AH900-P

IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC 1985, c L-2.*

BETWEEN:

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

(IBEW)

-and-

CANADIAN PACIFIC KANSAS CITY RAILWAY

(CPKC)

Motion for production

Arbitrator: Graham J. Clarke
Date: February 28, 2025

Appearances:

IBEW:
K. Stuebing: Legal Counsel
Y. Jin: Legal Counsel
J. Sommer: Senior General Chair – IBEW, SC 11

CPKC:
L. McGinley: Director, Labour Relations
S. Oliver: Manager, Labour Relations
R. Araya: Labour Relations Officer

Motion heard via videoconference on February 27, 2025.

Award

BACKGROUND

1. On September 30, 2024, the parties asked the arbitrator to hold an in-person arbitration. The arbitrator scheduled the matter for March 4, 2025. On October 28, 2024, the IBEW confirmed that the arbitration would examine the issue of the alleged use of non-union "Fixed Term Contract Employees" (FTCE) to perform bargaining unit work.

2. On February 25, 2025, the IBEW asked the arbitrator to order CPKC to produce:

> All correspondence between CPKC Rail and former IBEW System Council No. 11 members Luigi Bernava, John Rose, and Earl Korzenoski. This request includes but is not limited to any and all correspondence that resulted in the IBEW System Council No. 11 no longer being signatory and directly involved in the integration of the aforementioned individuals into bargaining unit positions in order to perform bargaining unit work. This written communication would contain the pre-employment exchanges leading to each employee signing a fixed term employment contract with CP Rail, plus all directions of work/duties to be performed, including the following forms of correspondence to Mr. Rose, Mr. Bernava, and Mr. Korzenoski:
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> - emails,
> - letters,
> - notes of discussions,
> - any other written records.
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> Finally, we request a copy of the Fixed Term Contracts signed directly with CPKC Rail without the IBEW System Council No. 11's involvement by Mr. Bernava, Mr. Rose, and Mr. Korzenoski.

3. In a February 26, 2025 email, CPKC disagreed with the IBEW's request:

> The Company has reviewed the Union's requested production order and is unable to agree to this request based on relevance, privacy, and the possible legal interest of Mr. Bernava, Mr. Rose and Mr. Korzenoski to this request, and these proceedings should this request be granted. The Company further objects to the Union's request based on the timing of same. Attached is email correspondence between the parties which the Company intends to rely on during tomorrow's case call. The Company reserves the right to expand upon the foregoing during the schedule CMC tomorrow which is scheduled for 2pm ET.

4. Given the imminent March 4, 2025 arbitration date, the arbitrator held a case management conference (CMC) at 2pm on February 27 to hear the parties' submissions.

5. For the following reasons, the arbitrator orders CPKC to produce the requested documents and information due to their arguable relevance to this arbitration. The arbitration will be adjourned to May 27, 2025 during which time the arbitrator remains available to resolve all remaining issues, if any, such as those related to privilege claims.

FACTS

6. The arbitrator makes no findings of fact in this decision. However, the parties' limited documentation helped provide the context for the current motion. The parties could not agree on a Joint Statement of Issue and instead filed separate ex parte statements.

IBEW Ex Parte Statement

7. The IBEW described the dispute:

> The Company's use of non-union Fixed Term Contract Employees to perform work that rightfully belongs to employees governed under Wage Agreement No. 1.

8. By way of background, the IBEW described how the parties had managed FTCEs in the past:

> From 2019 to 2023 there were approximately 14 Fixed Term Contract Employee (FTCE) agreements signed by the parties for employees to perform the work of S&C Maintainers and/or S&C Technicians. The Company agreed to remit the applicable monthly dues on behalf of all FTCE individuals as required by these agreements. The Union expressly consented to such temporary arrangements and mutually agreed to extend several of these contracts over multiple years.
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> On April 22, 2024, the Company gave notice that it would no longer be making any FTCE agreements with the Union, but rather would be making these agreements directly with the individual FTCEs.

9. The IBEW described the alleged violation of the collective agreement (CBA):

> It is the Union's position that since April 2024, the Company has been employing FTCEs to perform bargaining unit work. Specifically, the Union is aware that FTCEs are performing S&C Maintainer / mentoring work and/or S&C Technician / mentoring work filling bulletined vacancies, performing standby responsibilities, responding to trouble calls and calls outside of regular hours,

coaching Technician Trainees, performing the regular duties of an S&C Maintainer or S&C Technician, as well as completing Transport Canada mandated regulatory testing.

The above work has customarily been performed by a member of the IBEW System Council No. 11's bargaining unit and is work belonging to the employees covered by the Collective Agreement. Any work performed by a non-Union FTCE violates the Collective Agreement in question.

CPKC Ex Parte Statement

10. CPKC commented on the change for FTCEs:

> On April 22, 2024, the Company gave notice to the Union that the Union would no longer be signatory to new Fixed Term Contract Employee (FTCE) employment agreements. The Union alleged the work performed by FTCEs is bargaining unit work, being performed in violation of the Wage Agreement, and the Union must be signatory to the FTCE employment agreements.

11. In addition to certain preliminary objections, CPKC took the following positions on the merits of the IBEW's grievance:

> 1. The Union must demonstrate that the work performed by the FTCEs in question (Mr. Bernava and Mr. Rose) is exclusive to the bargaining unit, which the Company denies.
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> 2. The Union must demonstrate that the Company is prohibited, or restricted, from contracting out this work/ having a non-bargaining unit member perform this work. Where the work is demonstrated as being exclusive to the bargaining unit, which is denied, management rights and/or Wage Agreement Article 21 apply.
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> 3. The Union must demonstrate that management rights have been surrendered as evidenced by clear and unequivocal contract language, and Wage Agreement Article 21, or other Articles properly advanced through the grievance procedure, do not apply or have been violated, which the Company denies. No violation of the Wage Agreement has occurred.
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> 4. In support of their requested remedy, the Union must demonstrate that an employee was adversely affected by the Company alleged violation, which the Company denies. The Union's requested remedy is without merit and unsubstantiated and the Union has failed to provide any rationale, compelling argument, or evidence in support of its claim for damages and is now precluded from producing a rationale to suit its position at this stage. The Company further submits that damages are not appropriate or warranted in the circumstances.
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> 5. Regarding the FTCE employment agreements, the Company maintains the FTCE are non-union employees who are not represented by the Union. The

Wage Agreement does not apply to these individuals, nor does it govern their hiring or employment and as such, the Union can claim no right to be privy to the private employment agreement outside of the domain of their representation.

COLLECTIVE AGREEMENT

12. In article 21, the parties have negotiated CBA language for “Contracting Out”. Some of the introductory articles read:

> 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:
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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
> >
> > (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.
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> 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.
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> 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.
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> 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.

…

13. The arbitrator will presumably have to interpret article 21 when determining the merits of the IBEW's grievance.

GOVERNING PRINCIPLES

14. Both parties referenced their previous decision in AH724-P[1] which also involved a request for production. AH724-P had in turn referenced *Dynamex*[2] wherein the arbitrator confirmed that the test for document production is one of "arguably relevant" and noted that proportionality must also apply to such requests [footnotes omitted]:

> 21. The *Canada Labour Code* (*Code*) makes it clear that an arbitrator can order document production and particulars. Section 60(1)(a) of the Code provides a Part I arbitrator with several Canada Industrial Relations Board powers, including the production power described in s.16(f.1):
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> > (f.1) to compel, at any stage of a proceeding, any person to provide information or produce the documents and things that may be relevant to a matter before it, after providing the parties the opportunity to make representations.
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> 22. Generally, arbitrators will order production of particularized information where it is "arguably relevant" to the dispute. The term "dispute" means from both parties' perspective. However, the request cannot lead to the proverbial "fishing expedition" which has been described as "a search to find the basis of a case as opposed to a search for documents to support a case".
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> 23. While there may be debates about the extent of this production obligation, the arbitrator prefers the analysis which includes proportionality, an element which Ontario courts now apply to such requests.

15. In *Ontario Secondary School Teachers' Federation*[3], the arbitrator reviewed the issue of privilege (footnotes omitted):

> 56. However, some specific employer or trade union documents may be protected by established privileges. For example, a litigation privilege may apply to documents created with existing or anticipated litigation in mind:

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[1] *Canadian Signals and Communications System Council No. 11 of the IBEW (IBEW) v Canadian Pacific Railway Company*, 2021 CanLII 37611
[2] *Teamsters, Local Union No. 91 v Dynamex Canada Corp.*, 2020 CanLII 36857
[3] *Ontario Secondary School Teachers' Federation v Ontario Secondary School Teachers' Federation Staff Association*, 2024 CanLII 11434

> 17. Litigation privilege is concerned with protecting the efficacy of the adversarial process. For a document to [be] protected by litigation privilege it must be made with existing or contemplated litigation in mind and the dominant purpose of the communication must be to assist in the litigation. However, litigation privilege does not attach to documents that simply record facts as they occur: see for example Metropolitan Toronto Apartment Builders' Assn and Universal Workers Union, Local 183 (Litigation Privilege), 2013 CarswellOnt 13161 (Steinberg) at paragraph 12 and Scott Environmental Group Ltd, [2011] OLRD No 1210 at paragraph 13.
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> (Emphasis added)

57. Similarly, a solicitor-client privilege may attach to documents where a duly qualified legal counsel provided advice.

58. During the motion on January 31, 2024, both parties referred to the Wigmore test. The Association had the burden to show that it met all 4 requirements for a privilege to attach to certain documents:

> 1. That communications must originate in a confidence that they will not be disclosed.
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> 2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
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> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered, and
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> 4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

(Wigmore on Evidence, 3rd ed., at paragraph 2285)

PARTIES' POSITIONS

IBEW Submissions

16. The IBEW argued that its requested documentation and information met the arguably relevant test. Two of the three individuals had worked as FTCEs under the parties' previous process.

17. The IBEW advised it would have accepted a CPKC stipulation that the current FTCEs performed the same duties as before. In the absence of a stipulation, the IBEW requested documentation and particulars to understand what the three individuals, and

perhaps others, were doing. CPKC had allegedly provided that type of information under the previous process without objection.

18. The IBEW alleged it had sufficiently particularized the requested information in its February 25, 2025 letter to the arbitrator and in its earlier February 20, 2025 request to CPKC. It further contested the suggestion that privacy legislation prevented the disclosure of the documentation. Moreover, it noted that CPKC had the burden to support any claim of privilege.

19. The IBEW also emphasized that it had brought a policy grievance. It does not know how many FTCEs could be involved. It only knows of three at the current time. The grievance contested CPKC's general practice since April 22, 2024 when it gave notice of a change.

20. The IBEW asked for particulars to be provided such as the work the employees perform, why CPKC hired them and the date/duration of their contracts. If the arbitrator granted CPKC an adjournment, the IBEW requested a new date in May, 2025.

CPKC Submissions

21. CPKC did not dispute an arbitrator's authority to order production but emphasized that the test remained one of arguable relevance. In its view, the IBEW had not demonstrated any relevance. In its view, the FTCEs' hours of work, pay, bonuses, etc. had no relevance to the case.

22. CPKC argued that the documents were not required to determine bargaining unit work. It emphasized that even if some documents had to be produced, some personal details, such as salary, would have to be redacted. CPKC also noted that the three individuals were not parties to the arbitration and had not been allowed to participate.

23. If the arbitrator decided to order production, then CPKC requested an adjournment of the March 4, 2025 date because there were only a few business days remaining before the upcoming arbitration.

DECISION

24. As mentioned during the CMC, the arbitrator makes no findings of fact in this decision but merely describes the context the parties put forward.

25. The parties have referenced work of the bargaining unit work. This type of dispute sometimes raises nuances in the federal jurisdiction[4]. If necessary, the parties can address that issue at the arbitration.

26. For several reasons, the IBEW satisfied the arbitrator that the requested documents and information met the arguably relevant test.

27. The parties have negotiated contracting out language in CBA article 21. The documentation regarding the FTCEs' employment will arguably have an impact on the presumed arbitral task of interpreting article 21.

28. The ex parte statements further noted that both the IBEW and CPKC previously had a role in FTCE agreements. A comparison of the documentation used and exchanged before and after April 22, 2024 appears arguably relevant to this arbitration. This is especially the case since two of the three named employees had apparently worked previously on pre-April 22, 2024 term contracts.

29. CPKC explicitly noted in its ex parte statement that the IBEW had to "demonstrate that the work performed by the FTCEs in question (Mr. Bernava and Mr. Rose) is exclusive to the bargaining unit". The IBEW's production request will allow it to consider this issue.

30. CPKC may redact personal information such as employees' home addresses, but terms and conditions such as salary remain arguably relevant given the parties' allegations. For greater certainty, the arbitrator's order includes providing particulars about the work the FTCEs perform, why CPKC hired them and the date/duration of the contracts.

31. CPKC will provide the documents and particulars within 30 days of the date of this decision. Should CPKC raise privilege for any documents, then it will bring the matter before the arbitrator within the same 30-day period. CPKC will describe any such document(s) for which it claims privilege, including the date and the individuals involved[5].

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[4] AH721 - *Teamsters Canada Rail Conference v Canadian Pacific Railway Company*, 2021 CanLII 27309

[5] See *Puc Services Inc. v Power Workers' Union*, 2023 CanLII 49818 for a helpful description of the process CPKC must follow.

32. If there are concerns about confidentiality, then the parties can jointly draft and provide a confidentiality order for the arbitrator's signature. The IBEW satisfied the arbitrator that *PIPEDA*[6] does not prevent a production order for the requested documentation.

33. CPKC suggested FTCEs might have a right to participate in this arbitration. CPKC did not demonstrate how such a right arose. FTCEs differ from bargaining unit members who might have a legal interest during an arbitration, such as when an arbitrator hears a case about a disputed job competition. In the instant case, CPKC's ex parte statement argued that the FTCEs remained outside the bargaining unit.

34. The arbitrator will accept CPKC's request to adjourn the March 4, 2025 arbitration given the limited time available to comply with this production order. The parties helpfully confirmed their availability on May 27, 2025 for a hearing into the merits of this matter.

DISPOSITION

35. For the foregoing reasons, the arbitrator orders CPKC to provide the IBEW with the documentation and particulars requested. Remaining issues, if any, such as privilege, will be determined well in advance of the May 27, 2025 arbitration date.

SIGNED at Ottawa this 28th day of February 2025.

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Graham J. Clarke
Arbitrator

[6] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 at section 7(3)(c).