IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY

(the "Company")

AND

CANADIAN AUTO WORKERS, LOCAL 101

(the "Union")

In the matter of the grievance of concerning:

An Article 8 & Contracting Out of Boiler Work

Appearing for the Company:

Len Wormsbecker - Manager – Labour Relation – CPR

Sole Arbitrator: Sidney G. Soronow

Appearing for the Union:

Brian McDonagh - National Representative - CAW

Glenn White - Vice President – CAW Local 101

AWARD

Two grievances have been presented to the Arbitrator for determination. One of these grievances arises from and relates to the provisions of the Job Security Agreement between the Union and the Company. The second grievance arises from and relates to the Collective Agreement between the parties. The two grievances involve the same general underlying fact situation. As such, by agreement of the parties, both grievances were dealt with in one hearing.

The Collective Agreement contemplates that the parties will submit to the arbitrator a Joint Statement of Fact and Issue (the "Joint Statement"). The Joint Statement, in large measure, frames the difference or issue between the parties. In this instance, the Joint Statement reads as follows:

> "Dispute: The issuance of an Article 8 notice on June 7, 2005, effective October 7, 2005, advising of the abolishment of eight (8) permanent bargaining unit positions at the Winnipeg, Weston Power House. Also at issue is the alleged subsequent Contracting out of the bargaining unit work related to the Article 8 in question.
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> Statement of Fact:
> On June 7th, 2005 the Company issued an Article 8 notice, effective October 7, 2005 abolishing eight (8) permanent positions at the Winnipeg Power House, account new boilers installed at Winnipeg Diesel and Weston Shops.
>
> Statement of Issue:

It is the submission of the Union that Canadian Pacific Railway is violating the applicable Power Engineering Act(s) by not having operators for the two (2) new Boilers installed in the Weston Component Shop and one (1) new Boiler installed in the Winnipeg's old Diesel Shop.

Since 1996, the Company has required employees in the Stationary Firemen Classification to have a 4th class Manitoba Power Engineer License in order to maintain the coal fired boilers and the gas fired boiler at Winnipeg Weston Shops. The Union was given to understand that the Company was adhering to the Power Engineer Act of the Province of Manitoba. The Company now claims that the new boilers recently installed, are covered by Federal Boiler Regulations.

The Union contends that the Company has abolished 8 bargaining unit positions and then contracted out the work of inspecting, maintaining, servicing and repairing the newly installed boilers in Winnipeg Weston Shop. Work, the Union considers, as "work, normally and presently" performed by the 8 affected bargaining unit employees.

In this regard, the Union contends that the Company stands in violation of Rule 53, Rule 53.1, 53.3, Rule 53.5 and Rule 53.6 of the Collective Agreement and has improperly served an Article 8, effectively, permanently abolishing the 8 bargaining unit positions in question herein.

In view of the foregoing, it is the position of the Union that:

- the Article 8 notice issued on June 7, 2005, must be viewed as null and void; and

- the Company must be ordered to cease and desist the contracting out of bargaining unit work; and

- the original 8 bargaining unit members in the Firemen Classification, must be assigned to operate, inspect, maintain, service and repair the 3 new Miura Boilers; and

- the original 8 bargaining unit members in the Firemen Classification,

must be made whole with respect to any lost pay, including overtime pay, in relation to the use contractors performing their work, including any interest on any moneys owing.

The Company denies the Union's contention and claims."

In briefest terms, the background to this dispute arises from the fact that the Company elected to decommission central coal-fired boilers and close an existing facility. In its place, the Company installed three Miura boilers, which apparently represent a newer technology. The Miura boilers provide power and heat to the Weston Shops and the Winnipeg Diesel Shop. Prior to this installation, 8 Union employees were involved in the previous system, being 7 Stationary Firemen and 1 Coal Passer. The Article 8 notice pertained to abolishing the positions occupied by the aforesaid 8 Union employees.

The Article 8 Notice is issued pursuant to an agreement, known as the Job Security Agreement between the Company and the Union and the full text of Article 8 appears as Appendix A to this Award.

Although the full text of Article 8 appears in Appendix A to this Award, it is worthwhile to recite the opening portion of Article 8 which appears in Article 8.1(a), which reads as follows:

> 8.1(a) The Company will not put into effect any Technological, Operational or Organizational change of a permanent nature which will have adverse effects on employees holding permanent positions without giving as much advance notice as possible to the President of Local 101 or such other person as may be named by the Union to receive such notices. In any event, not less than 120 days notice shall be given, with a full description thereof and with appropriate details as to the consequent

changes in working conditions and the expected number of employees who would be adversely affected.

In proceeding with this arbitration, the Union relies heavily on Rule 53, which addresses contracting out. The full text of Rule 53 appears in Appendix B to this Award.

Rule 53.1 starts with a factual premise and then provides for the various exceptions to that premise.

The premise is that:

> "Work presently and normally performed by employees who are subject to the provisions of this Collective Agreement will not be contracted out".

A more detailed understanding of the circumstances is necessary. The starting point is to understand that the Weston Shops Power House was apparently built at the turn of the twentieth century. The operation went through various changes throughout the years. The most significant change (prior to the facts giving rise to this matter) occurred in 1949 when the old HRT boilers were replaced with three coal fired foster wheeler boilers, apparently rated at 45,000 lbs/hr each.

These boilers remained in operation until the closure of the powerhouse in 2005. The operation consisted of providing processed steam and heating to approximately 800,000 square feet of building footprints. Hands on operators were required around the clock to provide a safe and efficient operation, although the Company suggests that this manpower requirement was due to the age of the equipment and lack of modern technology.

The operation of the previous system required employees in the classification of Coal Passer to deal with unloading the coal and the conveyor system associated with the movement of the coal. The Stationary Firemen functioned as boiler operators to monitor the safe and efficient operation of the coal fired boilers and other related equipment. These coal fired boilers were not equipped with safety features such as automatic blow downs, low water boiler cutoffs and fuel cut offs. The Stationary Firemen were needed to manually correct and adjust any changes to the operation and equipment. To hold these positions, the Company required that the individual hold a 4th Class Power Engineer Certificate/License issued by the Manitoba Department of Labour.

The decommissioning of the central coal fired boiler and gas fired boiler coincided with the installation of Miura boilers. These new gas fired boilers were installed in 2005 and it is through these boilers that the heating and steam requirements are now met.

According to the information provided by the Company, these Miura boilers are equipped with all of today's newer safety devices, including:

(a) automatic blow down to keep good quality water treatment;

(a) low and high boiler water cutoffs;

(b) low and high gas cutoffs and pressure relief valves;

(c) PLC Central Panel that provides readouts of operations and detects any deficiencies;

(d) natural gas and steam pressure switches cutoff;

(e) safety valves;

(f) automatic steam pressure reducing valves.

Through an arrangement with AAA Alarm, the boilers are remotely monitored 24 hours a day, 7 days a week.

For some period of time, prior to the arbitration, there appeared to be differences of opinion as to whether the operation of the boilers was governed by federal or provincial legislation. By the time of the arbitration, both parties accepted that the federal legislation was the applicable legislation.

While provincial legislation apparently dictated constant monitoring of the previous boiler system by someone with the 4th Class Manitoba Power Engineer Certificate/License, this is not necessarily so under federal legislation as it relates to the Miura boilers.

Under the Canada Occupational Health & Safety ("COSH") regulations there is a definition of a "qualified person". The definition is as follows:

> "qualified person means, in respect of a specified duty, a person who, because of his knowledge, training and
>
> experience, is qualified to perform that duty safely and properly;"

Part V of COSH includes provisions concerning boiler and pressure vessels. Section 5.6 reads as follows:

> "Every boiler, pressure vessel and pressure piping system in use at a work place shall be operated, maintained and repaired only by a qualified person".

The federal legislation, in this regard, does not identify a requirement for a specific license in order for a person to achieve or meet the requirement of being a qualified person. Rather, the determination as to whether any particular individual is a "qualified person" is to be based on that person's knowledge, training and experience which would qualify that person to perform the duty safely and properly. The Company takes the position that it is therefore the responsibility of the employer to determine who is a qualified person to operate, maintain and repair the Miura boilers. It should furthermore be noted that COSH does not require continuous attendance, but rather simply that a qualified person be in attendance and readily available (and even this latter requirement is subject to exceptions).

Instead of having dedicated Stationary Firemen associated with the operation of the Miura boilers, the Company chose to train 34 employees in the Labourer, Diesel Service Attendant and Machinist classifications in respect of the operation of the new boilers. The Labourer, Diesel Service Attendant and Machinist are all classifications covered by this Collective Agreement.

The Company indicated that in connection with the operation of the boilers a daily inspection is undertaken by one of the employees who has been trained, during which daily inspection the following tasks are performed:

1. Check the gas pressure.
2. Check the steam pressure.
3. Check for escaping steam from safety valves.
4. Check for water or steam leak from boiler.
5. Check for visible wetness around the boiler.
6. Check for salt in tank of water softener.
7. Check water level in condensate tank.
8. Check sight glass to determine if water is clear or dirty.
9. Check water temperature of condensate tank.

According to the information provided by the Company, if any abnormalities in the operation of the boiler are found, the employee has been instructed to shut the boiler down and contact the Miura boiler representative. It is suggested that these daily tasks occupy 5 to 10 minutes to complete and that unless an alarm condition exists, there are no other duties required of the qualified person/employee charged with the operation of the boilers. The Company therefore argues that the five to ten minutes of daily work is insufficient to establish a full-time Stationary Fireman position. Although it may not be a substantial difference, I do note that in its grievance reply, the Company referred to fifteen minutes per day, rather than the five to ten minutes as submitted at the arbitration.

At this juncture, it should be noted that the Union suggests that the amount of training that the individuals received was minimal in character. Little (if any)

further information was offered to the Arbitrator to suggest that the amount of training (regardless of the amount of training time) was in any way inadequate to the actual task being performed.

The Union appears to take issue with the fact that work is being done (in relation to the boilers) by employees in the Labourer, Diesel Service Attendant and Machinist classifications, following upon the training which they received.

Earlier reference was made to the technological advances associated with the Miura boilers. It bears repeating, that the boilers are apparently equipped with various safety devices, such as safety valves, natural gas and steam pressure switches cutoff, low and high boiler cutoffs and low and high gas cutoffs and pressure relief valves. Any abnormality in these areas will result in the boiler automatically shutting down and triggering an alarm. Upon the occurrence of an alarm condition, the boilers will apparently emit an audible alarm as well as signalling an alarm condition to AAA Alarm Company. Procedures are in place as to what should occur, in the event of boiler failure or if an alarm condition exists.

It is therefore clear that the new boiler contains numerous safety devices which allow employees in the Labourer, Diesel Service Attendant and Machinist classifications, with some degree of training, to perform the tasks presently entrusted to them. There is no evidence before the Arbitrator to indicate that the task cannot be satisfactorily performed by trained employees in these classifications.

No doubt, the employees in the Stationary Firemen classification could, as well, readily perform these tasks. Indeed the Union indicates that the daily inspection tasks of the type above referred to, are part of the work previously performed by the Stationary Firemen classification in relation to the old boiler system. However, does that mean that the employees in the Stationary Firemen classification have the exclusive right to do such work?

The issue of the ownership of a bundle of job duties, was a cornerstone subject in the case of Canadian Pacific Railway and CAW, Local 101 (Appleton Grievance) a decision of this Arbitrator. The comments of this Arbitrator, at page 6 of that case, bear repeating, as follows:

> "To resolve this grievance, one is necessarily obliged to consider whether the Collective Agreement confers upon the Labourers classification the exclusive ownership of a bundle of job duties. This raises two immediate questions. Is there any contractual guarantee in the Collective Agreement of work jurisdiction? Correspondingly, does the Collective Agreement expressly create restrictions upon the employer in the assignment of cleaning work?
>
> These are extremely important questions. It is well understandable that employees would jealously guard against any encroachment on their perceived work jurisdiction. The quantity of work available to any particular classification may ultimately impact on the employment security of those within such classification.
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> Each classification of employees will, based on their

experience, formulate perceptions as to work jurisdiction boundaries. The general adherence to such boundaries, during day to day operations, may not itself, however, translate into an enforceable legal right.

In the well-known case of re U.S.W. and Algoma Steel Corp. (1968) 19LAC 236 (at page 243) the Board states:

> "There is no implied proprietary right of an employee in the job duties he is actually performing and specific provisions of the Agreement must be relied on to restrict managerial initiative".

While the foregoing quote is from a case more than 30 years ago, it does, in the Arbitrator's view, continue to represent the prevailing view in arbitral jurisprudence. As such, for the Union to succeed would necessitate express language in the Collective Agreement conferring a proprietary right to Labourers in respect of a specific bundle of job duties and consequently a line of demarcation of work jurisdiction. Alternatively, the Union must point to language in the Collective Agreement which would diminish or impair the ability of the employer in the assignment of the work in issue.

The Arbitrator has closely reviewed and considered the Collective Agreement as a whole, and in particular those portions of the Collective Agreement referred to by the Union (including Appendix 43). I note the references in Rule 23.39 and Rule 23.40 to cleaning shops and shop pits. However, I have been unable to find the type of language one would expect as

> necessary to create strict exclusive work jurisdiction relative to the cleaning work at issue. Moreover, I have been unable to find language which would restrict the assignment of the cleaning work in the circumstances of this case.
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> It is true, that in large measure there is traditional work associated with the Labourers classification. No doubt, as a day to day historical experience, cleaning work is generally assigned to and performed by Labourers. However, neither historical experience nor the references to cleaning in Rules 23.39 and 23.40 can be elevated to an enforceable right of exclusivity, unless the doctrine of estoppel can be properly applied to the circumstances.

Although the Appleton case dealt with Labourers and clean up work, the comments therein made have application to this matter. I have been unable to find anything in the Collective Agreement (nor was I directed to anything in the Collective Agreement) which reserves exclusively to the Stationery Fireman position, the daily tasks associated with the Miura boilers.

That having been said, if there was a legislative requirement that the tasks entrusted to the trained individuals (in the Labourer, Diesel Service Attendant and Machinist classifications) be attended to only by individuals holding a 4th Class Power Engineer Certificate, then the Company would be obliged to comply with such legislative enactment or any applicable regulation, such as COSH. In the definition of "qualified person", there was no indication that the individual has to hold any particular licensing status. Accordingly, based on the material before

the Arbitrator, there is no choice but to conclude that the employees in the Labourer, Diesel Service Attendant and Machinist classifications, who received training, meet the requirements of being a “qualified person”, at least in relation to the boiler operation work they are currently called upon to perform. It may be, that subsequent events may raise a fresh issue as to whether these individuals should be regarded as continuing to meet the requirement of being a “qualified person”. I am not, however, at liberty to speculate on that issue. It would be appropriate, however, to note that COSH has a definition of “inspector which defines “inspector” as “a person recognized under the laws of any province or by the

National Board of Boiler and Pressure Vessel Inspectors as qualified to inspect boilers, pressure vessel and pressure piping systems.” The Company must therefore be careful to ensure that the boiler related tasks for which it calls upon employees in the Labourer, Diesel Service Attendant and Machinist classifications, are not expanded in the future to encompass tasks which (by virtue of COSH) must be performed by individuals holding the credentials required to be an inspector or tasks which extend beyond their knowledge, training and experience.

In light of the foregoing, I cannot find it to be a violation of the Collective Agreement for the Company to have allocated the small amount of daily work in the fashion that they did, by drawing upon (and training) employees in the Labourer, Diesel Service Attendant and Machinist classifications. Furthermore, it is clear that the introduction of the three Miura boilers and the consequent impact

on the Coal Passer and the seven Stationary Firemen was a technological, operational or organizational change of a permanent character. The Company was obliged to give an Article 8 notice and it did so by giving at least the required 120 days notice.

Additional to the work performed by the bargaining unit employees (holding, the Labourer, Diesel Service Attendant and Machinist classifications), the Company entered into an agreement with Hi-Tech Boiler Sales Inc. ("Hi-Tech") for the supply of services. This agreement is entitled "Supply of Services Agreement". A copy of this agreement (hereinafter for convenience referred to as the "Service Agreement") was provided to the Arbitrator by each of the parties.

The Service Agreement with Hi-Tech describes the services to be performed by Hi-Tech, most particularly in Schedule "B" of the Service Agreement. These include:

- conduct a daily analysis of boiler water specifications;
- provide maintenance and cleaning as required;
- prepare and administer chemical solution to the boiler as required;
- responding to an alarm situation when advised by AAA Alarm Systems.

The Union has raised an issue concerning contracting out, by virtue of the Company's use of Hi-Tech. In that regard, the Collective Agreement prohibits "work presently and normally performed by employees who are subject to the

provisions of the Collective Agreement" from being contracted out, except in the circumstances specifically delineated.

It is the obligation of the Union to show that the work which is at issue is "work presently and normally performed". So far as the exceptions are concerned, the Union says that the Company must prove that it has met the test of one of the exceptions and it is not for the Union to have to prove otherwise. The Arbitrator agrees with this perspective and accordingly, it is the obligation of the Company to prove the applicability of an exception, if it is the Company's view that one or more of the exceptions apply.

While it would be usual to firstly address whether the work in question is work presently and normally performed, in this instance, it is convenient to review the subject firstly by addressing the exception which is relied on by the Company. In that regard, the Company is relying on Rule 53.2, which reads as follows:

> "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".

For these purposes, the relevant portion of Rule 53.2 is its reference to the "performance of warranty work". The parties have not, however, included a definition of this term in the Collective Agreement.

In a general sense, warranty work will often be work to repair defects in

workmanship or materials in the original manufactured item. In some cases, the term "warranty work" might be extended to include work that is required to maintain the warranty in good standing.

The best source or starting point for determining what is warranty work is to examine, in detail, the actual applicable warranty documents. Even then, there may be arguments as to what work constitutes "the performance of warranty work" for the purposes of Rule 53.2 of the Collective Agreement. The problem of determining what is warranty work is commented on in a case between these parties in SHP-483, a decision of Vincent L. Ready. At page 10 of that case, the arbitrator comments as follows:

> "What is a warranty? The parties to this collective agreement have not provided that definition as it relates to Rule 53.2. In the ordinary course of commerce a warranty is not left for definition of general application, but is negotiated between the parties with regard to the specific needs of the business arrangement. Calling something a "warranty" or not using that label will, in most circumstances, be inconclusive. One usually associates the word "warranty" with a guarantee against defects in materials or workmanship for a stipulated period of time.
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> **Black's Law Dictionary**, 4th revised edition contains three definitions or useages of "warranty" as applied to the sale of goods:
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> > A statement or representation made by the seller of goods contemporaneously with and as a part of the contract of sale, through collateral to the

> express object of it, having reference to the character, quality, or title of the goods, by which he promises or undertakes that certain facts are or shall be as he then represents them.... A promise or agreement by seller that article sold has certain qualities or that seller has good title thereto... A statement of fact respecting the quality or character of goods sold, made by the seller to induce the sale, and relied on by the buyer.

Those sorts of general definitions are not very helpful. The buyer of a radio is likely to be much less concerned with the warranty of the seller than the buyer of a locomotive who is concerned that it meets and continues to meet the needs which it has contractually committed to deliver.

Nor can I ignore the changing commercial realities. The Company has demonstrated that US railroads have demanded extended protection assurances from the sellers of locomotives. The Company made a decision to do likewise.

The result was the negotiation of the ISP covering a term of 15 years with certain renewal provisions.

I decline to define a "warranty" for all purposes. A warranty is whatever the parties to an agreement negotiate it to be. The buyer can be expected to press for as extensive a warranty as the seller is willing to give while the latter will wish to restrict its liability.

A warranty is usually some sort of guarantee of performance whether that be expressed as fitness

> for the purpose intended or expressed in terms of guaranteeing defects in materials and workmanship or expressed in specific target performance terms. A warranty is generally a guarantee or assurance that a product will do what the buyer expects it to do and what the seller has said it will do.
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> Within those broad generalizations the parties to a commercial contract will usually negotiate the terms of their warranty. Of course, this doesn't usually apply to the purchase and sale of everyday consumer goods where the buyer must be satisfied with whatever the manufacturer offers by way of warranty. There are, generally speaking, no opportunities to negotiate an individual warranty"

In its submission, the Company indicates that it agreed during late 2004 to purchase three Miura boilers from Hi-Tech. The Company further says that part of the purchase agreement included the warranties set out in the Service Agreement with Hi-Tech. The purchase agreement itself was not provided to the Arbitrator. As such, I am not in a position to conclude what was set out in the purchase agreement on the subject of warranties. Moreover, the Service Agreement itself does not detail the warranties.

Although the purchase agreement was not presented and while the Service Agreement did not detail the warranties, the subject of warranties does appear briefly in the Miura Steam Boiler Installation & Operation Manual, which Manual is included in the Union's material.

The following appears in Section 1.2 of the Manual:

"1.2 GUARANTEE

- Refer to warranty documents for specific details.
- SIX-MONTH labor warranty for boiler start up may be available, contact Local Sales and Service representatives for details. This labor warranty covers routine inspection and repairs at the job site. Travel and lodging expenses are not covered except within local representative service area.
- ONE YEAR Standard warranty for parts from boiler commissioning date or 18 months from shipping date whichever occurs first. Express shipping cost for overnight or next day delivery of parts is not included. Damage to the boiler or parts of the boiler after leaving the factory are not covered. Parts replaced under this warranty must be returned to MIURA. If the failed part is not returned, the customer will be charged for the new item.
- SEVEN-YEAR limited factory warranty on pressure vessel against material or workmanship defects."

The brief reference to warranty, as above cited, indicates that reference should be had to "warranty documents for specific details". The warranty documents containing any such specific details, were not placed before the Arbitrator.

In its submission, the Company referred to its reply to the Union Grievance on November 17th, 2005. In that response, the Company indicated that the new Miura boilers "are under an extended warranty and therefore the required scheduled preventive maintenance will be provided by the Miura service provider."

In this instance, the Company has not seen fit to provide a copy of the purchase agreement or any warranty documents as referred to in Section 1.2 of the Miura Steam Boiler Installation & Operation Manual. The failure to present this documentation, clearly undermines any ability to correlate the functions of Hi-Tech under the Service Agreement with the "performance of warranty work."

The Company submits that services provided by Hi-Tech are part of required scheduled preventative maintenance, which under the extended warranty are to provided by the Miura service provider. Based on the information and documentation provided to the Arbitrator, it is simply not possible to conclude that the services of Hi-Tech are part of required scheduled preventative maintenance under the extended warranty or that the warranty would be invalidated or at risk if the service work were performed by Stationary Firemen, rather than by Hi-Tech.

As noted earlier, it is the obligation of the Company to prove that they can bring the situation within the exception set out in Rule 53.2. In the Arbitrator's view, the Company has failed to do so, as the evidence does not demonstrate that the services performed by Hi-Tech are the "performance of warranty work".

The need for the Company to bring itself within the exception is only relevant if the work at issue is "work presently and normally performed by employees" covered by the Collective Agreement.

In paragraph 53 of the Company's submission they address this aspect as follows:

> "The Company has not contracted out the work of the CAW in contravention of the provisions of Rule 53.1. This was not a case where the Company has transferred to Hi-Tech Boiler Sales Inc. work that was being done by CAW employees. This was the purchase of new Miura Boiler with new component parts (e.g. natural gas components) that CAW workers had never worked on. This was not about changing the status quo but was rather a new set of circumstances that CPR was dealing with."

This type of argument appears to be addressed in a case referred to as SHP-409, being an arbitration between Canadian National Railway Company and CAW, a decision of Michel Picher. The case dealt with contracting out of Oil Lab work. On page 6 of that case, Arbitrator Picher states as follows:

> "Nor can the Arbitrator accept the argument of the Company that, by reason of technological advances and the introduction of computer and laser technology, the work performed by the employees involved cannot be said to be work "presently and normally performed" by employees, in a sense contemplated by rule 52.1 of the collective agreement. Firstly, I have some difficulty, with the argument of the Company that the work there protected is work as may have existed on February 3,

> 1988. It would appear to the Arbitrator that a straight-forward reading of the article suggests that the phrase "presently and normally" is intended to have an ongoing meaning referable to the present as it might exist at any point during the term of the collective agreement, and not as it may have existed on the day the contracting out rule became effective. I find it unnecessary to rest this part of my decision on that reasoning, however. More fundamentally, even if it were necessary to characterize the work of the employees as work such as existed on February 3, 1988, that work plainly continues to be done. The introduction of new equipment, methods, tools or technology does not change the fundamental nature of the work which, in this case, is the ongoing testing of locomotive oil for viscosity, water content, impurities and other properties which have consistently been monitored for many years. While the methods and sophistication of the work may have changed, the tasks to be performed has not, and it cannot be said that the tasks in questions are other than "work presently and normally performed by employees" who are members of the bargaining unit".

The work being performed by Hi-Tech (as referred to in Schedule B to the Service Agreement) appears, based on the information presented, to be essentially the same nature of work as was previously performed by the Stationary Firemen. While the equipment (boilers) may be different, the work being performed by the outside contractor is, in the Arbitrator's view, "work presently and normally performed by employees who are subject to the provisions of this Collective Agreement". It therefore follows that the work contracted out to Hi-Tech constitutes contracting out and that such contracting out is contrary to the Collective Agreement, since none of the exceptions have been shown to apply.

It is the Union's position that the Company not only violated Rule 53.1, but as well violated Rule 53.3, 53.5 and Rule 53.6 of the Collective Agreement. Various portions of Rule 53 create a consultative process in circumstances where the Company contemplates contracting out. It does not appear that the Company's compliance with those provisions would constitute an admission by the Company that any proposed contracting out is contrary to the Collective Agreement. Rather, the consultative process creates a forum for disclosure and discussion and promotes better understanding of the facts and situations which may give rise to contracting out. In the course of this consultative process, the Union would have an opportunity to put forth comments and/or alternatives.

It is not entirely clear why the Company did not follow the consultative process provisions in Rule 53. Perhaps such failure simply arose from the Company's belief that they would not be engaging in prohibited contracting out. While the contracting out has been determined to have been a prohibited activity, I am of the view that the Company acted honestly (although mistakenly) in arriving at their conclusion.

It is obviously too late for the consultative processes contemplated by Rule 53 to occur in relation to the events which are the subject matter of this arbitration. In the future, greater efforts should be made by the Company to comply with both the words and spirit of the consultative provisions of Rule 53 (and Appendix 39) relating to potential contracting out situations. It is unnecessary to direct any

specific redress on this aspect, other than to note the failure by the Company to proceed in the manner contemplated by the Collective Agreement.

In relation to this proceeding, the Union has requested that the bargaining unit members in the Stationary Firemen classification, be made whole with respect to any lost pay, including overtime pay, in relation to the use of an outside contractor, including any interest on any monies owing. It is appropriate that any loss of wages or benefits be compensated and I so order, although I do not order interest on any amounts which may be found to be owing.

That having been said, it is not clear that any of the affected Stationary Firemen have actually experienced any loss in wages or benefits, as apparently the affected Stationary Firemen were absorbed and now hold Labourer or Diesel Service Attendant positions.

Furthermore, it appears that certain provisions of the Job Security Agreement may have resulted in those Stationary Firemen maintaining their rate of pay even thought they are now functioning in a Labourer or Diesel Service Attendant position. While compensation is ordered, the quantum and individuals to receive same (if any) should be left, in the first instance, to be discussed by the parties and hopefully they can reach agreement. Failing such agreement, the matter may be referred back to the Arbitrator and accordingly the Arbitrator retains jurisdiction to reconvene, at the request of either party hereto, in the event the parties are unable to agree upon any such quantification issue.

Consequent upon the Arbitrator's determination that there was prohibited contracting out, the Company is obliged to cease such contracting out and return to the bargaining unit the work that is now being performed by Hi-Tech. The mechanics of how this work will be returned to the bargaining unit will be left, in the first instance, to be worked out between the Union and the Company and failing agreement on this issue, either party may refer the matter back to the Arbitrator and the Arbitrator retains jurisdiction to determine this issue.

It would appear that the Union invites the Arbitrator to consider the Article 8 notice null and void in consequence of a finding of the occurrence of prohibited contracting out. I do not accept that the finding of prohibited contacting out, in this case, automatically or inevitably leads to a conclusion that the Article 8 notice should be considered null and void. It is clear that the Company was putting into effect a technological, operational or organizational change of a permanent nature which would have adverse effects on employees holding permanent positions. The fact is that the three Miura boilers represented a new level of technological sophistication that allowed certain functions to be addressed through the use of employees in the Labourer, Diesel Service Attendant and Machinist classifications, albeit with some training. This justified the Article 8 notice, even if the subsequent finding of prohibited contracting out of some work, results in the return to the bargaining unit of work that was contracted out (and potentially therefore may give rise to the re-establishment of one or more Stationary Firemen positions, depending on the actual amount of work involved). In consequence, the

grievance asserting that the Article 8 notice is null and void, is denied.

The Arbitrator retains jurisdiction to address issues as hereinbefore stated, or as well, in the event of any dispute between the parties with respect to the interpretation or implementation of this award.

The issues raised in this arbitration were both significant and interesting. Both parties presented very full and comprehensive arguments, accompanied by significant case law in the form of previous arbitration cases, all of which cases were considered and reviewed for the purposes of issuing this decision. I would like to express my appreciation and thanks to both parties for their skill, competence and clarity in presenting their respective positions and arguments, all of which were of great assistance to me.

There has been some delay in the publication of this Award, however, these were difficult issues presented with a significant amount of material.

Dated at Winnipeg this 16th day of November, 2006.

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Sidney G. Soronow
Sole Arbitrator