CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3041

Heard in Montreal, Tuesday, 13 April 1999

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE – BROTHERHOOD:

Issues arising from the Company's notice of February 3, 1999 of its planned closure of its Butt Welding Facility at the Transcona Yard in Winnipeg, Manitoba.

DISPUTE – COMPANY:

The Company's notification to the BMWE, dated February 3, 1999, that an organizational change would be implemented involving employees located at the Transcona Rail Yard & CWR Plant, due to the Company's sale of the CWR Plant to Chemetron True Temper a subsidiary of Progress Rail Services Corporation.

BROTHERHOOD'S STATEMENT OF ISSUE:

The Company, by way of notice served pursuant to article 8 of the Job Security Agreement, advised the Brotherhood of its intention to close, and to abolish all of the positions associated with the above noted facility. The Company also advised the Brotherhood of its intention to contract out the bargaining unit work long done at the facility to a contractor, Progress Rail of Vancouver, B.C. As a result, the Brotherhood filed two grievances objecting to this contracting out and to the job abolishments. The parties have agreed to expedited arbitration to settle the dispute.

The Brotherhood contends that: **(1.)** The work in question is, and has for generations, been work "presently and normally performed" by bargaining unit members; **(2.)** The Company's actions are in bad faith and for no valid business purpose; **(3.)** The Company's actions are in violation of Section 31 of Agreement No 41.

The Brotherhood requests a declaration that the Company's actions are in violation of the collective agreement. The Brotherhood further requests that **(1.)** the Company be ordered to abandon its plans to divest itself of the welding facility, **(2.)** in future, bargaining unit members be exclusively used to perform the work associated with the facility, **(3.)** the article 8 notices served relating to this matter be rescinded, **(4.)** all affected employees be returned to their former positions, **(5.)** all affected employees be compensated for all losses incurred, and **(6.)** the Job Security Fund be reimbursed an equal amount to that paid out of the Fund to any and all affected employees.

COMPANY'S STATEMENT OF ISSUE:

The Company, by way of proper notice service pursuant to article 8 of the Job Security Agreement, advised the Brotherhood of its intention to sell the above noted facility to Chemetron True Temper and to abolish the positions associated with this facility. As a result, the Brotherhood filed two grievances, one for the CWR Plant and one for the Rail Yard, objecting to this transaction as contracting out of its bargaining unit work, and the accompanying job abolishments.

The Company contends that the transaction in question is a sale of a business and is not a violation of any provision of Wage Agreement No. 41.

The Company requests that a declaration that the Company's sale of the Transcona facility to Chemetron True Temper is not in violation of any provision of Wage Agreement No. 41.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) J. J. KRUK	**(SGD.) R. SMITH**
SYSTEM FEDERATION GENERAL CHAIRMAN	**FOR: GENERAL MANAGER, TRACK**

There appeared on behalf of the Company:

G. D. Wilson	– Counsel, Calgary
R. M. Andrews	– Manager, Labour Relations, Calgary
K. Fleming	– Counsel, Calgary
K. Jansens	– General Manager, Track
J. Presley	– Director, Maintenance of Way Development
D. Roemer	– President, Chemetron
J. Schebo	– Vice-President, Chemetron
P. C. Leyne	– Director, Equipment & Facilities
G. W. England	– Director, Litigation Counsel Group, Florida Progress

And on behalf of the Brotherhood:

D. W. Brown	– Counsel, Ottawa
P. J. Davidson	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
G. D. Housch	– Vice-President, Ottawa
D. McCracken	– Federation General Chairman, Ottawa
R. Giest	– Secretary/Treasurer, Lodge 207, Winnipeg
R. Mitchell	– CWR Plant Representative, Winnipeg
R. Heinrichs	– General Chairman

AWARD OF THE ARBITRATOR

This grievance concerns what the Brotherhood alleges is the improper contracting out of work performed by its members at the Transcona Butt Welding Plant, located in Winnipeg. It submits that the work in question has traditionally been performed by bargaining unit members, and that the decision of the Company to sell the plant building and equipment to an independent contractor, which will thereafter supply product of the plant to the Company, is in violation of the prohibition against contracting out contained in the collective agreement. The Company responds that it has made a decision to rationalize its operation and to concentrate on its principal business of operating a mainline railway, as a result of which it has decided to sell that part of its business associated with the butt welding plant. In that circumstance it submits that there has not been a contracting out contrary to the provisions of the collective agreement.

None of the facts pertinent to this grievance are in dispute. For many years the Company has utilized continuous welded rail (CWR) in the construction and maintenance of its rail lines. CWR is a seamless string of segments of rail welded together into lengths which are, on average, approximately 1,400 feet. The Company purchases 80 foot lengths of rail, referred to "stick" rail from a steel mill located in Sydney, Nova Scotia, and from a Japanese supplier, via Vancouver. For the past ten years, following the closure of a butt welding plant at Smiths Falls, Ontario, all of the Company's CWR has been butt welded and assembled at the Transcona facility. CWR is an important material in the Company's operations, as its longer lengths allow for fewer joints in the track, resulting in substantially less wear and tear on rail cars and locomotives, as well as a reduced need for maintenance of the track itself. As there were no manufacturers of CWR at the time the technology emerged, the Company, like other railways, established its own manufacturing plants. In 1968 plants were set up at Transcona, in Winnipeg as well as at Smiths Falls. As noted above, all of the production has been from the Transcona plant since 1989.

The CWR plant is situated on some twelve acres of land in a location on the east side of Winnipeg adjacent to the Company's Transcona freight yard. The Company relates that it commenced in 1996 to examine methods of increasing its efficiencies and reducing costs in relation to producing or obtaining CWR. That exercise eventually led to its receiving a proposal from an independent producer of CWR, with operations in the United States, Chemetron – Railway Products Inc. Following negotiations with Chemetron, a contract was executed, the terms of

which involve the sale of the building, equipment and tools of the Transcona Butt Welding Plant to Chemetron, as well as a long term lease of the land upon which the plant is situated. Part of the contract is an undertaking by Chemetron to supply CWR to the Company, although it is common ground that it is free to produce welded rail at Transcona for sale to any other customers which Chemetron may service. The contractor is also at liberty to supply the Company CWR from its other plants located in Steelton, Pennsylvania, Pueblo, Colorado and Vancouver, British Columbia, subject to certain conditions and mutually established specifications.

The agreement between the Company and Chemetron is to take effect on June 5, 1999. The parties therefore agreed to expediting this matter to arbitration to obtain a ruling in advance of the proposed change. It is not disputed that the change will involve the abolishment of virtually all of the bargaining unit positions of the Brotherhood covered by a dedicated supplementary agreement to the collective agreement, representing approximately fifty positions.

The Brotherhood invokes article 31.1 of the collective agreement, which regulates the ability of the Company to contract out work and provides as follows:

> **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.

Counsel for the Brotherhood submits that none of the exceptions described within the foregoing provisions can be fairly said to operate on the facts of the instant case. He argues that the rationale of the Company is essentially that it can obtain CWR cheaper by purchasing it from an outside contractor than by producing it itself, as it has traditionally done. Counsel stresses that the work in respect of the production of CWR is clearly "work presently and normally performed by employees subject to the provisions of agreement no. 41 …", and that the objective facts disclose that the Company made a decision to contract out for the purchase of CWR in substitution of its own production, contrary to the prohibition against contracting out contained in article 31.1. In that regard he emphasizes the fact that rail butt welding has been part of the core operation of the Railway for many years, a part which is essential to its functioning. The very existence of the Transcona Plant, he submits, is evidence that the Company clearly has the manpower and equipment necessary to perform the work in question, as it has always done. He further submits that the suggestion of the Company that it is increasingly inefficient to bring stick rail from Japan via Vancouver to Winnipeg for assembly into CWR for shipment back to the field in Alberta and British Columbia is not, of itself, a basis for invoking any of the exceptions within article 31.1 In that regard the Brotherhood stresses that stick rail has been brought to Winnipeg from the west coast for some twenty years for assembly into CWR. There would, it submits, be nothing new in the circumstances described by the Company to bring its decision within the exceptions to article 31.1.

More fundamentally, counsel for the Brotherhood submits that the mere fact that it might be cheaper for the Company to contract out the work does not of itself justify the contracting out. In this regard he refers the Arbitrator to several prior awards within the industry, including **Shopcraft Case 156** which dealt with the abolishment of bunkhouse attendant's positions, and **CROA 1869**. Nor, he submits, can the Company avoid its obligations in respect of the prohibition to contract out on the basis of an argument that what it has done can also be characterized as the sale of its business or part of its business. Whether the transaction would constitute the sale of a business

within the meaning of Section 44 of the **Canada Labour Code**, counsel submits, so as to give rise to issues of successorship, is irrelevant to the application and interpretation of the prohibition against contracting out agreed between the parties in the terms of article 31.1 of their collective agreement. He further questions how the concept of the sale of a business can be asserted in aid of the Company's position, stressing that the statutory adjudications in relation to that concept by labour boards in Canada have almost uniformly supported the protection of collective agreement and bargaining unit rights. He also questions whether the decision of the Company to contract out the work can be said to have been made in good faith, noting the jurisprudence which suggests that even where collective agreements may have no prohibition against contracting out, such a prerogative must be exercised by an employer in good faith.

In support of the Brotherhood's submission counsel stresses the hand-in-glove nature of the arrangement between the Company and Chemetron. Emphasizing that the contractor will continue to utilize the same building, equipment and premises in Winnipeg previously operated by the Company to supply the Company with CWR, he submits that the objective facts clearly disclose a classical case of contracting out. He directs the Arbitrator to a number of the provisions of the contract made between the Company and Chemetron which, he submits, disclose a relationship consistent with a contracting out arrangement. In summary, he points to the following facts as demonstrative of a contractor/client relationship:

1. Butt welding is vital and necessary for CP to operate.
2. CP intends to lease a building in its Transcona Yard to Progress Rail Services [Chemetron] , a large, well-known rail services contractor, to perform the work.
3. To meet volume demands, Progress will be required to perform work for CP virtually full-time, all year round.
4. CP will decide where Progress may purchase stick rail.
5. CP will decide the type of rail to be welded, the number of welded strings and the length of each welded string.
6. CP will decide the correct loading position for each length of CWR.
7. CP will pick the CWR up and deliver wherever it is needed.
8. CP shall be responsible for the cost of transportation of the CWR and of the stick rail (if, in the latter case, CP is the carrier which it almost certainly always will be).
9. CP must agree with the contractor's inventory levels and CWR delivery schedule.
10. The contractor's work must meet CP's specifications.
11. CP has the right to conduct inspections and verifications whenever CP deems it necessary. Furthermore, CP may, at its discretion, monitor the contractor's quality control practices and records.
12. The contractor's performance shall be measured by "performance indicators" (including such things as the number of defective welds or the percentage of time items are shipped on time). These "indicators" shall be monitored by a committee half composed of CP officers. This committee shall review the performance of the contractor and determine such things as "penalties or incentives associated with performance indicators".
13. CP has the right to audit the contractor's records pertaining to the calculation of charges under the Agreement.

In further support of his submissions counsel refers the Arbitrator to the decision of the Quebec Court of Appeal in **Syndicat des travailleurs et des travailleuses des épiciers unis Métro-Richelieu et Épiciers unis Métro-Richelieu Inc.** (1996) R.J.Q. 1509 as well as **Re Department of Transportation & Communications and Canadian Union of Public Employees, Local 1867** (1991) 19 L.A.C. (4th) 23 (Veniot).

The Company's representative submits that the objective facts disclose the sale of the Company's business, so far as it relates to the production of CWR. He stresses that in accordance with the terms of an asset purchase agreement Chemetron acquires control of all elements necessary to operate what was formerly part of the Company's business. In this regard he notes that the contractor has obtained possession of the land at Transcona by

means of a lease, and purchased outright the building, equipment, inventories, tools and all non-fixed assets, as well as the roads and rail lines at the plant, outdoor machinery, overhead cranes and has assumed all applicable contracts. He further notes that Chemetron becomes liable for such matters as environmental contamination, other potential liabilities of all kinds and maintains the right to enter into agreements, deals with obligations under assumed contracts, controls any license to use the roadways, is responsible for property and other applicable taxes, as well as utilities and insurance on the premises. There has, in the Company's submission, been a full divestiture of the business which will be taken over by Chemetron at Transcona as a going concern. Its representative submits that the Company retains no interest in the CWR plant or related equipment and that its contract to provide inbound and outbound freight service to Chemetron is indistinguishable from its similar contracts with any other customer or supplier.

The Company's representative further highlights Chemetron's own perspective of the arrangement. He notes that it is Chemetron's intention to operate the Winnipeg plant as a production centre to service a number of clients, including some American roads in the mid-west, as well other roads, including shortlines, within Canada. He also stresses that the tendency in North American railways has, over the past years, involved a movement away from railways producing their own CWR. Citing the example of a number of American roads, he notes that the trend has been for companies to divest themselves of parts of their business which are not core to the operation of a railway. Further, he adds that the divestiture of non-core operations has been part of the Company's own strategy, as evidenced by its sale of shortlines in a number of locations in Canada and the United States, its sale of its barge service from Vancouver to Vancouver Island and the sale of its wiring and communications shop at Weston Shops in Winnipeg. These adjustments, he maintains, have allowed the Company to refocus its attention on the operation of its core transcontinental rail undertaking, and have generated cash flow to allow for the purchase of new high horsepower locomotives, improvements in track infrastructure and other capital projects which, in 1997 and 1998 totalled $1.95 billion. Finally, the Company's representative stresses that the contractor is better positioned than the Company to make technological investments that will be necessary in the future and that its current technical expertise in the production of CWR exceeds the Company's own capacity and sophistication. Finally, he notes that various kinds of track components have traditionally been purchased by the Company from outside contractors in the railway industry. In this regard he cites the example of ties, spikes, bolts and stick rail as components of CWR track installation which are all obtained by outsourcing.

The principal jurisprudential argument advanced by the Company is reliance on the decision of this Office in **CROA 2944**. That award, which concerned a challenge by the Brotherhood to the transfer of the Webbwood and Little Current Subdivisions by the Company to a shortline operator as being in violation of the contracting out provisions of the collective agreement which is here in issue. This Office ruled, in part, as follows:

> The Arbitrator has substantial difficulty with the initial position of the Brotherhood, which is that what transpired is a contracting out of part of the Company's business. The generally accepted understanding of contracting out was well expressed by Arbitrator Ian Springate in **Coca Cola and United Brewery Workers** (1983), 11 L.A.C. (3rd) 207 where, at p.210 the following appears:
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> > Contracting out is generally understood to be the practice whereby one employer arranges to have a second employer perform work on its behalf.
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> Can it be said in the instant case that the Company has contracted with HCR to perform work on its behalf? I think not. Very simply, CP Rail no longer operates on the territory which has been fully leased to the shortline operator. It no longer has any risk of profit or loss in respect of the territory, has no interest in the operations or profitability of the shortline operator and is, subject to the usual rights reserved to a lessor of real property, without any rights in the property which would allow it to operate an ongoing business on the lines in question. It has, literally and figuratively, left the premises. Subject to receiving the payment of rental fees, it has no ongoing economic interest in the leased property. Should it wish to make use of the lines in question it must do so through normal arrangements for running rights, negotiated at arm's length, as would be the case with any railway.
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> On the facts presented, the Arbitrator is compelled to the conclusion that, for a period of twenty years, the Company has surrendered its interest in the property, and its ability to operate a railway on it. That interest has vested entirely in the shortline lessor, HCR, which has full control over all aspects of the property for the duration of the lease. In that circumstance what has occurred cannot

> fairly or properly be characterized as a contracting out. Nothing is being done on the Company's behalf by HCR. On the contrary, the Company has divested itself, for the duration of the lease, of all of that part of its business associated with the sections of the Webbwood and Little Current Subdivisions which are the subject of this dispute. It was therefore entitled, as it did, to treat the transaction as an operational or organizational change within the meaning of article 8 of the Job Security Agreement. Nothing in the evidence before the Arbitrator discloses a violation of the contracting out provisions found in section 31 of the collective agreement.
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> For the foregoing reasons the grievance must be dismissed.

The Company's representative submits that the facts in the case at hand, which involve total divestiture of its interests in the Transcona Butt Welding Plant, bring this case within the principles reflected in **CROA 2944**. In that regard the Company stresses the following factors:

- CPR will no longer operate the assets or land being transferred to Chemetron.
- CPR will no longer have any risk of profit or loss in respect of that operation
- CPR will have no interest in the operations or profitability of Chemetron
- CPR will have no rights left allowing it to operate an ongoing CWR manufacturing business
- CPR will have no ongoing economic interest in the CWR operation at Transcona
- CPR Will be negotiating for the supply of CWR from Chemetron, as it would with any other supplier
- CPR will surrender its interest and its ability to operate the CWR business at Transcona
- CPR's interest will vest entirely in Chemetron, which will, subsequent to closing, have full control over all aspects of that operation.

The Company also relies, in substantial part, on the award of Arbitrator Frumkin in **Re Service d'Enlèvement de Rebuts Laidlaw Québec Ltée and Métallurgistes unis d'Amérique Syndicat des Métallos, Local 15377** (1996) 53 L.A.C. (4th) 17. That case concerned the closure of a garage maintenance facility by the company, pursuant to a decision to have its waste collection vehicles serviced by several outside contractors. As an initial finding Arbitrator Frumkin concluded that the article relied upon by the union, which prevented the assignment of work to employees other than bargaining unit persons, was insufficient to protect against contracting out. The Company relies on his alternative reasoning, however, which is expressed in part at pp. 22-24 as follows:

> But, as far as the tribunal is concerned, whatever interpretation may be extended art. 1.03 and even if the collective agreements did contain provisions that might operate to preclude the contracting out of work the grievances in this case cannot succeed. The reason for this is quite simple. The company did not direct work which comprised part of its business operations to other than bargaining unit members. Nor did it direct work to third party concerns which it could have directed to bargaining unit members. Rather, the company decided to shut down a segment of its operations consisting of repair and maintenance of its fleet of vehicles and in consequence of that decision, one taken in good faith, there remained no work of such a nature for the company to perform. Simply put, work which bargaining unit members may claim must be work which the employer is in a position to perform and which comprises part of its business operations. These conditions were no longer present once the company shut down its garage facility. …
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> A complete shut-down of a segment of an employer's operation resulting in layoff cannot, in the tribunal's view, give rise to considerations of application of provisions of a collective agreement designed to protect the integrity of the bargaining unit such as art. 1.03 or to preclude the contracting out of work to the detriment of bargaining unit members. …

The Company further refers the Arbitrator to **Re Teamsters and Reimer Express** (1984), 7 C.L.R.B.R. (NS) 21 as an example of a determination by the former Canada Labour Relations Board in respect of the sale of a business.

I turn to consider the merits of the instant dispute. Firstly, and with the greatest respect, the Arbitrator has substantial difficulty applying the reasoning reflected in the award of Arbitrator Frumkin in the **Laidlaw** case in the case at hand. Clearly, it is the language of the collective agreement which determines whether an employer is at liberty to contract out bargaining unit work. Where, as in the instant case, the collective agreement contains categorical language prohibiting the contracting out of work "presently and normally" performed by bargaining unit employees, on what logical basis can it be concluded that contracting out occurs when a segment of the work presently performed by employees is outsourced, but does not occur when the entire operation in which they are presently employed is shutdown as part of a decision to obtain the same product from an external contractor?

A review of the cases and the scholarly literature confirms that the collective agreement language of clause 31.1 is particularly strong, if not exceptional. One study has noted, for example, that in Ontario only 2.47% of collective agreements, covering no more than 2.03% of employees, contain absolute prohibitions against contracting out, while 26% of collective agreements contain partial or qualified prohibitions. (See James K.A. Hayes and Michael D. Wright **"Contracting Out at Arbitration: A Union Perspective"** Labour Arbitration Yearbook 1994-95 p. 373 at 378 (Toronto 1995).) In approaching a dispute of this kind, the first source of analysis must be the collective agreement itself. Some collective agreements, such as the agreement considered by Arbitrator Frumkin in **Laidlaw**, are expressed in terms which have traditionally been interpreted to mean that the work of bargaining unit employees cannot be assigned to other employees or supervisors of the same company. Most collective agreements which deal with contracting out establish prohibitions which, as in the collective agreement at hand, are qualified.

Since the seminal decision of Arbitrator Arthurs in **Russelsteel Ltd.** (1966) 17 L.A.C. 253, arbitrators in Canada have recognized that absent collective agreement language to the contrary, management retains the discretion to contract out work. As the jurisprudence indicates, such prohibitions must be expressed in relatively clear and unequivocal language. In my view the language of section 31 of the collective agreement here under consideration is clear and unequivocal. Titled "Contracting Out", the article specifically states that work "presently and normally" performed by bargaining unit employees "… will not be contracted out" save in certain clearly enunciated exceptions. The six exceptions provided within clause 31.1 do not expressly provide or implicitly suggest that the contracting out by sale of an entire segment of the Company's operation constitutes a permissible contracting out. On the contrary, the six enumerated exceptions narrowly define closely circumscribed circumstances generally tied to the proven inability of the Company to be able to perform the work in question by the use of its own managerial skills, manpower and equipment. The only two variants on that theme are found in sub-paragraph 4, which relates to extraordinary capital or operating expenditures and sub-paragraph 6 which deals with work which would require the management of an unstable or fluctuating work force. In my view, for the reasons related below, none of the exceptions can fairly be said to apply to the facts of the instant case.

This Office has had ample opportunity to consider and comment upon the provisions of clause 31.1 of the instant collective agreement, the language of which is found generally within collective agreements in the railway industry in Canada. The language of clause 31.1 of the instant collective agreement, like others in the industry, takes its genesis from the arbitration award of the Honourable Emmett M. Hall dated December 9, 1974. That award categorically established the general prohibition against contracting out and specifically delineated the only exceptions where contracting out is permissible.

Railway arbitration awards have had occasion to consider arguments similar to that of the Company to the effect that it is permissible to contract out part of its business which it no longer views as being part of the "core business of the railway". That very expression was utilized by another employer in a grievance between the **Canadian National Railway Company and the National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 100**, an unreported award of this Arbitrator dated July 16, 1996 (**SHP 409**). The facts in that case disclosed that CN had traditionally conducted the testing and analysis of oil samples from its locomotives as part of its preventative maintenance. It operated testing facilities, which employed members of the CAW bargaining unit, at Moncton, Montreal, Toronto, Winnipeg and Edmonton. In an attempt to rationalize operations CN announced the elimination of the oil lab facilities at Moncton and Montreal and contracted out the operation of the oil labs at the three remaining locations. In that case, as in the instant case, it appears that CN transferred its own equipment and laboratories to the contractor.

It was there concluded that the transaction did constitute a contracting out in violation of the collective agreement. Specifically, the Arbitrator found that the exception there contained in article 51.2(d) of the collective agreement, concerning the nature and volume of the work not justifying the capital or operating expenditure involved, was not persuasive. In that regard the award reasons, in part, as follows:

> The issue then becomes whether the Company can succeed on the alternative basis that its decision to contract out is justified by the exception found in rule 52.1(d), namely that the nature or volume of the work is such that it does not justify the capital or operating expenditure involved in maintaining the oil testing program. In this regard, and setting aside the question of whether rule 52.1(d) was intended to apply to a "new or occasional venture", the Arbitrator is not persuaded that it can have any application in the case at hand. It is not disputed that the closure of the service facilities at Moncton and Montreal, and the related transfer of work from those locations to MacMillan Yard at Toronto has or will occasion expenditure to the Company in relation to the oil testing work. It is estimated that the Company may be required to spend as much as $125,000.00 to expand and relocate off-site the oil testing lab at MacMillan Yard. Further, there may also be some expense in relocating the lab in Edmonton, as it is believed that seismic vibrations from passing train movements over tracks which are adjacent to the lab in that location may affect test results.
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> While the Arbitrator is not unsympathetic to the fact that the Company is faced with certain additional expense, principally in the form of expanding its facility at MacMillan Yard, that is a consequence which flows from its own decision, obviously motivated to realize other permanent monetary savings, in closing the facilities in Moncton and Montreal. It is also significant, in my view, that there are virtually no capital expenditures to incur in respect of equipment. Indeed, it is not disputed that the contractor to whom the work has been outsourced has obtained and is using the very equipment previously owned and operated by the Company. On what basis can it be said that the ownership and operation of such equipment, whether in five locations or three, is an expenditure not justified by the nature or volume of the work involved? Firstly, there has been no substantial change or decline in the amount of work, in the sense that the same number of locomotives require the same degree of regular testing now, just as they did previously. This is not a case, therefore, where it can be said that the amount of work performed has dwindled to a degree of insignificance, so as to render the continued capital and operating expenditures non-justifiable.
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> Nor can the Arbitrator accept the argument of the Company that, by reason of technological advances and the introduction of computer and laser technology, the work performed by the employees involved cannot be said to be work "presently and normally performed" by employees, in a sense contemplated by rule 52.1 of the collective agreement. Firstly, I have some difficulty with the argument of the Company that the work there protected is work as may have existed on February 3, 1988. It would appear to the Arbitrator that a straight-forward reading of the article suggests that the phrase "presently and normally" is intended to have an ongoing meaning referable to the present as it might exist at any point during the term of a collective agreement, and not as it may have existed on the day the contracting out rule became effective. I find it unnecessary to rest this part of my decision on that reasoning, however. More fundamentally, even if it were necessary to characterize the work of the employees as work such as existed on February 3, 1988, that work plainly continues to be done. The introduction of new equipment, methods, tools or technology does not change the fundamental nature of the work which, in this case, is the ongoing testing of locomotive oil for viscosity, water content, impurities and other properties which have consistently been monitored for many years. While the methods and sophistication of the work may have changed, the tasks to be performed have not, and it cannot be said that the tasks in question are other than "work presently and normally performed by employees" who are members of the bargaining unit.

For many years arbitral authority has been clear within the industry that the exception of sub-paragraph (iv) which deals with capital and operating expenditures is not tantamount to a licence to contract out where it is established that work can thereby be done more cheaply. In **Canadian Pacific Limited and the Canadian Council of Railway Shopcraft Employees and Allied Workers**, an unreported award of Arbitrator J.F.W. Weatherill dated July 10, 1984 (**SHP 156**) the union grieved the abolishment of bunkhouse attendant positions at Brandon, Broadview and Swift Current, where the bunkhouse maintenance work in question was contracted out. In allowing that grievance Arbitrator Weatherill rejected the suggestion that the exception of sub-paragraph (iv) justified contracting out merely as a means of reducing costs, commenting, in part, as follows:

> … In his award, Mr. Justice Hall indicated that the right of management to contract out work was not absolute, and that long-service employees also have rights which must be respected. …

> In the **Crane Wheels** case between the same parties (February 8, 1982), it was said that it was apparent that exception (4) to the general rule against contracting-out did not contemplate a simple cost comparison. Indeed, it may be said that a provision prohibiting the employer from contracting out except where it could save money by doing so would not generally be regarded as a very meaningful provision.
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> In the instant case, the "nature or volume" of the work at the locations in question would appear to have justified the operational expenditure involved for many years. There were no new or special considerations involved beyond the realization that persons other than the company's own employees could be arranged for to do the work more cheaply. Such is not, in my view, a case coming within the contemplation of exception (4) to the general prohibition of contracting-out set out in the letter of understanding.

The foregoing reasoning was followed by this Office in **CROA 1966**, a matter which involved the parties to this grievance. It was there found that the Company violated the contracting out provisions of the collective agreement by subletting snow removal work at St-Luc and Outremont Yards in Montreal, work traditionally performed by members of the bargaining unit. This Office again confirmed that the mere fact that the work in question could be performed more cheaply by outside contract did not bring the situation within the exception contemplated in sub-paragraph (iv).

Nor can the Arbitrator share the Company's view of the application of the principles emerging from **CROA 2944**. That case, which also involved these parties, concerned the entire conveyance, by means of a twenty year lease, of the Webbwood and Little Current Subdivisions in Northern Ontario to a shortline operator, Huron Central Railway Inc. On the facts of that case it was clear that CP Rail retained no interest whatsoever, save as the lessor of the lands in question, had no interest in the operations on the line nor any ongoing economic interest in the leased property. It was there found that there was a true and unqualified conveyance of the Company's business, and an entire departure from the products and services previously performed by the Company on the territory in question. In that circumstance this Office concluded that contracting out had not occurred. The facts at hand are substantially differrent.

When the jurisprudence is examined, I am satisfied that the facts of the instant case are far closer to those of the oil lab operation of CN considered in **SHP 409**, and do not compare to the facts disclosed in **CROA 2944**. In the instant case the production of CWR at Transcona has been an integral part of the company's business for thirty years. There can be no question that the work related to that production has been and is work presently and normally performed by employees of the bargaining unit, within the meaning of clause 31.1 of the collective agreement. As noted above, the collective agreement makes no exception for work which may or may not qualify as part of the core undertaking of the Company, assuming that a workable definition of that concept could ever be determined. Once it is determined that the work in question is bargaining unit work, it must next be established that there has been a contracting out and whether such contracting falls within any of the exceptions provided within clause 31.1.

I am satisfied that what has transpired in the instant case is manifestly a case of contracting out. Prior to this arrangement the Company produced all of its CWR at its own production facility at Transcona. With the advent of its contract with Chemetron, the Transcona plant and facility would pass into the hands of the contractor which would, in turn, supply all of the Company's CWR needs which are essentially unchanged. Whether the transaction so characterized qualifies as the sale of a business or part of a business within the meaning of the **Canada Labour Code** is not a question which this Office needs to determine. The possibilities of successorship and other rights which might flow from the arrangement between the Company and Chemetron are matters to be properly assessed under the jurisdiction of the Canadian Industrial Relations Board, pursuant to the **Canada Labour Code**. Those considerations can have no significant bearing on the contractual rights and obligations of the parties as contained within clause 31.1 of their collective agreement. It is the application and interpretation of that provision which is the jurisdiction and obligation of this Office.

The purpose of clause 31.1 is relatively obvious. It is intended, by agreement, to provide a form of job security and protection of work to those members of the bargaining unit who have traditionally performed work falling within the job classifications of their collective agreement. In the instant case there is an entire supplement to the collective agreement dedicated to the terms and conditions of employment of persons employed at the Butt Welding Plant at Transcona. A corollary purpose to the contracting out provisions is, of course, to protect the integrity of the bargaining unit and the Brotherhood's interests in that regard.

The Arbitrator is inclined to agree with the argument of the Brotherhood that the interpretation advanced by the Company would virtually empty clause 31.1 of much of its meaning and significance. If by redefining the concept of its core enterprise the Company can divest itself of substantial and long-established parts of its operations, simultaneously obtaining the same services from a contractor, the original purpose of the article as handed down by Mr. Justice Hall is obviously much reduced. The original intention of clause 31.1 is plainly not expressed in terms of the railway's core function. It is expressed in terms of work "presently and normally" done by bargaining unit employees. Such work is not to be contracted out during the term of the collective agreement, unless the Company can establish that the specific exceptions contained within the article apply.

In the instant case it is clear to the Arbitrator that none of the exceptions to clause 31.1 can fairly be said to apply. The very existence of the Transcona Plant is evidence that the Company has the managerial expertise, skills, manpower and equipment to produce CWR for its own use, as it has done for decades. For the reasons reflected in the jurisprudence, the exception relating to capital or operating expenditures does not apply, nor is there any question of fluctuations of employment. Whatever economic gains might be desirable in the eyes of the Company, the outsourcing of that production cannot be justified on any of the exceptions to clause 31.1. While the Arbitrator can appreciate that in an increasingly competitive world profitability might be enhanced by outsourcing the work which is here at issue, for reasons which the parties best appreciate they have contractually bound themselves not to do so. The fact that the Company might wish to take itself out of the business of producing CWR is, for the reasons discussed above, no answer to the fact that it has, by its arrangement with Chemetron, effectively contracted out work "presently and normally" performed exclusively by members of the bargaining unit.

For the foregoing reasons the Arbitrator finds and declares that the Company's intention to transfer the Transcona Butt Welding Plant to Chemetron, and thereafter to purchase CWR from Chemetron, constitutes contracting out in violation of clause 31.1 of the collective agreement. The Arbitrator further directs that the Company rescind the article 8 notice which it conveyed to the Brotherhood and that it treat the employees affected in conformity with the provisions of the collective agreement, maintaining all affected employees in their current positions. While the Brotherhood has further requested a direction in respect of the compensation of employees who may have been adversely impacted, as well as reimbursement of the Job Security Fund, there is no evidence before the Arbitrator to the effect that there have been any adverse consequences in that regard. I therefore retain jurisdiction in respect of that aspect of the award, as well as any other issue concerning the interpretation or implementation of this decision.

May 14, 1999

(signed) MICHEL G. PICHER
ARBITRATOR