SHP 715

IN THE MATTER OF AN ARBITRATION

BETWEEN: CANADIAN NATIONAL RAILWAY COMPANY

AND UNIFOR LOCAL 100

AND IN THE MATTER OF A GRIEVANCE RELATING TO THE CONTRACTING-OUT OF LOCOMOTIVE CAPITAL PROJECTS

ARBITRATOR: J.F.W. Weatherill

A hearing in this matter was held at Montreal on April 11, 2014.

A. Rosner, B. Stevens, K. Hiatt, T. McKimm, J. Ouimet and J. Klos, for the union.
R. Campbell, R. Bateman, P. Yourich, S. Blackmore and C. Gilbert, for the company.

AWARD

The Dispute and Joint Statement of Issue in this matter are as follows:

DISPUTE:

Violation of Rules 51, 52, Appendix XIII and Attachment 1 related to the contracting out of overhaul wreck repairs and engine change outs to Quality Rail Shops.

JOINT STATEMENT OF ISSUE:

The Union contends that Agreement 12 members presently and normally perform this work and as a result the Company violated the above rules. The Company disagrees as it may contract out such work providing that one or more exceptions under rule 51.1 apply. Exceptions 51.1 (b), (e) and (f) allow for this action. The Company did not violate the rules alleged by the Union.

At the outset of the hearing, the union made it clear that it did not claim that wreck repairs or warranty work were covered by this grievance. The claim is rather that major engine repairs or engine changeovers (with the exceptions just referred to) fall within the scope of work "presently and normally performed" by members of the bargaining unit, and that such work was improperly contracted-out to Quality Rail Shops.

The material portions of Rule 51.1, Contracting Out, should be set forth at the outset. They are as follows:

51.1 Effective March 6, 2001, work presently and normally performed by employees who are subject to the terms of this collective agreement will not be contracted out except:

(b) where sufficient employees, qualified to perform the work, are not available within the railway; or

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

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

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.

It is the union`s contention that in or around November, 2012, the company sent approximately twenty locomotives for major back-shop work to a company in Illinois known as Quality Rail Service. "Back-shop work" refers to overhauls and engine changeouts as well as the production or repair of components, main generators and alternators and repair of major wreck damage. It is to be distinguished from the work performed at running repair shops, which perform, generally, running repairs and inspections. The company at present has one back shop in Canada, Transcona Shops, in Winnipeg. There are six running repair shops, located at Vancouver, Prince George, Edmonton, Winnipeg, Toronto and Montreal. The latter three have the capacity to perform, as well as the usual running repairs, work on engine changeouts and main generators. Thus, work similar to that performed at Transcona may, to some extent, be performed at the running shops in Winnipeg (Symington), Toronto and Montreal (Taschereau). The same classifications of employees are involved in such work (Heavy Duty Mechanics and Electricians), and at Winnipeg there is a degree of interchange of such employees between Transcona and Symington, depending on the nature and volume of the work. It is not suggested that the performance of some "back-shop" work at a running repair shop constituted contracting-out. It may also be that while equipment is at Transcona for major back-shop work, certain other work, such as a running shop might perform, is also performed. That is a matter of efficiency, and is not in issue here.

The company took the position that the work on the locomotives sent to Quality Rail Service was not work "presently and normally performed" by employees at Transcona, so that Rule 5.1 does not apply in the circumstances, and that I have no jurisdiction in the matter. The question whether or not the work in question is or is not work presently and normally performed by employees is, however, one over which I clearly do have jurisdiction, although of course if I determine that the work in question is not such work, then my jurisdiction in the matter ends.

It may be noted at the outset that some of the work sent to Quality Rail Service may have been work of the sort referred to in the last paragraph of Rule 51.1 The union made it clear

that any such work is not covered by this grievance. In one case, one of the engines to which the union referred was in fact repaired at the running shop in Symington Yard; again, the union agreed that that work was not to be covered by this grievance. As well, the company referred to four of the cases covered by the grievance where locomotives failed on-line while operating in the United States. Operational efficiency would certainly justify the carrying-out of all scheduled work on that locomotive at the location of the failure (that is, a shop relatively close to the site) before placing the locomotive back in service.

It does not appear to be contested that the tasks to be performed on the engines sent to Quality Rail Service would be of the same general nature as the tasks performed regularly at Transcona on similar equipment. Prior to the company's acquisition of the Illinois Central Railroad and the development of its operations in the United States, I think it would be fair to say that work on engines such as those in question (that is, high horsepower engines, as opposed to smaller, lower-horsepower engines which do not operate far from their regular operating area) would normally be repaired or engines rebuilt or replaced at Transcona (as well, prior to their closure, at the company's other back-shops at Moncton and Point St. Charles). The high horsepower engines in question, however, are, as the company puts it, "system assigned", so that, as the company states, "they can be worked on any train assignment throughout CN's system in Canada and the United States and not individually belonging to any specific country or shop in a geographical area". (The company, however, in its brief of argument, does refer in places to the "assigned locations" of locomotives). As well as sending certain work of the sort in question to Quality Rail Service, the company also has some such work performed at its Illinois Central back-shop in the United States, where the employees are represented by other unions. I would note at this point my view that if there is a contracting-out in a case such as this, it is just as much such when the work is assigned to employees in another bargaining unit as when it is sent to a separate employer such as Quality Rail Service.

While I have no difficulty in concluding that the tasks to be performed on the equipment in question are tasks of the sort presently and normally performed by employees at Transcona, and while it may be that employees at Transcona have in fact performed such tasks on some of the very equipment which was sent to Quality Rail Service in 2012, it does not necessarily follow that employees at Transcona have, subject to the exceptions noted above, "ownership" of all back-shop (or "capital") work performed on the company's high horsepower locomotives. It is the case, however, that a large proportion of such work is indeed performed at Transcona. To put it another way, I conclude from all the material before me, most of which is not in dispute, that employees at Transcona presently and normally perform the bulk of the work of the sort in question.

It was the company's position that employees at Transcona have in fact received more than their "share" of such work, so that the amount of work sent to Quality Rail Service could not be said to come within the scope of the work presently and normally performed by them. To support this position the company relied on an agreement between the parties made following the award of an arbitrator in a somewhat similar case (*SHP 596, June 10, 2004 (Chapman)*). That agreement, dated January 8, 2007, includes the following:

7. The parties agree that the ratio between all CN High Horsepower Locomotive inspection work is 65% Canadian - 35% American and will be maintained as such, except as provided for in paragraph 13 hereunder.

8. The Company confirms that it is not its practice to deadhead locomotives to the USA for repair, inspection or overhauls, but if so, the requirements of Rule 51 must be respected.

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13. CN commits that it will not change the overall assignment of locomotives on either side of the border as a means to subvert the protections afforded by this memorandum of agreement or to avoid the spirit and intent of this agreement. However, it is recognized that many factors influence fleet allocation, including but not limited to purchases of locomotives, retirement of locomotives, wreck damage, acquisition of foreign roads, divestiture of assets, legitimate tax avoidance strategies, lease arrangements to provide locomotives to third parties or lease arrangements to acquire locomotives from third parties, or loss of major customers.

The company contended that, because of this agreement, the union was required to show that contracting-out had exceeded "the 35% U.S. threshold" and was infringing on the 65% portion "recognized as covered by Canadian work ownership protections". The material presented by the company at the hearing shows that the distribution of overhaul work in Canadian shops in 2012 in fact "exceeded the 65% distribution threshold", and that this was in part due to the in-sourcing of work to Canadian facilities. It may well be that, applying section 7 of the memorandum of agreement referred to above, the company has indeed assigned more work to Canadian shops - that is, more work within the bargaining unit - than it was required to do. The difficulty with the company's argument, however, is that the memorandum applies in respect of inspection work and does not apply to the work in question here. While I do not consider that the union has shown that its members at Transcona were entitled to *all* work of the sort in question (and subject to the exceptions which have been referred to), it is nevertheless the case, and I so find, that those employees presently and normally perform such work (always subject to the exceptions noted), although they do not "own" the work in the sense that they, "exclusively", are entitled to perform it (the two terms in quotes do not appear in Rule 51).

In all of the circumstances, I am driven to the unsatisfying (for the parties) conclusion that *most* of the work of "capital" repairs to high horsepower locomotives is presently and normally performed by members of the bargaining unit and I find, in this case, that there has in fact been a contracting-out of a certain amount of such work within the meaning of Rule 51. The company contends that if there is contracting-out, it falls within certain exceptions set out in Rule 51, and I now turn to a consideration of these.

First, as to the exception in Rule 51.1(b): it is the company's position that there were not sufficient qualified employees available. The material before me indicates that the Transcona Shops were fully staffed, and that there were no employees laid off. Several arbitration cases have, however, held that the exception does not apply where regular employees would be able to perform the work with the use of a reasonable amount of overtime. Transcona employees had a very low average of overtime in 2012. While I do not consider that Transcona employees could have completed all of the work claimed in the grievance, the company has not shown that they could not have performed any substantial part of it. Accordingly, while a portion of the contracted-out work could, I find, have been performed within the bargaining unit, not all of it could. The exception in Rule 51.1(b) has been only partially established.

Second, as to the exception in Rule 51.1(e): I agree with the company's submission that, given that at least the Symington and Taschereau shops were fully occupied with running repairs at the material times, the work in question could only have been performed at Transcona. The work force there, however, while fully occupied, could, I consider, have performed at least some portion of the contracted-out work, given appropriate scheduling and a reasonable amount of overtime. Here too, the exception has been only partially established.

Third, as to the exception in Rule 51.1(f): while "undesirable fluctuations in employment" would, I consider, arise (having regard to the materials provided by the company) if all of the work in question were required to be performed at Transcona, for the reasons set out in the preceding two paragraphs, that is not the case. The exceptions in Rule 51.1(b) and (e) have, as I have found, been established in part. Thus, the grievance can succeed only in part, and the company can properly be expected to have performed at Transcona only that amount of work which could be accomplished with a reasonable amount of overtime by the existing qualified force without any undesirable fluctuation in employment. Accordingly, this third exception has not been made out.

For all of the foregoing reasons, it is my conclusion that there has been a violation of Rule 51.1 of the collective agreement. The extent of that violation is a matter to which I will return, following a consideration of the other Rule alleged to have been violated, Rule 51.2. That Rule is as follows:

51.2 The Company will advise the Union representatives involved in writing, as far in advance as practicable , but no less than thirty days except in cases of emergency, of its intention to contract out work which would have a material and adverse effect on the employees.

In all instances of contracting out, the Company will hold discussions with the

representative of the Union in advance of the date contracting out is contemplated, except in cases where time constraints and circumstances prevent it.

The company gave no notice to the union of the contracting-out in question, believing that the exceptions in Rule 51.1 applied, and that there would be no material and adverse effect on employees. As I have found, however, the contracting-out was, to some extent, in violation of the collective agreement, and employees have suffered a material and adverse effect to the extent that they have been deprived of a reasonable amount of overtime. In any event, however, the second paragraph of Rule 51.2 calls for discussions with the union "in all instances of contracting out", and the company has not shown that "time constraints and circumstances" would have prevented such discussions. In a case of this sort, such discussions might have reflected those considerations which led to the memorandum of agreement establishing, for inspection work, the proportion of work which might properly be sent out of the country. The failure to observe Rule 51.2 has clearly had consequences in this case.

While there has been a violation of the collective agreement, both with respect to some of the work contracted-out and with respect to the failure to give notice to or hold discussions with the union, the relief to be granted, apart from a declaration that there has been a violation of Rule 51.1 and of Rule 51.2, is difficult to assess. There has been some loss of overtime work at Transcona, and some compensation to employees may be in order. Rule 51 may appear to contemplate, as a typical case, the contracting-out of some particular job, rather than, as here, a group of jobs, any one of which might not, by itself, be the subject of contracting out. Nevertheless, the Rule certainly applies to the present situation, with the unsatisfactory (as I consider it) result, which really follows from the lack of notice and consultation.

For these reasons, and having regard to the particular circumstances of this case, my award is 1) to declare that the company has violated Rule 51.1 and Rule 51.2 in the manner outlined above; and 2) to require the parties to meet and discuss the matter of compensation for employees adversely affected in this case. I remain seised of the matter for the purpose of determining any questions which may arise in respect of compensation and the application of the foregoing, and to complete the award.

DATED AT OTTAWA, this 23rd day of April, 2014,

_____,
Arbitrator