CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3548

Heard in Montreal, Wednesday, 12 April 2006

Concerning

CANADIAN NATIONAL RAILWAY COMPANY
CANADIAN NATIONAL TRANSPORTATION LIMITED

and

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

EX PARTE

DISPUTE:

Requirement of the employer to have four drivers sign Union cards and to come within the scope of the Owner-operators' collective agreement.

UNION'S STATEMENT OF ISSUE:

Four drivers working under the control and direction of the Company and for all practical purposes functionally indistinguishable from members of the bargaining unit, have not been required to sign Union cards. The Union contends this is a violation of articles 1.1, 1.2, 1.3, 1.4, 1.5, 1.6 and 1.7 of the collective agreement as well as the Union's certification.

The Company denies the Union's contention.

FOR THE UNION:

(SGD.) R. FITZGERALD
PRESIDENT, COUNCIL 4000

There appeared on behalf of the Company:

D. S. Fisher	– Director, Labour Relations, Montreal
M. Peterson	– National Manager, Intermodal Road Ops

And on behalf of the Union:

A. Rosner	– National Representative, Montreal
R. Doherty	– Regional Representative, Winnipeg
N. Glover	– Local Chairperson,

AWARD OF THE ARBITRATOR

There is little, if any, material dispute with respect to the facts of the case at hand. The bargaining unit is comprised of owner-operators of heavy truck tractors engaged in hauling the loaded and unloaded trailer chassis of the Company various distances from a number of terminals in Canada. Article 1.2 of the collective agreement defines the employees who fall within the bargaining unit in the following terms:

> **1.2** In this agreement, "owner-operator" shall mean a person who is contracted to the Company to provide transportation service and to make available for this purpose a single highway tractor and related equipment, all under the terms and conditions set out in a standard contract between the Company and the individual owner-operator. For the purposes of this agreement, an owner-operator shall be deemed to be a dependent contractor of CANADIAN NATIONAL TRANSPORTATION LIMITED within the meaning of that term as found in Part I of the *Canada Labour Code*.

Since 1994 the Company has voluntarily recognized the Union as the bargaining agent of owner-operators as reflected in article 1.1 of the collective agreement:

> **1.1** CANADIAN NATIONAL TRANSPORTATION LIMITED, herein referred to as "*the Company*", recognizes the NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA), herein referred to as "*the Union*", as the sole collective bargaining agent for all owner-operators engaged under a standard contract with the Company.

In the case at hand the Union alleges that the Company has effectively engaged an owner-operator operation run by two brothers, Gerry and Roger Larocque, in Winnipeg, under the name "XLT Transport". The Union alleges that the conditions under which the services of XLT Transport are engaged are virtually indistinguishable from

those of the owner-operators within the bargaining unit. The Union therefore seeks a declaration that XLT and the Larocque brothers are employed as owner-operators and fall within the bargaining unit, as a result of which they must be treated under the terms of the collective agreement, with dues to be remitted on their behalf.

The Company maintains that the collective agreement expressly allows it to retain the services of owner-operators who do not fall within the bargaining unit to a maximum of 30% of the work handled system wide and no more than 40% in any given terminal. On that basis it maintains that there has been no violation of the collective agreement, and that its actions are well within the agreed parameters of article 11 and Appendix 1 to the collective agreement. Its representative further relates that if there has been a decline in the hours of work of owner-operators that is attributable to the loss of business, which continues to the present, resulting from the strike of 2004.

The issue is relatively narrow, namely whether XLT Transport is a deemed dependent contractor and owner-operator falling within the terms of the collective agreement. It is common ground that the bargaining unit employees, who are dependent contractor owner-operators of their own truck tractors, are subject to a standard contract. While it does not appear disputed that the terms of this standard contract may vary, in particular with respect to remuneration and certain other conditions, the Union filed in evidence, as an example, a standard contract of an owner-operator at Winnipeg referred to as Gerry Dewald Transport. That contract contains a great number of provisions, but for the purposes of this dispute its general flavour is reflected in the following provisions:

1:01 Subject to the terms of the agreement between the Company and the Canadian Brotherhood of Railway, Transport and General Workers (*the Union*) signed at Montreal, Quebec and dated the 31st day of May 1994 (hereinafter called "*the Union agreement*"), as may be amended from time to time by agreement between the Company and the Union or its successors, the Company engages the services of the Contractor and the Contractor agrees to provide the transportation service and to make available therefore the tractor, tractors, trucks or other vehicles (hereinafter called "*the tractor*") more particularly specified in *Schedule "A"* hereto.

…

1:03 The Contractor for himself, his employees, servants and agents covenants to observe and comply with the rules and regulations set forth in Schedule "C" hereto as the Company may dictate from time to time with respect to the dispatch, shipping and handling of its freight and the services to be performed hereunder in connection therewith, the conduct of drivers and operators and other matters pertaining to the transportation services herewith contracted for, all of which rules and regulations now or hereafter in force are to be read as forming part of the terms and conditions of this agreement. It is understood and agreed that such rules and regulations are subject to review and may be changed from time to time in a manner not completely at variance and inconsistent with the terms, conditions, spirit and tenor of this agreement between the Company and the Contractor, without the necessity of renewing this agreement in its entirety.

2:01 The tractor shall be operated solely and exclusively for the account of the Company during the term of this agreement and the Contractor expressly covenants that he or she will not, during such period, use the tractor on his own account or make it available to anyone else; and that he or she will not, during such period, act as a carrier, broker, contractor, servant or agent on behalf of any other common carrier or person engaged in the shipment, carriage or transportation of goods and commodities, without the prior written consent of the Company.

2:02 The Contractor shall maintain and operate the tractor and the transportation service herewith contracted for at all times in a safe, efficient and workmanlike manner in accordance with such instructions as the Company may from time to time issue and in a manner satisfactory to the Company and in compliance with all present laws.

2:03 During the term of this agreement, the tractor shall be operated at all times under the licenses, permits and operating authorities of the Company. Where applicable, the tractor shall be licensed and registered in the joint names of the Company and the Contractor, for the purposes of insurance, licensing and its operation under the licences, permits and operating authorities of the Company.

…

2:06 The Contractor shall furnish the Company with particulars of the driving licences, driving qualifications and driving record and such other information

relevant thereto as the Company may from time to time require in respect of himself, or any other person or she engages or employs to drive and operate the tractor, with the Company's consent. The Contractor agrees, upon request or notification of the Company, to discharge any driver or operator who is unsatisfactory or unacceptable to the Company and to replace him with a satisfactory substitute, if so required.

…

2:08 The Contractor agrees, at his own expense, to keep and maintain the tractor in good and safe operating condition, and in appearance, all satisfactory to the Company and to maintain, inspect and service the same to the extent required therefore and to replace all worn out parts, equipment and accessories thereto. The Company shall have the right to inspect the equipment at any time without prior notice.

3:01 The Contractor shall, at his own expense, pay the costs of painting the tractor in such manner as the Company may direct in respect of a distinctive colour scheme and other identifying insignia and of thereafter maintaining the same during the term of this agreement. The Contractor shall apply decal lettering, as supplied by the Company, in the manner specified by the Company. In the event the Company alters its colour scheme, the Company will absorb the expense of repainting the tractor.

…

3:03 Without limiting the generality of the foregoing, the Contractor further covenants and agrees with the Company as follows:

> **(1)** To use the tractor only in the normal and ordinary course of business of a motor carrier and not to use or permit the same to be used for any illegal or improper purpose; and to hold the Company indemnified against any files or penalties for speeding, reckless or careless driving, or the violation of any statute, regulation or ordinance of any lawfully constituted public or regulatory authority this not to apply in respect of an over-weight load of which the Contractor had no knowledge and could not have been reasonably expected to have had knowledge.
>
> **(2)** To pay all taxes and fees lawfully imposed on or in respect of the tractor or its operation or the use thereof by any federal, provincial, state or other lawful taxing authority, exclusive of licensing feeds, road tolls and ferry charges required to be paid by the Company.
>
> **(3)** To carry out or cause to be carried out any maintenance inspection of the tractor required under any federal, provincial, state or other applicable law or by virtue of any insurance requirements.
>
> **(4)** To pay all costs and expenses of fuel, grease, oil, tires and other operating and maintenance charges required for the tractor.
>
> **(5)** To pay all salaries, wages, board, travelling and other like expense of himself and his employees for services performed under this agreement.

> **(6)** To promptly pay or remit all deductions or assessments for income taxes, unemployment insurance, Quebec Pension Plan and other like social security benefits which may be payable by reason of the salaries or wages of himself or his employees.
>
> **(7)** To indemnify and save harmless the Company from and against any and all claims and demands whatsoever for or in respect of this salary, wages, expenses remuneration or other monetary benefits payable to an employee, servant or agent of the Contractor for services performed hereunder.

As can be seen from the foregoing, the owner-operators are truly dependent upon the Company which is the primary, if not the exclusive, source of their work – albeit they can perform other work by agreement with the Company. It is not disputed that some of the owner-operators may have more than one truck or tractor under contract, and that they may employ one or more other employees of their own to operate those tractors in whole or in part. The owner-operator remains responsible for paying his employees and observing all normal employer obligations, as for example reflected in the general terms of article 3.03 of the standard contract quoted above. It is also common ground that at Winnipeg all of the members of the bargaining unit have had their tractors painted white, with the red letters CN appearing prominently on the side.

The record discloses that XLT Transport first came into the service of the Company during a strike by employees of CN, represented by the Union in other bargaining units, in February of 2004. While the instant bargaining unit was not in a legal strike position, picketing activity and the honouring of picket lines by a number of truckers caused disruption to the Company's operations. Therefore it expanded its use of outside contractors who were then willing to cross the picket lines as a means of

continuing its service. The strike was settled following a tentative agreement with the striking bargaining units on March 14, 2004. On the same day a settlement was also reached for the owner-operators, in light of the need for work-sharing by seniority because of the decline in business resulting from the strike. To that end the following letter dated March 14, 2004 signed by the Company's Director and addressed to the Union's President, outlines the transition which would take place:

> Dear Mr. Johnston:
>
> This is in regard to the loss of traffic resulting from the strike on CN and its impact on the Owner-operator.
>
> As a means of addressing the impact upon the Owner-operators, for the period from the date of ratification until August 31, 2004, the hours of work will be allocated on the basis of an average of 50 hours per Owner-Operator per week. The available work will be allocated to the senior people. Should there be insufficient work available at a terminal to provide an average of 50 hours per week, the junior Owner-Operators will be laid off temporarily.
>
> The Company will be limited to a total of 25 external brokers during the period form the fifth day after ratification until August 31st 2004, across the system.
>
> Thereafter, the 70/30 ratio referred to in Appendix 1 will apply again. The parties will meet prior to August 31st to review and discuss the traffic patterns and work allocation of both Company drivers and external brokers.
>
> Yours truly,
>
> James Cairns
> Director – CNTL

There appears to be no challenge to the Union's representations concerning the introduction of XLT Transport into the workplace. Two trucks operated by brothers Gerry and Roger Larocque were introduced into the Winnipeg Terminal during the course of the strike. Within some two months of the end of the strike their tractors were repainted white in a manner identical to the trucks of the owner-operators in the bargaining unit, were stencilled with registration numbers and standard large CN decals were applied to

the side doors in a manner consistent with article 3.01 of the standard contract reproduced above. In appearance, therefore, their vehicles became virtually indistinguishable from those of the owner-operators, as opposed to the differently coloured or decorated vehicles of other independent truckers whose services might be utilized from time to time by the Company at the terminals. It seems that in fact there may be as many as four trucks so treated by the Company and XLT Transport, as other drivers are now being utilized by XLT.

The Union expresses the concern that those trucks and drivers came to be utilized in such a way as to handle more hours of work than bargaining unit members, notwithstanding that, after August of 2004, the number of owner-operators at Winnipeg had declined by attrition from eighteen to sixteen and the number of hours of work available to the members of the bargaining unit had also been reduced significantly. As represented by the Union, owner-operators who could previously count on fifty hours of work per week found themselves operating between thirty and forty hours per week, and in one instance facing a decline of approximately 40% in revenues.

It is not disputed that the arrangement which the Company made with XLT Transport is permanent in the sense that XLT Transport works every day for CNTL in much the same manner as the owner-operators in the bargaining unit. It is also not disputed that XLT Transport has not signed a standard contract form, and that its understanding with the Company is entirely verbal. It would also appear that XLT is paid slightly lower rates for the work which it performs than is paid to the owner-operators who fall under the collective agreement.

The Union submits that in this circumstance the facts confirm the status of XLT as an owner-operator which is in effect indistinguishable from the members of the bargaining unit, with the sole exception of the fact that its agreement or arrangement with the Company is entirely verbal or, in the Union's words "An oral gentlemen's agreement and a handshake." The Union's representative notes that the similarity between XLT and owner-operators extends to the fact that both have been provided with blackberry communication devices which are used to relate to movement orders, at the Company's expense. The Union specifically alleges violations of the following provisions of the collective agreement:

> **1.1** CANADIAN NATIONAL TRANSPORTATION LIMITED, herein referred to as "*the Company*", recognizes the NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA), herein referred to as "*the Union*", as the sole collective bargaining agent for all owner-operators engaged under a standard contract with the Company.
>
> **1.2** In this agreement, "owner-operator" shall mean a person who is contracted to the Company to provide transportation service and to make available for this purpose a single highway tractor and related equipment, all under the terms and conditions set out in a standard contract between the Company and the individual owner-operator. For the purposes of this agreement, an owner-operator shall be deemed to be a dependent contractor of CANADIAN NATIONAL TRANSPORTATION LIMITED within the meaning of that term as found in Part I of the *Canada Labour Code*.
>
> **1.3** The Company agrees not to enter into any agreement or contract with owner-operators, individually or collectively, which in any way conflicts with the terms and provisions of this agreement without the express consent of the Union. Any such agreement or contract will be null and void.
>
> **1.4** The standard contract shall require that all owner-operators covered by paragraph 1.1 of this article become and remain members of the Union during the continuance of this agreement.
>
> **1.5** Upon engaging a new owner-operator, the Company shall have such new owner-operator sign a Union membership card and forward it to the chief shop steward. The Union shall furnish a supply of blank Union membership cards.

> **1.6 (a)** It is agreed by the Company and the CAW that there shall be no discrimination or harassment towards an owner-operator based on the owner-operator's age, marital status, race, colour, national or ethnic origin, political or religious affiliation, sex, family status, pregnancy, disability, union membership or sexual orientation.
>
> **1.6 (b)** It is agreed that the terms "discrimination" and "harassment" as used in this article shall be as defined and interpreted in the Canadian Human Rights Act.
>
> **1.7** The Company shall furnish the Union with a list of new owner-operators contracted by the Company within 14 days of their being engaged. Owner-operators will be responsible for furnishing a list of replacement drivers to both the Company and the Union.

In response, the Company relies, in part, upon the fact that XLT Transport has not signed a standard contract as contemplated by article 7.5 which deals with the establishment of seniority, a provisions which reads as follows:

> **7.5** When two or more owner-operators commence service in the same seniority group on the same day, the procedure for establishing their relative seniority standing shall be as follows:
>
> **(a)** The owner-operator who commenced service at the earlier hour of the day shall be senior.
>
> **(b)** When owner-operators commenced service at the same hour of the day, the owner-operator who signed the standard contract first shall be senior.

The Company also draws to the Arbitrator's attention the provisions of article 11 which permits sub-contracting in the following terms:

> SUB-CONTRACTING
> **11.1** The Company may, from time to time, sub-contract work to other parties as required. No permanent reduction in the number of owner-operators shall be made as a direct result of sub-contracting work.
>
> **NOTE:** Appendix 1 to this agreement will govern the manner in which trucking services may be sub-contracted.
>
> **11.2 (a)** At the request of either party, a meeting will be held, from time to time, for the purpose of discussing possible ways and means of having sub-contracted work performed by owner-operators.

(b) Where mutually agreed, the parties may amend the terms and conditions of this agreement to facilitate the performance of such work by owner-operators.

11.3 In the application of this article, the use of employees employed by the Company or its subsidiaries and represented by the Union shall not constitute sub-contracting.

Appendix 1 referred to in the Note quoted above, gives greater specificity with respect to the limits of the Company's ability to utilize other outside contractors. It provides, in part, as follows:

APPENDIX 1
APPLICATION OF ARTICLE 11 IN RESPECT OF CONTRACTED TRUCKING

1. For the purpose of this Appendix 1, Union represented drivers include owner-operators and Company employed tractor trailer operators operating Company owned or leased tractors governed by a collective agreement between the Company and the Union.

2. For the purpose of this Appendix 1, the term "paid moves" refers to loads and empties in respect of which the Company is required to provide bobtail moves, or pick-up and/or delivery service either on a local or extended basis under the Company's current Intermodal marketing contracts. All other traffic is excluded from the application of this Appendix 1.

3. The purpose of this Appendix 1 is to ensure that union represented drivers handle a minimum of 70% of the paid moves handled over the course of each calendar year as defined herein, as calculated on the basis of all terminal together in total. At each terminal, drivers will handle a minimum of 60% of the paid moves handled over the course of each calendar year as defined herein.

4. For the purpose of this Appendix 1, the calendar year will extend from March to February, inclusive. It shall be divided into four quarters beginning in March of each year.

First Quarter	–	March to May
Second Quarter	–	June to August
Third Quarter	–	September to November
Fourth Quarter	–	December to February

5. In each quarter, the Company will, on an ongoing basis, keep record of the number of the paid moves handled by union represented drivers and the number of paid moves sub-contracted out to contractors on the basis of all terminals together in total, and on an individual terminal basis.

> **6.** The first quarter of each calendar year is the quarter when traffic volumes will, normally, be highest. At the end of the first quarter, the Company will compare the number of paid moves handled by union represented drivers to the total number of paid moves handled. If the percentage handled by union represented drivers is below 70% on a national basis or below 60% on a terminal basis, additional owner-operators will be engaged to bring the total complement of union represented drivers up to the number that would have been required to handle a minimum of 70% of the total or to handle 60% on a terminal basis.
>
> **7.** In each subsequent quarter of the calendar year, the number of union represented drivers will be maintained at the level established at the end of the first quarter except in cases of a decline in traffic volumes substantially affecting the number of paid moves handled. In such cases, reductions will be accomplished in a manner that will best allow the 70% minimum to be met for the remainder of the calendar year and a 60% minimum on a terminal basis.
>
> **8.** The provisions of this Appendix 1 will be applied on the basis of all terminals together in total for the purposes of calculating the 70%, and calculated on an individual terminal basis for the purposes of calculating the 60%.

The Company's representative stresses that in fact the Company assigns close to 90% of its revenue moves to the Union represented owner-operators, and is well within the agreed parameters of article 11 and Appendix 1 to the collective agreement. He further relates that if there has been a decline in the hours of work of owner-operators that is attributable to the loss of business, which continues to the present, resulting from the strike of 2004.

In support of its position the Company relies upon a number of prior authorities including the following: **Re IKO Industries Ltd. and United Steelworkers of America** (2002) 118 L.A.C. (4th), 1 (P.C. Picher); **Re Dynamix Inc. and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 141** (2002) 111 L.A.C. (4th), 145 (Tims); **Re Interprovincial Concrete Ltd. and Construction & General Workers' Union, Local 890** (1989) 6 L.A.C. (4th) 137 (Hornung); **Re Don Mills Foundation for Senior Citizens and Service Employees International Union, Local 204** (1984) 14

L.A.C. (3rd) 385 (P.C. Picher); and **Re Sault Ste Marie Board of Education and the Canadian Union of Public Employees, Local 216** (1974) 5 L.A.C. (2d) 179 (Shime).

The Company specifically points to the following list of factors identified by Arbitrator P.C. Picher in the **Don Mills Foundation** award as the test for identifying the true employer:

(i) The party exercising direction and control over the employees performing the work

(ii) The party bearing the burden of remuneration

(iii) The party imposing discipline

(iv) The party hiring the employees

(v) The party with the authority to dismiss the employees

(vi) The party which is perceived to be the employer by the employees

(vii) The existence of an intention to create the relationship of employer and employees

The Arbitrator also notes Ms. Picher's reference to the decision of the Supreme Court of Canada in **Pointe Claire (City) v. Quebec (Labour Court)** (1997) 147 D.L.R. (4th) 1:

> Moreover, when there is a certain splitting of the employer's identity in the context of a tri-partite relationship, (the client company/the employment agency/the worker supplied by the agency) the more comprehensive approach and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business.

The Union's representative also relies on the decision of the Supreme Court of Canada in **Pointe Claire**, as well as the **IKO Industries** decision. Further, he drew to

the Arbitrator's attention the decisions of this Office in **CROA 1599, 2272, 2652, 2997**, as well as the two following reported decisions: **Re North York (City) and C.U.P.E., Local 94**, 1997 49 C.L.A.S. 473 (Springate); **Re Inglis Ltd. and United Association of Journeymen & Apprentices of Plumbing & Pipefitting Industry of U.S. and Canada, Local 170** (1987) 5 C.L.A.S. 69 (McColl).

Both parties concede that the jurisprudence does not deal four-square with the issue in the dispute before me, dealing as it generally does with the issue of who is the true employer. I am familiar with the cited jurisprudence and must agree with that assessment. The issue in the case at hand is more narrow, and deals entirely with whether the owner-operator XLT Transport falls within the terms of the collective agreement. To answer that question some sense of the purpose and understanding which underlies the collective agreement must be reached.

In the Arbitrator's view it does little good, without more, to characterize XLT Transport or any other contractor who moves chassis and trailers on behalf of the Company as an "owner-operator". It does not appear disputed that it is open to the Company to bring owner-operators, that is to say small trucking enterprises where the same individual owns and operates a truck, into service at its terminals "from time to time" or to deal with a particular need, without those owner-operators necessarily becoming members of the bargaining unit under the instant collective agreement. Similarly, it is obviously open to the Company from time to time to contract in the services of larger trucking companies whose employees may be dispatched to the CNTL terminals to aid in its operation on an as needed basis. As is clear from the

provisions of Appendix 1, the Company has substantial latitude to resort to both small owner-operators and larger outside trucking companies to handle work in its terminals, outside the 60% and 70% limitations which are reserved to bargaining unit owner-operators on a national and local basis under the terms of Appendix 1, with respect to the handling of moves.

What, then, is the essence of the owner-operator / dependent contractor concept which is at the heart of the collective agreement? In the Arbitrator's view that essence can be captured in one word: permanence. As is evident from the letter and scheme of the collective agreement, and the terms of the standard contract of employment, the thing which demarcates the bargaining unit members is their virtually unqualified undertaking to provide their services to CNTL, absent any agreement otherwise, and to be available to provide those services on a daily basis. That is the core distinction of employees who are owner-operators who fall within the terms of the collective agreement. It is that sense of permanence and continuity which lies at the heart of owner-operators who are "engaged under a standard contract by the Company" as contemplated under article 1.1 of the collective agreement, and clearly reiterated in the terms of article 1.2 reproduced above. Owner-operators who are utilized "from time to time", as contemplated by article 11.01 of the collective agreement, do not have such permanence and are therefore not within the bargaining unit of dependent contractors.

What then, do the facts at hand disclose? Clearly, XLT Transport has bound itself to the Company in pursuance of a permanent, continuous arrangement whereby it does provide its services virtually exclusively and on a daily basis. Indeed, as noted above, it

does so in a manner which distinguishes it from other owner-operators whose involvement with the Company may be more occasional or intermittent. To that end, its trucks have been painted white and bear large CN logos in a manner which makes them indistinguishable from those of the owner-operators under the collective agreement. The terms and conditions of employment for XLT Transport, with the possible exception of rates of pay, are also virtually indistinguishable from those of the members of the bargaining unit. For example, with respect to the issue of discipline, the Arbitrator accepts the evidence of the Union's witness to the effect that an admission was made to him that on one occasion when a driver of XLT Transport was observed driving too quickly and recklessly, XLT was effectively directed by the Company's supervisor to suspend that driver for three days. The evidence also confirms, as noted above, that XLT drivers are provided with blackberry communicators, in the same manner as are owner-operators within the bargaining unit, although the evidence is not clear as to whether blackberries are also loaned to other owner-operators who may work on a more temporary basis. The owner-operator XLT Transport is not utilized "from time to time" or on an ad hoc basis, in the sense contemplated by article 11.1 of the collective agreement. Moreover, it is for all practical purposes fully under the control of the Company, in respect of the factors reviewed within the **IKO** award.

Upon a careful review of the collective agreement I am satisfied that it does, as the Company submits, reserve to the employer a substantially broad right to contract out, subject to the permissible limits negotiated within the terms of Appendix 1. That right must, however, be read in a manner consistent with the recognition clause of the collective agreement. That clause expressly acknowledges that owner-operators who

enter into what is tantamount to a permanent or continuing contract of adhesion with the employer are by reason of that arrangement to be dealt with under the terms of the collective agreement. I am satisfied that that is a fair characterization of the circumstances of XLT Transport.

The fact that the Company has dealt with XLT Transport on a verbal rather than on a written basis is, in my opinion, neither here nor there for determining the reality of the arrangement. At best that might demonstrate a violation of article 1.3 of the agreement which specifically prohibits the Company from entering into agreements with owner-operators which conflict with the terms of the collective agreement absent the Union's consent.

It is trite to say that in such matters it is substance, and not form, which must prevail. If the Company's interpretation were accepted it would be tantamount to concluding that the Union and the Employer agreed to an arrangement whereby, through mere resort to verbal rather than written standard contracts, the Company could effectively engage in "double-breasting" to the point of creating a permanent establishment of non-union owner-operators. In the Arbitrator's view that would plainly fly in the face of the clear intention of the collective agreement with respect to the status and treatment of owner-operators who do enter into a permanent or standard contract with the Company.

It is also questionable whether it matters if a contract is made verbally. In that regard it is noteworthy that there is no reference to the standard contract being in a written form, whether in article 1.1 or 1.2 of the collective agreement, although there is incidental reference to the signing of a contact for the purposes of determining relative seniority, under the provisions of article 7.5 of the collective agreement. Common sense would suggest, however, that the collective agreement compels the Company to use a written "standard" contract unless the Union agrees otherwise. In any event, on the whole, I am satisfied, as stated above, that it is the substance of the arrangement, and not its mere form, which must determine whether an owner-operator is to be treated as falling under the terms of the collective agreement.

As is evident from article 11.1 of the collective agreement, if XLT Transport were used intermittently and from time to time, it would arguably fall outside the ambit of the collective agreement. This is plainly not the case, however. It is used on a permanent ongoing basis under conditions identical to those governing owner-operators in the bargaining unit, albeit in apparent violation of article 1.3 of the collective agreement.

For reasons which should be obvious, while I accept the principles described in the jurisprudence cited above, and in particular those found in the **IKO** decision, those principles are not central to the resolution of the case at hand, which turns on the language of the collective agreement. As is plainly evident, there are no meaningful distinctions between the circumstances under which the owner-operators within the bargaining unit work for the Company and the circumstances under which XLT Transport performs its services. They are one and the same, and there is therefore no

need to enter into a fine balancing of the various elements of analysis found within the established jurisprudence. If it were necessary to do so, however, the conclusion must be that XLT Transport is fully controlled, for work purposes, by CNTL, so as to make XLT a dependent contractor, and not an occasional sub-contractor.

Therefore, for all of the reasons foregoing, the Arbitrator is satisfied that in the case at hand XLT Transport does fall within the definition of "owner-operator" found within article 1.2 of the collective agreement. It is therefore to be treated and compensated as such, with all appropriate dues to be remitted to the Union.

The matter is remitted to the parties for the purposes of any more precise remedial determination, a matter of which the Arbitrator remains seized in the event of any dispute between them.

April 25, 2006

(signed) MICHEL G. PICHER
ARBITRATOR