision. The thrust and purpose of the third paragraph of subcontracting provision is relatively clear. There is nothing in that provision which prevents the contracting out of the work to another carrier. As understandable as the Union's concerns may be, whether that carrier carries out its own operations by the use of employees or owner-operators is neither here nor there for the purposes of the application of the third paragraph of the subcontracting provision.

For the foregoing reasons the grievance must be dismissed.

November 13, 1992

**(Sgd.) MICHEL G. PICHER**
**ARBITRATOR**