CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2997

Heard in Calgary, Tuesday, 10 November 1998

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

CanPar Transport has hired an outside contractor, signed to a defined term contract, to deliver and pick up CanPar shipments in Edmonton, while regular CanPar employees are laid off.

EX PARTE STATEMENT OF ISSUE:

In December of 1997 CanPar hired an outside carrier, Dynamex, to assist with deliveries and pickups within the metropolitan Edmonton area. This company was hired as a result of increased volumes and excessive overtime being performed by the employees of the Edmonton terminal. This firm has allegedly been hired on a six month contract.

The Union in November negotiations and previous meetings had requested, on a system wide basis, that the Company help in the elimination of excessive and compulsory overtime.

Due to the utilization of Dynamex, on a defined contract basis, several CanPar employees have been laid off, effective January 2, 1998, while Dynamex employees continue to perform their duties.

The Union grieved that this practice cease and that the three affected employees be reimbursed for lost wages as this was a violation of the collective agreement.

The Company denied the Union's request.

FOR THE UNION:

(SGD.) D. J. DUNSTER
EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Vice-President, Operations, Toronto
S. Derbyshire	– Supervisor, Calgary
P. Kitchener	– Supervisor, Hamilton

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
D. Neale	– Division Vice-President, Hamilton
A. Kane	– Assistant Division Vice-President, Vancouver
B. Plante	– Local Chairman, Calgary
A. Geldof	– Shop Steward, Edmonton

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in dispute. Due to a surge in business in the fall of 1997 the Company found itself scheduling excessive overtime for employees at Edmonton. It appears that this raised complaints from employees at the Edmonton terminal. In response, as it has done previously both at Edmonton and elsewhere in its operations, the Company contracted with an outside carrier, in this case Dynamex, to carry out a certain portion of delivery work in the Edmonton area. The Company's representations, not challenged by the Union, are to the effect that Dynamex insisted on a six month contract as a condition of accepting to perform the work in question.

The arrangement so established caused no difficulty through the fall and Christmas season. With a decline in volumes in February of 1998, however, the Company had insufficient work for its regular employees, and was required to temporarily lay off three junior bargaining unit employees.

The Union makes a two-fold submission. Firstly it argues that the employees of Dynamex, who it is not disputed utilized the Company's forms and digital scanners in the performance of their work, are in fact employees of the Company who fall within the bargaining unit, in keeping with the principles enunciated in **CROA 1599**. Alternatively, the Union maintains that what transpired was a contracting out contrary to the intention of the collective agreement.

Counsel for the Company submits that there is nothing unusual in the arrangement established at Edmonton, initiated at the request of the employees without objection from their Union. He argues, firstly, that what occurred is not in the nature of the hiring of persons to fully perform the work of bargaining unit employees under the direction and control of the Company. He stresses that the facts at hand are to be distinguished from those disclosed in **CROA** 1599, where it was found that certain warehousemen obtained from a contractor were in fact fully controlled in all aspects of their work by the Company, so as to fall within the bargaining unit. Counsel notes that the arrangement with Dynamex is simply to provide the contractor with a volume of freight for delivery in a certain area, without any specific directions to the persons carrying out the deliveries in respect of the routes to be followed or any other aspect of the manner in which they operate. It is common ground that the Dynamex drivers have their own vehicles and uniforms which are different from those of the Company.

With respect to the issue of contracting out Counsel for the Company stresses that there is no prohibition against contracting out within the collective agreement, a fact sustained in a number of prior awards of this Office, as noted in **CROA 1599**. On behalf of the Company he points to a number of circumstances where a substantial number of terminals across Canada, said to number in the vicinity of forty-five, have been closed or partially closed, occasioning the layoff of employees where the deliveries in the locations concerned have been transferred into the hands of outside contractors. He stresses that those circumstances have never attracted grievances, as indeed they could not. In sum, the Company stresses that contracting out is a common device necessary to the Company's operations, and contractually accepted by the bargaining agent. In such circumstances the use of Company forms and scanners by the contracting company is normal. By the estimate of the Company's representative, Mr. Paul MacLeod, the Company's forms and paperwork are utilized in 100% of contracting out situations and its scanners are used approximately 80% of the time by contracted delivery staff.

Upon a review of the facts and the jurisprudence cited, the Arbitrator cannot sustain the grievance. In **CROA 1599** the issue was whether the persons brought in to work in the Company's warehouse at Edmonton were employees falling within the bargaining unit, so that in fact there was not a true contracting out. That is reflected in the following passages from the award:

> The first issue is whether there was contracting-out. It is not disputed that the collective agreement does not prohibit contracting-out (*CROA 850, 1003, 1004* and *1022*). The Company maintains that the facts disclose a permissible contracting-out. The Union submits that the four persons brought into the warehouse in fact worked as the employees of the Company, so that a true contracting-out is not established. That is the first issue to be resolved.
>
> Recent years have seen a substantial number of arbitral awards addressing both the issue of whether the employer is entitled to contract-out, and the related question of whether the utilization of personnel from an employment service constitutes contracting-out or whether such individuals are in reality employees falling within the bargaining unit. The tests to be applied to resolve these issues were thoroughly, and in my view correctly, reviewed and summarized in *Re Maple Leaf*

> *Mills Ltd., Grain Elevator Division and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees* (1986), 24 L.A.C. (3d) 16 (Devlin).
>
> Much of the jurisprudence concerns the application of the traditional "control test" to determine whether a personnel service or the host Company is the "employer" for the purposes of a collective agreement. This approach is originally derived from the decision of the *Privy Council in Montreal v, The Montreal Locomotive Works Ltd*. (1947) 1 DLR 161, where Lord Wright listed the elements of the fourfold test: (1) control; (2) ownership of tools; (3) chance of profit; (4) risk of loss. In the more complex work settings and employment relationships of recent decades greater emphasis has been placed upon the control test and, in some instances, following the lead of tort law, to the still broader concept of an organizational test. In the Arbitrator's view the concept that a person is to be deemed an employee for purposes of liability because his or her activity falls under the general activities of an employer's organization is of doubtful utility in the labour relations context. The policies of the courts geared to tracing liability to the deep pocket of an employer are of limited value in resolving disputes concerning the intended application of a collective agreement. The principles which have evolved in respect of the control test remain, in my view, the most pertinent in determining of issues of this kind.

The arbitrator concluded that there was sufficient control of the contracted personnel exercised by the Company so that they must be viewed as employees who fell within the bargaining unit.

In the case at hand there is no evidence to sustain the conclusion that, on a normal application of the control test, the staff of Dynamex working for the Company on contract delivering the Company's freight in the Edmonton area can fairly be said to be employees falling within the bargaining unit. In essence, it appears that although they utilize the Company's paperwork and scanners, their obligation is to collect freight for delivery within a certain geographic area, without any direction or supervision as to the manner in which their work is carried out. What is disclosed in evidence is a true sub-contracting or contracting out, not the contracting in of persons who work under the control and direction of the Company, in a manner indistinguishable from other bargaining unit employees.

There is, as the Company stresses, no provision within the collective agreement which would prevent the contracting out of bargaining unit work. Such work has been contracted out in many other locations where terminals have been closed, in whole or in part, occasioning the layoff of employees who are then compelled to exercise their seniority or recall rights. What the case at hand discloses is a legitimate business requirement to contract out in the fall of 1997 to deal with a surge in freight volumes. The arrangement with the contractor is not permanent, and plainly does not have as its purpose the undermining or erosion of the bargaining unit. The contract with Dynamex is temporary. There is nothing in the collective agreement which would prevent the Company from making a such an arrangement.

For all of the foregoing reasons the grievance must be dismissed.

November 17, 1998

(signed) MICHEL G. PICHER
ARBITRATOR