CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3062

Heard in Montreal, Wednesday, 13 July 1999

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

EX PARTE

DISPUTE:

The Company has violated article 20 of the Supplemental Agreement by abolishing sixteen (16) "Mechanic A" positions.

EX PARTE STATEMENT OF ISSUE:

The Company has advised the Union under article 8 that it would eliminate sixteen (16) "Mechanic A" jobs as of September 1st, 1996.

The Union maintains that the Company cannot reduce the number of full-time employees while still resorting to contracting out.

The Company denies any violation of article 20 and maintains that the reduction of work is due to the consolidation of two (2) work places into one.

FOR THE UNION:

(SGD.) A. ROSNER
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:

A. deMontigny	– Manager, Labour Relations, Montreal
A. Giroux	– Counsel, Montreal
D. Gagné	– Director, Intermodal. Montreal
M. Vachon	– Terminal Coordinator, Montreal
C. Roy	– Garage Manager, Montreal
D. Smith	– Director – Special Projects, Montreal
C. Jennis	– Human Resources Associate

And on behalf of the Union:

A. Rosner	– National Representative, Montreal
A. S. Wepruk	– President, Council 4000 (ret'd)
J. Savard	– Negotiation Committee, Montreal
W. Boiteau	– Local President, Montreal
Y. Suxducan	– Local Vice-President, Montreal
J. P. Chouinard	– Representative, Montreal
C. Bouchard	– Witness
J. Bellerose	– Witness

AWARD OF THE ARBITRATOR

The issue in this dispute is whether there has been a violation of article 20.1 of the Supplemental Agreement. It reads as follows:

> **20.1** The Company may, from time to time, sub-contract work to other parties as required. There shall be no permanent reduction in the number of full time employees as a result of sub-contracting work.

This Office has had occasion to consider the interpretation of the foregoing provision, which differs substantially from contracting out provisions generally found within the railway industry. In **CROA 2749** it was confirmed that the Company cannot contract out if to do so results in a reduction of the complement of permanent staff, notwithstanding that there may have been a degree of attrition or retirement incentives. The Company's argument to the contrary was rejected in the following terms by the Arbitrator in that award:

> After careful consideration of the issue, the Arbitrator is unable to agree with the Company. The parties before the Arbitrator are sophisticated and experienced in collective bargaining. If it had been their intention to limit the Company's ability to sub-contract where, for example, employees could not be laid off by reason of such action, they could easily have formulated language to that effect, such as is commonly found in other collective agreements. The language of article 20.1, however, is different. It does not speak to or address the consequences of contracting out on individual employees. Rather, it prohibits any permanent reduction "in the number of full time employees" by reason of sub-contracting work. That would suggest an undertaking not to disturb the *status quo* as to the number of employees in the bargaining unit by sub-contracting.

The protection of the bargaining unit complement intended by article 20.1 was further confirmed in **CROA 2887**, where the following passage appears:

> As the foregoing passage indicates, by the language of article 20.1, which is relatively novel in the railway industry, the parties have agreed that contracting out can occur provided that there is no change in the *status quo* with respect to the number of full-time employees in the bargaining unit. It is notable that the language is not framed in terms of adverse impacts on individual employees. In that regard it is to be contrasted with provisions long-established within the industry relating to contracting out which make certain rights and obligations conditional on contracting out causing an adverse impact on individual employees. …

The sole issue in the material before the Arbitrator is whether the Union has established, as it has the burden to do, on the balance of probabilities, that any of the positions lost were not the result of technological, operational or organizational change, but by reason of the Company's contracting out of work. It is common ground that the Company gave notice to the Union under article 8 of the Employment Security and Income Maintenance Plan of its intention to rationalize operations by merging work previously performed at Monterm in two locations, the "blue tent" and the "garage", by bringing all work within the garage building effective September 1, 1996. It is common ground that sixteen bargaining unit positions were ultimately eliminated. The Union submits that twelve of those positions are in fact attributable to the Company's contracting out of work previously performed by members of the bargaining unit.

Upon a review of the material filed the Arbitrator is compelled to allow the grievance, in part. It does appear, on the material before me, that a certain number of positions were lost by reason of the decision of the Company to upgrade the performance of certain work and operations by resorting to contractors.

The first category of work challenged by the Union concerns repairs done to generator sets and cables. The unrebutted representation of the Union is that the work in question was previously performed by three heavy duty mechanics at the blue tent location, being the equivalent of two full time jobs. It appears that the work continues, and is now performed entirely by a contractor, Onan Est du Canada Inc. In the circumstances the Arbitrator is compelled to conclude that the equivalent of two full time jobs has been lost to the bargaining unit by reason of the contracting out of the generator set repairs.

The Union next challenges the loss of work in respect of towing. It appears that a single employee, Mr. Rock Sylvain, classified as a helper, performed towing functions. On the material before me I cannot find that contracting out has resulted in the loss of this position. It appears that the Company has reverted to owner-operators, thereby

having substantially less towing of its own equipment to perform. Its representations affirm that towing within the yard is still performed by bargaining unit employees. In the circumstances I can attribute no loss of a permanent complement position to the contracting out of towing work.

The Union next asserts that there has been a loss of work in respect of the servicing of refrigeration units on both containers and trailers. Prior to the change garage employees performed routine inspections, temperature settings, minor repairs, the checking of fuel and the fuelling of the units of all loaded refrigerated containers and trailers. The Company's submission is clear that it did make a decision to up-grade the service provided to the refrigeration units. According to its evidence the maintenance system previously in effect was not sufficient to avoid an unacceptably high rate of breakdowns, and that it became preferable to have the servicing of the refrigeration units performed on a more thorough basis by the supplier/sub-contractor, Thermo King. In the result, the Arbitrator is compelled to conclude that the decision of the Company to up-grade the service on the refrigeration units by sub-contracting the work did result in the elimination of the equivalent of four full time jobs from the bargaining unit.

The evidence also confirms that the Company's decision to up-grade the quality of welding has resulted in the loss of the equivalent of one full time job. It appears that welding, principally relating to the repair of cranes, was previously not of a standard to adequately protect the equipment. Consequently the Company decided to engage the services of a contractor which provides a single welder with the appropriate grade of certification to perform the work in question. While it may be that the Company was entitled to decide to up-grade the quality of welding from the work done by "railway welders" from within the bargaining unit by contracting out, it can do so only if there is no corresponding loss of any position to the full time bargaining unit complement. I am satisfied that the decision to perform the welding to a higher standard, by means of contracting out, did result in the loss of one full time job, contrary to the provisions 20.1 of the Supplemental Agreement.

The Union's submissions in respect of work lost through adjustments by contracting out in relation to cleaning and the maintenance of shunt tractors is less persuasive. It would appear that only a few hours per day of work in relation to the cleaning of washrooms and offices during the evening has been contracted out. The material before me does not establish a sufficient causal link between that adjustment and the loss of any complement position to the bargaining unit. With respect to the work servicing shunt tractors, the evidence is at best unclear. It would appear that a number of the shunt units are in fact new and under warranty. The Arbitrator is unable to make an affirmative finding, based on the material provided by the Union, that the relative reduction in in-house servicing of shunt units is in fact attributable to contracting out.

In the result, I am satisfied that the evidence before me reveals, on the balance of probabilities, that approximately seven permanent bargaining unit positions have in fact been lost by reason of the Company's contracting out of work in relation to the repair of generator sets, the servicing of refrigeration units and welding. While it is understandable that the Company might, for valid business purposes, prefer to up-grade the service given to the various pieces of equipment in question by resorting to more highly qualified contractors, it is free to do so only if such action does not result in the reduction of permanent complement positions within the bargaining unit. While the evidence before me would suggest that certain of the jobs eliminated by reason of the article 8 notice were in fact the result of legitimate operational and organizational change, to the extent that some of that change has involved contracting out, I am compelled to conclude that there has been a violation of the provisions of article 20.1 of the Supplemental Agreement.

On the basis of the material before me it is important to stress that there may be some latitude in finally identifying the precise number of jobs lost to the bargaining unit by reason of the Company's actions. For the purposes of the present award the Arbitrator finds that approximately seven positions, more or less, were eliminated from the permanent full time complement by reason of contracting out. I prefer to refer the matter back to the parties to allow them to examine the facts more closely and reach such agreement as they might in respect of the appropriate count of positions and the commensurate remedy. It may also be noted that the Union does not seek monetary compensation in this case, as it is common ground that the employees affected were the subject of payments made pursuant to a special agreement flowing from the article 8 notice.

The grievance is therefore allowed in part. The Arbitrator finds and declares that the Company violated article 20.1 of the Supplemental Agreement by contracting out work which resulted in the elimination of positions, presently estimated at approximately seven in number, from the permanent bargaining unit complement. The Company is directed to cease the violation by restoring the appropriate number of positions to the bargaining unit complement. The matter is referred back to the parties for discussion of the remedy most suitable in the

circumstances. I retain jurisdiction in the event of any dispute in that regard, or generally concerning the interpretation or implementation of this award.

July 16, 1999

(signed) MICHEL G. PICHER
ARBITRATOR