

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

(the “Employer”)

AND:

UNIFOR, LOCAL 101R

(the “Union”)

(Contracting Out at Alyth Freight Car Repair Shop Calgary –
Grievance #145-2018-015; CAN-CP-UNIFOR-2018-00000567)

ARBITRATOR:

Vincent L. Ready

COUNSEL:

Sharney Oliver
for the Employer

Joel Kennedy
for the Union

HEARING:

February 2, 2021
Virtual hearing

DECISION:

April 29, 2021

The parties agreed I was properly constituted as an arbitrator under the terms and provisions of the Collective Agreement with the requisite jurisdiction to hear and determine the matters in dispute.

This matter pertains to a grievance filed by the Union alleging the Employer has improperly contracted out bargaining unit work at its Alyth Freight Car Repair facility located in Calgary Alberta.

The grievance outlines the basis of the Union's complaint as follows:

On February 05, 2018, Mr. Crothers, a bargaining unit member and the only remaining Labourer working at the Alyth Car Shop, retired from Company service.

Subsequent to Mr. Crother's retirement, employees of Caldwell Cleaners Limited (CCL) were observed for the first time performing cleaning and sanitizing work which had previously been performed by bargaining unit members. There was no prior notice of contracting-out on the Company's part.

The background to the grievance is not in dispute.

Mr. Crothers worked as a Shop Labourer at the Alyth Car Shop for 38 years prior to retiring on February 5, 2018. At the time of his retirement, Mr. Crothers was the only remaining Labourer working at the facility. His work there before his retirement included cleaning and sanitizing offices, meeting rooms and Car Shop, including its employee facilities and service areas, and completing general shop cleanup such as emptying garbage bins and sweeping floors. Mr. Crothers was also responsible for ordering and stocking supplies.

Shortly following Mr. Crothers retirement, the Union observed cleaning duties in Alyth facility being performed by a third party contractor.

On February 26, 2018, the Union submitted a Rule 28-Grievance Resolution Form to the facility Manager requesting he reply within the 21-day time limit specified in the Collective Agreement. No reply was forthcoming.

On April 16, 2018, the Union filed the present grievance.

The provisions of the Collective Agreement governing contracting out are set out in Rule 53 and are further elaborated on in Appendix 39 dated March 12, 2001, both of which are set out below:

RULE 53 CONTRACTING OUT

53.1 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 and cannot be made available through a permanent transfer of employees from other locations on the system, through a reasonable level of training, re-training or upgrading of the active or laid-off employees; or
- (ii) where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees and cannot reasonably be made available through a permanent transfer of employees from other locations on the system; or
- (iii) when essential equipment or facilities are not available and cannot be made available at the time and place required from Railway-owned property, or 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.

Note: All work that was previously performed at the former Ogden Shop facilities, except work that is presently and normally performed at Running Shop facilities or Weston Shop Facilities, may be contracted out. Such work that may be contracted out includes, but may not be limited to, Car Air Brakes, Locomotive Air Brakes, Traction Motors, Wheels/Bearings, Paint, Trucks, Engines, Alternators, Generators, miscellaneous component parts, Locomotive or car builds, locomotive or car rebuild/remanufacture, and major locomotive or car wreck repair etc. A minimum of 40% of System Traction Motor Combo building will remain bargaining unit work.

53.2 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.

53.3 At a mutually convenient time at the beginning of each year and, in any event no later than Jan 31st, representatives of the Union will meet with the designated officers to discuss the Company's plans with respect to contracting out work for that year.

53.4 The Company will advise the Union representative 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.

53.5 Except in cases where time constraints and circumstances prevent it, the Company will hold discussions with representatives of the Union in advance of the date contracting out is contemplated. The Company will provide the Union 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, and any other details as may be pertinent to the Company's decision to contract out. During such discussions, the Company will give due opportunity and consideration to the Union's comments on the Company's plan to contract out and review in good faith such comments or alternatives put forth by the Union. If the Union can demonstrate that the work can be performed internally in a timely fashion as efficiently, as economically, and with the same quality as by contract, the work will be brought back in or will not be contracted out, as the case may be.

53.6 Should a Regional Union Representative, 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 he requests a meeting to discuss such contracting out, it will be arranged at a mutually acceptable time and place.

53.7 In the event Union representatives are unavailable for any meetings, such unavailability will not delay implementation of Company plans with respect to contracting out of work for that year.

53.8 Where the Union contends that the Company has contracted out work contrary to the provisions of this Rule, 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.

Closed Period Contracting-Out Proposal

53.9 The parties agree to establish a Joint Committee, composed of representatives of Mechanical Services and UNIFOR 101R, which is mandated to review all instances of contracting-out of work coming under the scope of Mechanical Services as identified and listed in the Attachment hereto. The parties agree to use their best efforts in order to achieve a resolve, by mutual agreement, on all the identified items.

In reviewing the identified items, the parties will take into account all of the factors that drive contracting decisions. These factors include economics, flexibility, capacity, equipment, quality, time constraints and customer requirements.

Where a business case cannot be made to have the work performed in-house under the existing collective agreement terms and conditions, the parties may, by mutual agreement, modify such terms and conditions in an effort to have the work performed inhouse.

The review process will be limited to two items per month unless otherwise mutually agreed to by the parties.

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APPENDIX 39 FILE: UNION CONCERNS IN REGARD TO
CONTRACTING OUT

March 12th, 2001

Tom Murphy
President, Local 101
Rail Division, CAW-TCA Canada

Dear Sir:

This is in regard to concerns raised at this round of bargaining with respect to Contracting out contrary to the provisions of Rule 53.

It is not the intent of the Railway to contract out bargaining unit work contrary to the provisions of Rule 53 of the Collective Agreement.

In view of the Union's concerns it is proposed that the parties make a joint presentation to the appropriate management and Union personnel at each terminal in regard to how the Contracting out Rule is to be applied reviewing the applicable Railway jurisprudence in this regard. These presentations are to be completed within 180 days of the ratification of the settlement unless otherwise mutually agreed.

In addition to ensuring that the Regional Vice-President and Local Representative is notified of any Contracting out being anticipated, or planned, it is proposed that Joint Terminal Contracting Out Committees be established (after the joint presentation) is made which will meet, as and when required, to discuss any contracting out matters which may be considered. The Joint Terminal Committees shall consist of the duly authorized Representatives on the Union's side and the Service Area Manager or Facility Director on the management side. The Regional Vice-President will be notified of the results of the meeting and any concerns raised by him will be reviewed.

The Union also raised concern with respect to work that has been contracted out in each terminal which the Union considers work of

the bargaining unit. Notwithstanding, the position of the parties, it was agreed that the Joint Terminal Contracting Out Committees will be mandated to review cases of this nature in accordance with Rule 53.9.

Should there be a dispute as to whether Rule 53 is being violated the matter shall be progressed to the Vice-President and the appropriate Labour Relations Officer immediately for resolve prior to progressing the matter through the grievance procedure. The National Staff Representative and the Director of Labour Relations shall be notified of any dispute in this regard.

POSITIONS OF THE PARTIES

The Union contends the Employer violated Rule 53.1 by contracting out work “presently and normally performed” by members of its bargaining unit. It argues that employees of Caldwell Cleaners Limited (CCL) were not observed performing cleaning and sanitizing work until after Mr. Crothers’ retirement. It notes there was no prior notice of contracting out given by the Employer.

In addition, and in the alternative, the Union submits that the Employer’s failure to provide notice, enter into good faith discussions and to provide requested information are violations of Rules 53.4, 53.5 and 53.6. It states the Employer’s failure to abide by these provisions made it impossible to perform the work in-house, even if any of the exceptions identified under Rule 53.1 were deemed to apply.

With respect to the Employer’s preliminary objection asserting the grievance has been improperly expanded, the Union notes the grievances were unanswered, and asserts the grievance is not difficult to understand when read in good faith. In other words, the Union asserts the basis for the grievance has always been clear – it objects to the fact that work normally performed by a bargaining unit member at the Alyth Car Shop is now being performed by

outside contractors, and that the Employer did so without providing any notice or letters of intent.

By way of remedy, the Union seeks a declaration that the Employer has breached the Collective Agreement; compensatory damages for the loss of regular and overtime work by bargaining unit members; an order that the impugned work be returned to the bargaining unit; and an order requiring the Employer to comply with all notice requirements in respect of any future contracting out of work presently and normally performed by members of the bargaining unit. On the latter request, the Union submits the Employer had demonstrated an inability or unwillingness to adhere to Rules 53.4 and 53.5 and that an order of future compliance is appropriate.

The Employer objects to what it characterizes as an improper expansion of the Union's grievance, asserting the grievance filed was limited to a complaint about not being provided proper notice. Further, the Employer takes position that the Union cannot request a "blanket award" to cover future instances the Union unilaterally determines to be a violation of the Collective Agreement. The Employer characterizes the Union's requested remedy as "a ruling that would consolidate all Contracting Out grievances – future and not as of yet docketed – into one award."

With respect to the merits, the Employer states the Union has failed to identify a provision in the Collective Agreement that requires it to fill a vacancy created by attrition. Its position is that the volume of work available following Mr. Crothers' retirement did not justify filling the position. Indeed, it observes it only engaged an employee from Caldwell Cleaners Limited three times a week for three to four hours, in other words, a maximum of twelve hours a week. In the Employer's submission, this is not a case of contracting out, but rather "the reorganizing of ancillary tasks".

Further, it notes, Rule 53 requires notice be given only when work contracted out “would have a material and adverse effect on employees.” According to the Employer, the Union bears the burden of proving employees in this case were adversely impacted, and this burden has not been met in this case. The Employer notes Mr. Crothers was the last Labourer working in the facility and asserts there could consequently be no impact on any employee.

In fact, the Employer denies that cleaning duties are exclusive to the Labourer classification, noting that unlike duties associated with other trades in the Collective Agreement, there is no Rule outlining the duties of the Labourer position. The Employer submits that in order for work to be found to constitute bargaining unit work, it must be performed exclusively by the bargaining unit. In this case, the Employer argues, the impugned tasks are also performed by United Steelworkers, Local 1976 members, who work as Cleaners, Janitors and Labourers. The Employer therefore takes issue with the Union’s request for compensatory damages for loss of regular and overtime work by bargaining unit members, arguing the Union has failed to establish the impugned work is bargaining unit work, and that employees do not have a proprietary right to overtime work in any event.

DECISION

I will start by dealing with the Employer’s argument asserting the Union has improperly expanded the scope of the grievance. Upon review of the submissions, I have determined the grievance is sufficiently and clearly worded to capture the essence of the Union’s complaint in this case. Further, to the extent there was any lack of clarity around the grievance as worded, I note the Employer could have properly engaged the Union during the grievance process to clarify – an opportunity it appears the Employer did not take. I therefore

decline to grant the Employer's preliminary objection in respect to the alleged expansion of the original grievance.

On the merits of the grievance, I start by observing that Article 53 of the Collective Agreement is premised on protecting bargaining unit work from contracting out unless the Employer can bring itself within one of the exceptions outlined in the Article itself. Further, Article 53.5 requires the parties to engage in meaningful consultation to determine whether contracting out can be avoided. Pursuant to Rule 53.5, the parties are required to attempt to agree, where possible, to fashion a mutually-acceptable agreement to avoid the work being contracted out.

The documentation before me leads to the conclusion that Article 53 was not given proper consideration in the present case before the work at issue was contracted out to a third party. In other words, the Employer's decision to unilaterally contract out cleaning work at the Alyth facility contravened the Collective Agreement.

In the present case, there can be no question that the work at issue was normally and, at the time it was contracted out, exclusively performed by the Labourer's position which is contained in the Collective Agreement. While the nature or volume of work may not justify an ongoing full-time Labourer position at the facility as alleged by the Employer, certainly, the Employer was obligated to discuss with the Union its desire to contract out this work and to provide all relevant information to the Union so that the parties could have meaningful dialogue about this proposal.

I accordingly declare the Employer has violated the contracting out provisions of the Collective Agreement and order the parties to engage in a consultation process to determine whether the contracting out in this case can

be avoided and to determine an appropriate remedy for the Employer's breach. I respectfully decline to issue an order that the Employer abide by all notice requirements in respect of any future contracting out of work given that both parties are bound to follow the negotiated terms and conditions as set out in the Collective Agreement, and the grievance procedure is in place to address any future alleged breaches.

I remain seized with the requisite jurisdiction to resolve any issues arising from this Award.

The grievance is allowed. It is so awarded.

This award is issued pursuant to the arbitration provisions of the Collective Agreement (Rules 29.1-29.7).

Dated at the City of Vancouver in the Province of British Columbia this 29th day of April, 2021.



Vincent L. Ready