CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4680

Heard in Montreal, April 10, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEE DIVISION

DISPUTE:

Contracting out claim on behalf of Mr. G. Samms.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

At the material time, the grievor, Mr. Greg Samms, worked on the Alberta Distribution Crew. On October 16, 2014, after the completion of his normal shift, he parked the vehicle assigned to him at the designated location and went on rest days. Upon his return, he discovered that the vehicle had been moved to another location. It was moved by a contractor, Hallcon, from Innisfail to Medicine Hat. On October 30, 2014, the same vehicle was moved by contractors from Medicine Hat to Lethbridge. On November 4, 2014, it was moved for a mid-shift move from Lethbridge to Lacombe. On November 6, 2014 it was moved from Lacombe to Innisfail. And on November 10, 2014 it was moved from Innisfail to Medicine Hat. A grievance was filed that took the position that the grievor should have performed all this work.

The Union contends that the work involved was work presently and normally performed by the grievor and the bargaining unit. By permitting the contracting out, the Company violated collective agreement sections 13.2, 13.3, 13.4, 13.5 and Appendix 1 of section 13.

The Union requests that the Company be ordered to compensate the grievor at the overtime rate for all hours worked by the contractor(s).

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Doherty	**(SGD.)**
General Chairperson	

There appeared on behalf of the Company:

D. Pezzaniti	– Assistant Director, Labour Relations, Calgary
J. Bairaktaris	– Director, Labour Relations, Calgary
M. MacDonald	– CP Legal, Calgary

And on behalf of the Union:
G. Doherty – General Chairperson, Ottawa
D. Brown – Counsel, Hudson

AWARD OF THE ARBITRATOR

The grievor was a Group 1 Machine Operator in the Alberta Distribution Crew which consisted of some 15 employees. They were responsible for loading, unloading, distributing as well as picking up ties and other track material. The grievor was awarded his position on February 13, 2014 and held it for the rest of the work season.

The grievor's assigned vehicle was a one-ton crew cab pickup. He used it daily for the entire work season for a number of tasks including: driving the extra gang foreman while he was taking and managing track occupancy permits; transporting employees to and from the Rail Train; transporting rail saws, drills and other small tools. He also transported employees to and from work locations as well as their hotels. The grievor would also load and unload rail when required.

The Union maintains that the Company's hiring of the contractor Hallcon to drive the crew cab normally operated by the grievor breached article 13.2 of the collective agreement, as well as a long-standing practice. Article 13.2 is clear that *"work presently and normally performed by employees…will not be contracted out",* except in

circumstance of the listed exceptions. There is no dispute that the circumstances found in the list of exceptions do not apply in this case.

The Union notes that the grievor used the truck daily and was in charge of its care and operation. He would take the truck home at the end of the work cycle and report with it at the new location at the beginning of the next work cycle. The Union asserts that all of the Alberta Distribution Crew trucks were moved by employees of the crew-even larger ones such as 10 ton or Brandt trucks. The grievor transported the operators of those larger truck to and from their vehicles. The operation of Company vehicles of every kind used by the Company, including the grievor's crew cab, has in the Union's view always been a core function of the bargaining unit and is work that is *"presently and normally"* performed by the bargaining unit.

The Union further submits that in contracting-out situations, the Union is not required to prove that it has performed the work exclusively but, as Arbitrator Weatherill stated in **SHP 156** *"…it is open to the Union to make a claim of contracting out based on the circumstances of a given location, notwithstanding that contracting out may have occurred in respect of similar work, without grievance or arbitration.".* The Union emphasizes that contracting out is not about work exclusivity but rather about work

"presently and normally" performed by the bargaining unit. The Union also notes that violations of the contracting out provisions were found, for example, in a case involving the contracting out of scrap sorting work (**CROA 4315**). A breach of the contracting out provisions was also upheld in a case involving a dispute arising out of the Company's decision to contract out the chauffeuring of train crews (**CROA 3113**). The grievance was also upheld in a case where salt-spreading equipment was available to the Company and the Company nevertheless used the services of an independent contractor (**CROA 1966**).

The key issue here is whether the grievor was performing core or ancillary functions when he was asked to relocate the crew cab and drive it to another location after his work day was completed.

The grievor performed the tasks assigned to him with his truck during his work day, including transporting rail employees and loading/unloading rails. All of these tasks were performed during his assigned working hours. The evidence is that all five of the incidents in question involved transportation of the vehicle after the grievor worked his regular 10-hour day. The grievor would be fully entitled to claim a breach of the contracting out provisions of the collective agreement if a contractor was brought in to perform any of the tasks he was typically assigned to do with the assistance of his vehicle during his assigned working hours.

But the task of moving the truck from location to location after his assigned work day was over is another matter. Although the grievor was often the only person to operate the crew cab, and could even keep it with him on weekends or after work, he was also paid to just drop off the vehicle at a requested location and leave it there. On those occasions where he dropped off the vehicle at a designated location in order for it to be in place for the next assignment, he would be transported back home and be paid for his commuting time from the drop-off location. The truck would then be driven back to the next required location, often by someone other than the grievor such as a management employee.

The fact that the grievor was not the person to drive the crew cab on all those occasions when it was to be repositioned indicates that his normal duties did not necessarily include the repositioning of his crew cab for all assignments. Some of those repositioning assignments fell to other individuals, particularly in instances where the grievor may have already driven a significant distance himself to a designated location after working 10-hour day and still had to commute back home in another vehicle.

The Company also points out that there were other important operational reasons to have the option of using the services of another driver or contractor to reposition the vehicle. In all five cases here, the grievor, as noted, had already worked a full 10-hour day. For example, the October 16, 2014 trip would have added up to an 18-hour day in order for the grievor to reposition this vehicle and then have to travel an additional 400 km each way from Innisfail to Medicine Hat. The grievor went on to work

9 overtime hours the next day which he would have been unable to do had he worked an 18- hour day on October 16, 2014.

There are similar examples found in the other four occasions of the grievor potentially putting at risk the loss of his assignment by exceeding his maximum allowable work hours.

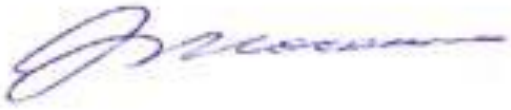
The grievor could not have repositioned the vehicles on the five occasions in question given his assigned work cycles, the transit time for each of the moves and considering the overtime hours he had already worked as occurred on October 30, 2014 when he worked 2.5 hours of overtime after working his assigned 10-hour day.

To sum up, the case here does not involve core duties such as in the cases involving sorting out scrap metal or using the salt-spreading equipment or chauffeuring out train crews. Had the Employer contracted out the task of loading rails onto the crew cab, that would certainly be work that is normally performed by the grievor and a core duty. The task of repositioning cars, although often performed by the grievor at the end of his regular shift, cannot be considered a core duty of a Group 1 Machine operator as there are occasions when someone other than the grievor is assigned for normal operational reasons to reposition the vehicle to another location after he drops it off. In addition, given that the assignments here involved repositioning the crew cab on days where the grievor had already worked his regular 10-hour day, and even additional

overtime hours, he could have compromised his assignment for the next day for having exceeded his maximum allowable work hours.

For all the above reasons, the grievance is dismissed.

May 2, 2019



JOHN M. MOREAU, Q. C.
ARBITRATOR