AH701

IN THE MATTER OF ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY

(the "Company")

And

CANADIAN SIGNALS AND COMMUNICATIONS SYSTEM COUNCIL NO. 11 OF THE IBEW

(the "Union")

Contracting Out Grievance (2042-097)

Arbitrator:
Richard I. Hornung, Q.C.

For the Company:

Lauren McGinley	Assistant Director Labour Relations
Diana Zurbuchen	Manager Labour Relations
Jodie Sokolosky	Assistant Director S&C Operations
Jeff Switzer	GM S&C Operations
Cory Wogrinc	Assistant GM S&C Operations
Scott Shaw	Sr. Director Labour Relations
Ed Harwick	Assistant GM S&C Operations

For the Union:

Denis Ellickson	Counsel
Steve Martin	Senior General Chairman
Lee Hooper	General Chairman
Bill Duncan	Regional Representative – CP East

Hearing
January 7, 2020
Calgary, Alberta

AWARD

1. This grievance involves the contracting out of maintenance work and restoration repairs to the Slide Fence at Mile 3 Cascade Subdivision between May 8-16, 2017.

2. On May 25, 2017, the Union filed a grievance alleging that the Company violated Article 21 of the Collective Agreement by utilizing Third Party Contractors (TPC) to perform work that is normally performed by bargaining unit employees.

3. Further, it alleges that the Company – to the prejudice of the Union - failed/refused to provide it with the necessary information which it requested as required pursuant to Article 21.5 of the Collective Agreement.

4. It requests that the employees affected be compensated 80 hours at punitive rates or in such other manner as this Arbitrator sees fit.

5. In response the Company asserts that at the annual Contracting Out Meeting on June 30, 2017, it provided the Union with an 8 page presentation (Company Tab 4) outlining the work required for the 2017 calendar year - including staff allocation, hiring plans and additional TPC resources. The Company argues that this reflected the consistent practice between the parties and was intended to serve as the appropriate notice of all the work to be Contracted Out for 2017, pursuant to the provisions of Article 21.3-21.6 of the Collective Agreement.

6. On the second page of the presentation (Tab 4), specific reference is made to "*Spot Repair of Rock Fence*" relative to District 3 and 4, (which includes the Cascade Subdivision).

7. The Company maintains that the Union had the opportunity, at that stage, to discuss or request additional details. It says that the Union failed to do so.

8. At the meeting of January 30, 2017, the Union requested further information in

relation to the "*Spot Repair of Rock Fence"* as well as details for each of the projects including their due dates, estimates, available employees and intended hiring. No additional information was provided by the Company at that time.

9. On February 7, 2017 (Union Tab 3) the Union requested the details related to deadlines or due dates for project work assignments that could cause the use of contractors along with, *inter alia,* details it earlier requested, including estimates or projections as to the work load compared to available employees and intended hiring to accomplish this work.

10. On February 10, 2017, the Company responded to the Union's request by providing them with a copy of the same document (Company Tab 4) it provided at the meeting of January 30, 2017.

11. On March 4, 2017, the Union again requested further information. And, another similar request followed after that.

12. On March 6, 2017, the company responded, proposing a discussion at an intended meeting in Winnipeg during the week of April 3, 2017.

13. On March 31, 2017 (Union Tab 4), the Union advised the Company that its representative was unable to attend that meeting and requested further information from the Company relative to the exact locations and more specific work details of all construction projects for 2017. It also sought specific details for any maintenance work that has already been "*or will be contracted out this year."*

14. At a meeting on April 4, 2017, the Company agreed to provide further information. It did so on April 20, 2017. When it did so, that information referred to three projects that were being Contracted Out in District 4. The Spot Repair of Rock Fence was not one of those listed.

15. Shortly after, the Union became aware that the Company had retained non-bargaining unit employees to perform the Repair of Rock Fences at issue here. The work was done by an S&C Assistant Foreman along with two contractors and lasted for the period of May 8 – 16, 2017.

16. On May 25, 2017, the Union grieved the Company's action (Union Tab 5) alleging, *inter alia*, that the Company had violated the Collective Agreement by Contracting Out work without having met the necessary requirements of Article 21 and by failing to provide the information required by Article 21.5.

17. By letter of January 29, 2017 (Union Tab 6), the Company denied the Union's grievance stating:

> *The Union had every opportunity to discuss or request additional details. The Union failed to do so. For the Union to now object to a third party contract to performing spot repair of rock (slide) fence at Mile 3 Cascade Subdivision is unacceptable.*

18. After quoting the comments of Arbitrator Piche in **CROA 1833**, the Company concludes: *Based on the foregoing, the Company can see no violation of the wage agreement and the grievance is respectfully declined.*

Joint Statement of Issue

19. The parties submitted the following **Joint Statement of Issue**:

> *Dispute:*
>
> *The Contracting Out of regular maintenance work and restoration repairs to the slide fence at Mile 3 Cascade Subdivision between May 8th and 16th, 2017.*
>
> *Union Position:*
>
> *The Union alleges that the Company violated Article 21 of the Collective Agreement by utilizing Third Party Contractors to perform work that is normally and traditionally performed by bargaining unit employees.*
>
> *The Union further alleges that this work was provided to the third party contractor in violation of Appendix F and as a result of the former S&C General Manager's direct family ties to the third party contracting Company.*

The Union requests that the employees affected by this alleged violation be compensated 80 hours each at punitive rates. In the alternative the Union requests that the penalty be mitigated as the arbitrator sees fit.

Company Position:

On January 30, 2017, the Union was provided a presentation detailing the Company plans with respect to contracting out of work. The Company maintains the Union had the opportunity to discuss or request additional details, but failed to do so.

The Company can see no violation of the Wage Agreement, disagrees with the Union's contentions and denies the Union's grievance in its entirety.

Collective Agreement

20. The relevant provisions of the Collective Agreement provide as follows:

ARTICLE 21 CONTRACTING OUT

21.1 Work presently and normally performed by employees who are subject to the provisions of this collective agreement will not be contracted out except:

(i) when technical or managerial skills are not available from within the Railway; or

(ii) where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees; or

(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

(iv) where the nature or volume of work is such that it does not justify the capital or operating expenditure involved; or

(v) the required time of completion of the work cannot be met with the skills, personnel or equipment available on the property; or

(vi) where the nature or volume of the work is such that undesirable fluctuations in employment would automatically result.

21.2 The conditions set forth above will not apply in emergencies, to items normally obtained from manufacturers or suppliers nor to the performance of warranty work.

21.3 At a mutually convenient time at the beginning of each year and, in any event, no later than January 31 of each year, representatives of the Union will meet with the designated officers to discuss the Company's plans with respect to contracting out of work for that year. In the event Union representatives are unavailable for such meetings, such unavailability will not

delay implementation of Company plans with respect to contracting out of work for that year.

21.4 The Company will advise the Union representatives involved in writing, as far in advance as is practicable, of its intention to contract out work which would have a material and adverse effect on employees. Except in case of emergency, such notice will be not less than 30 days.

21.5 Such advice will contain a description of the work to be contracted out; the anticipated duration; the reasons for contracting out and, if possible, the date the contract is to commence. If the General Chairman, or equivalent, requests a meeting to discuss matters relating to the contracting out of work specified in the above notice, the appropriate company representative will promptly meet with him for that purpose.

21.6 Should a General Chairman, or equivalent, request information respecting contracting out which has not been covered by a notice of intent, it will be supplied to him promptly. If the General Chairman requests a meeting to discuss such contracting out, it will be arranged at a mutually acceptable time and place.

21.7 *Where the Union contends that the Company has contracted out work contrary to the provisions of this Article, the Union may progress a grievance commencing at the last step of the grievance procedure. The Union officer shall submit the facts on which the Union relies to support its contention. Any such grievance must be submitted within 30 days from the alleged non-compliance.*

Arguments/Decisions

21. There was no dispute that the work in question fell within the definition of "*Work presently and normally performed"* by members of the bargaining unit.

22. While not disputing that fact, the Company initially argues that the grievance ought nevertheless to be dismissed. Relying on **CROA 1833** and **CROA 2571**, it asserts (Company Tab 2) that the Union had an opportunity to discuss its concerns or request additional details further information but failed to do so. By raising the incident at the late stage the grievance was files, it did not meet its onus of candor and laid in the bushes with respect to the incident in a manner that was *"Plainly inconsistent with sound principles of labour relations".*

23. With all due respect, I am unable to conclude that the Union "*lay in the bushes*". As revealed in the preceding discussion of facts, the Union raised the issue and made

several requests for information, pursuant to Article 21.5, prior to the filing its grievance. The Company did not respond directly to any of those requests.

24. The Company argued that the Contracting Out Document (Company Tab 4) – which lists the "*Spot Repair of Rock Fence*" – includes the same information and was provided on the same basis as prior years. However, that fact alone does not eliminate the Union's right to request such further information as Articles 21.5 and 21.6 fairly anticipate.

25. Article 21.6 specifically directs that where information which is not covered by the notice of intent is requested by the General Chairman it is to be promptly provided to him.

26. Accordingly, the Union's request for further information was appropriate. The Company's denial of this grievance (as iterated both in the Joint Statement of Issue and its grievance response letter of June 29, 2017), based on the argument that the Union "*lay in the bushes*" or otherwise failed to request appropriate information, is therefore not well-founded.

27. I conclude that the Slide Fence work was *"work presently and normally performed"* by employees who were subject to the provisions of the Collective Agreement at the time that it was contracted out by the Company.

28. I also conclude (below) that the Company's failure to provide the Union with the information it requested and was entitled pursuant to Article 21, adversely affected the Union resulting in a loss of opportunity and ability to represent its member employees.

Excessive Overtime

29. Although the Union objected to the introduction of a new argument not raised in its Grievance Response or the JSI (an issue I will deal with below), the Company argued, in the alternative, that it was not obligated, in any event, to comply with the

Contracting Out provisions in that the exception in Article 21.1(ii) applied. Namely, there were insufficient employees either qualified to perform the work or available to do it.

30. It contends that arbitral jurisprudence (**SHP 440** and **SHP 627**) allows that the foregoing exception is applicable – and the Contracting Out provisions would not apply - if the intended work amounted to "*an excessive overtime burden*" (**SHP 627**).

31. It points out that the Union requested 80 hours of punitive overtime rates for two S&C Maintainers as an appropriate remedy. However, 80 hours of overtime is more than the statutory allowable overtime during the period in question. Furthermore, it asserts that the named employees had already claimed 20 and 12.5 hours of overtime between the period of May 8 - May 16. Given the circumstances, each grievor could not have performed the work "*given his assigned work cycles….and considering the overtime hours he had already worked.*"

32. In **SHP 440** Arbitrator Picher comments as follows:

> *As a final submission, the Company's representative submits that item (ii) of rule 53.1 [*Article 21.1(ii)] *applied to allow the Company to resort to contracting out. He submits that there were not sufficient employees qualified to perform the work available from the active or laid off employees. In the result, the Company submits that there was no violation of the contracting out provisions of the collective agreement.*
>
> *…*
>
> *… there appears to be some inconsistency in the CROA jurisprudence with respect to the issue of the possibility of resort to overtime as an alternative to contracting out.*
>
> *…*
>
> *The better view would appear to be that expressed by Arbitrators Frumkin and Weatherill …* ***That is to say, where it can be demonstrated that a "reasonable amount of overtime" could have allowed bargaining unit work to be performed without contracting out, the Company may be unable to claim that qualified active employees could not have performed the work required. By the same token, if the work in question can only be accomplished by resort to overtime so substantial as to be unduly burdensome, the exception may well be established. The determination of what constitutes a reasonable amount of overtime must, I think, be resolved on the facts of each particular case,*** *regard*

being had to a number of factors, including the general practice or pattern with respect to the scheduling of overtime work in the workplace in question.

(Emphasis added)

33. Leaving aside my conclusion, below, that the Company is precluded from raising the overtime issue, it is nevertheless worthwhile to note that I accept and agree with the logic of Arbitrator Picher in **SHP 440.**

34. However, even were the issue addressed here, I would have been unable - given the absence of notice to the Union and the consequent inability for the Union to adequately respond - to conclude, with that gap in the evidence, whether or not the bargaining unit work could have been performed within a reasonable amount of overtime. And, if so, what that reasonable overtime might be in this case.

Failure to Raise the Overtime Issue

35. As confirmed by numerous **CROA** awards, the failure of either party to raise an issue in dispute - either through the grievance procedure or in the JSI – will, in most cases, preclude it from doing so at the hearing.

36. In this case, the Company failed to raise the overtime issue either in its Grievance Response (Company Tab 2) or the JSI. In both those documents the Company re-iterated its position that its denial of the grievance was based on the Union's failure to request additional details in a timely manner.

37. In fact, in its grievance response the Company underscores the necessity to deal only with the issues that are properly advanced in the grievance when it notes as follows:

> *… In accordance with the grievance procedure, the Company will be prepared to proceed only on the issues that have been properly advanced through the grievance procedure.*

38. Accordingly, the Company's argument, based on the overtime issue and the

exception contained in Article 21(1) (ii), is denied.

Failure/Refusal to Provide Information Pursuant to Article 21

39. Finally, the Union asserts that even if the Company could establish that one of the exceptions enumerated in Article 21.1 applied, it was nevertheless obligated to provide the information contemplated by Article 21.5 and to comply with Article 21.6. Its failure/refusal to do so, despite the Union's repeated requests (and the ultimate contracting out which resulted), both prejudiced the Union and represented an attack on the integrity of the bargaining unit.

40. In support of its position, the Union refers to the decision of Arbitrator Freedman in *North West Company Inc. and RWDSU Local 468 (1996) 57 LAC 4th 158*, where he states (at para. 59):

> *… For the concept of the bargaining unit to be meaningful, and for the bargaining unit to have integrity, both of which are necessary conditions to a meaningful collective agreement, it must be acknowledged that (absent express language so stipulating) the Company has not reserved to itself the right to assign in a material way work to non-unit members that is normally and regularly done by unit members. Were that not so, then the sanctity of the bargaining unit, and indeed the value of the collective agreement, would be fragile and greatly limited at best. That result would be inconsistent with the labour relations regime in this province and country, and could not be sustained without very clear language in the Agreement.*

41. The work in question was work that was "presently and normally performed by employees *who were subject to the provisions of the Collective Agreement*", which the Company agreed not to contracted out other than for cases excepted and specifically enumerated in Article 21.1.

42. The Company's failure/refusal to provide the information, in the circumstances here, hindered and impaired the Union's ability to determine both when the work was to be done or to object to the subject work being Contracted Out so as to claim it for its member employees.

43. I agree with the Union that the failure of the Company to a provide the required information adversely affected its ability to represent its members and compromised its

ability to assess its position relative to the contracting out of the work at issue.

Conclusion

44. Accordingly, I declare and/or direct that:

a. The grievance is allowed.

b. The work at issue was work that was "*presently and normally performed"* by employees who were subject to the provisions of the Collective Agreement at the time it was contracted out by the Company.

c. The Company shall not contract out work that falls outside of the specific exceptions contained in Article 21.

d. The Company's failure to provide the information requested by the Union, pursuant to Articles 21.5 and 21.6, had an adverse effect on the Union and its reasonable opportunity to pursue overtime work on behalf of its members.

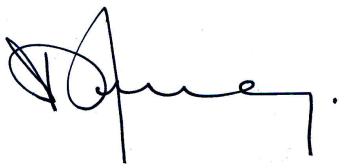
e. Going forward, the Company shall provide a timely response to appropriate requests by the Union for information that falls within the parameters of Article 21.5 and 21.6.

f. The matter shall be referred back to the parties for a determination of what reasonable remedy is appropriate in the circumstances.

g. In the event that the parties are unable to agree on an appropriate remedy, the matter shall be returned to me for final disposition.

45. I shall retain jurisdiction with respect the application, interpretation and implementation of this award.

Dated at Calgary, Alberta this 20th day of April, 2020.



Richard I. Hornung, Q.C.
Arbitrator