IN THE MATTER OF AN AD HOC ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY

("the Company" / "CN" / "the Employer")

- AND -

UNIFOR LOCAL 100

("the Union")

CONCERNING THE SHOPCRAFT GRIEVANCE of PR0120

SHP-748

Pursuant to the parties' Video Conference Arbitration Handling Guidelines of June 15, 2021

Christopher Albertyn - Sole Arbitrator

APPEARANCES

For the Union:

Joel Kennedy (Presenting), National Rail Director
Cory Will, President, Unifor Local 100
Jason Lancaster, Prairie Region Vice President, Unifor Local 100

For the Company:

Richard Charney, Senior Partner, Norton Rose Fulbright
Samual Keen, Associate, Norton Rose Fulbright
Mark Grubbs Sr, Vice-President Mechanical, CN
Melanie Martens, Director LR & HR Compliance, CN
Ron Campbell, Labour Relations Manager, CN

Hearing held by videoconference on July 29, 2024.
Award issued on October 15, 2024.

AWARD

1. This award concerns shopcraft grievance PR 120 of May 21, 2020.

2. The parties' Joint Statement of Issue reads as follows.

JOINT STATEMENT OF ISSUE

Dispute

Contracting out work presently and normally performed by Unifor bargaining unit members working at the Traction Motor Shop, Air Brake Shop, and Wheel Shop at Canadian National Railway's Transcona Shops.

Joint Statement of Issue

On May 11, 2020, the Company notified the Union of its decision to temporarily close the Traction Motor Shop, Air Brake Shop and Wheel Shop, due to "the cataclysmic effect of the pandemic on our business and on our customers, and as a result train starts were curtailed, locomotives and cars were stored, and consumption of wheel and other parts decreased proportionally". These shops have not been reopened.

On May 21, 2020, the Union filed a Step II grievance alleging the Company had contracted out work, and that it had done so without providing any notice (the "Grievance").

On October 29, 2020, the Company responded, declining the Union's

grievance.

3. The dispute concerns the application of Rule 51, Contracting Out.

RULE 51
Contracting Out

51.1 Work presently and normally performed by employees who are subject to the provisions of this collective agreement will not be contracted out except:

(a) when technical or managerial skills are not available within the railway; or

(b) where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees; or

(c) 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

(d) where the nature or volume of work is such that it does not justify the capital or operating expenditure involved; 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.

51.2 The Company will advise Union representatives in writing, as far in advance as practicable, but no less than thirty days except in cases of emergency, of its plans 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.

To this end, at mutually convenient times on a quarterly basis, the National President of Local 100, the Local 100 Vice Presidents and the Unifor National Representative (or designates) and the appropriate company officers (Chief Mechanical Officers or designates) will meet to discuss the Corporation's plans with respect to contracting out of work for the coming months.

51.3 The Company will provide the Union with a description of the work to be contracted out; the anticipated duration; the reasons for contracting out, and, if possible, the approximate date each 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 plans 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. Where a business case cannot be made to have the work performed by Unifor members under 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 by Unifor members.

51.4 Should a Regional Vice-President, or equivalent, request information respecting contracting out which has not been covered by a notice of intent or discussed in a quarterly meeting, it will be supplied promptly. If the Regional Vice-president requests an additional meeting to discuss such cases of contracting out, it will be arranged at a mutually acceptable time and place.

51.5 Where the Union contends that the Company has contracted out work contrary to the provisions of this Rule, the Union may progress a grievance by using the grievance procedure which would apply if this were a grievance at step 2 under the Collective Agreement. The union officer shall submit the facts on which the Union relies to support its contention. Such grievances will be submitted directly to the appropriate company officer (Chief Mechanical Officer or department Director), with a copy to Labour Relations, and will be discussed in joint conference or as part of the next scheduled quarterly meeting. Any such grievance must be submitted within 30 days from the alleged non-

compliance, failing which the matter shall be deemed to be closed.

Facts

4. In about May 2020, at the early peak in the COVID-19 pandemic, the Company decided to close the Transcona Shops ("the shops") in Winnipeg (the Wheel Shop, the Air Brake Shop and the Traction Motor Shop). This decision was made because the railway had much reduced mileage and had built a surplus stock of wheels and other parts that it could use. The Union accepts that this initial decision to shut down the shops was legitimate.

5. The Union's concern is with the Company's decision to keep the shops closed once the surplus stock of wheels and other parts had been used up, and the Company's refusal to resume production at the Transcona Shops. Instead, it transferred the work to third-party contractors. That is what the Union objects to.

6. CN has not reopened the shops, and it has no plans to do so. Instead, CN expanded its use of third-party contractors. The grievance concerns these decisions, and it concerns the way in which the Company failed to engage with the Union to effect the contracting-out and to maintain the shuttering of the shops.

7. The history of this matter starts in 2010. That is the start date of the details the Company has provided of the scope of its contracting-out of the work of the Transcona shops. From 1998 until 2001 there were derailments from improperly modified wheel boring, principally from the Wheel Shop. The wheelsets were loose and could cause car derailments. CN identified that the defects were being caused by the Wheel Shop equipment that had become outdated and needed replacement. So, in 2010, the Company undertook a review of the potential cost of renovating and upgrading the Wheel Shop. The quote it received ("the Simmons Proposal") estimated it would cost between $19 and $25 million to replace the existing

equipment. This potential cost was prohibitive, and CN decided not to proceed with the contemplated improvements in the equipment.

8. CN did not engage the Union at all on the above considerations. As a result, the Union was unaware of the contemplated refurbishment, of the potential costs of doing so, and of the decision not to proceed with the necessary improvements. This meant that the Union did not have any opportunity to provide input on how the situation could be addressed. CN let the equipment in the Wheel Shop run down because the cost of improving it was prohibitive.

9. The contracting-out of the work of the Transcona Shops started in 2003. From 2010 the percentage of the contracted-out work of the three shops (Wheel Shop, Air Brake Shop, Traction Motor Shop) was as follows, with subsequent changes:

Wheel Shop contracted-out work:
2010: 23%
2019: (just before the pandemic and the notice of closure): 79%
2023: 93%
Traction Motor Shop contracted-out work:
2010: 30%
2019: 70%
2020: 100%
Air Brake Shop:
Valves 22-23-506 contracted-out work:
2010: 72%
2019: 60%
2020: 100%
Valves 22-24-508 contracted-out work:
2010: 49%
2019: 58%
2020: 100%.

10. From the above, the result of the closure of the shops in 2020 was that a very small portion of the Wheel Shop was retained, but 93% was contracted-out, and all the work of the Traction Motor Shop and of the Air Brake Shop was contracted-out.

11. The Union claims that it was unaware of the above contracting out until the information was disclosed in this matter and says that it never had an opportunity to address the issue. However, there were two previous grievances concerning contracting out. The first in 2014, which was withdrawn; and in 2018 which was resolved without prejudice. I have no further information on these grievances nor on the resolution of the second.

12. Prior to the closure of the shops in May 2020, the Company conducted a financial analysis of the cost differences between doing the work in the Wheel Shop as compared to having the work done by third-party contractors. The analysis revealed that CN could have saved over $3.8 million in 2019 if all the work were done by contractors. Similarly, it would have saved $336,550 by moving the work at the air break shop to third-party service providers. In total, the 2019 financial analysis estimated it would have saved over $4.5m in 2019 had it given the work of the Transcona Shops to third-party contractors.

13. The impact of the shuttering of the shops in 2020 was that the following positions were eliminated:

- 3 jobs in the Air Brake Shop
- 11 jobs in the Traction Motor Shop
- 30 jobs in the Wheel Shop.

14. The Union learned of the closing of the shops on May 11, 2020. The

employees affected by the closure were told the next day, May 12, 2020, that their jobs were to be eliminated on May 15, 2020 (three days later).

15. 63 employees were affected by the closure. 40 were absorbed into other jobs in the Transcona Shops; 23 were laid-off, but, by February 2021, all who wished to return were recalled to work. The affected employees were mostly absorbed into locomotive maintenance.

16. There was no discussion with the Union by the Company prior to the shop closures in May 2020. There was also no information supplied to the Union in the period following, despite repeated requests by the Union to be told of CN's intentions, particularly as to when it would re-open the shops, and as to the extent of the contracting-out it was doing.

17. The Union filed this grievance on May 21, 2020, when it received no initial information from the Company.

18. The first substantive response to the Union was on October 29, 2020, denying the grievance. CN's reply explained that the shutdown had been necessary in May 2020 because of the surplus stock built up through the pandemic. CN denied that it had contracted-out more work than prior to the downturn in traffic. No information was given as to the Company's future intention.

19. On the same date, October 29, 2020, the Union referred the grievance to arbitration.

20. The figures provided by the Company for this case, indicating the significant increase in the percentage of work contracted-out in 2020, do not accord with the statement made on October 29, 2020 that the Company had not, by the time of that reply, contracted out a much higher percentage of the overall work of

the shops than it had prior to the pandemic. The information it gave to the Union was therefore false.

21. The date of hearing of the arbitration was scheduled before me on October 18, 2022. Shortly before that date, in September 2022, CN requested a meeting with the Union. By then the contracting out was complete.

22. The parties met on September 9, 2022 and they discussed the grievance. They concluded a Memorandum of Settlement. In it the Company agreed to assess the viability of reopening the shops "based on the cost of upgrading existing equipment and processes to appropriate safety standards with a view of exploring options for modernizing the shop". The parties agreed to work collaboratively on safety recommendations. The Company agreed to provide the Union with regular bi-monthly updates on the progress of the assessments of the Wheel Shop. In return, the Union agreed to hold the grievance in abeyance for six months. I was advised that the hearing scheduled for October 18, 2022 was cancelled.

23. The parties further agreed that, at the conclusion of the six-month assessment period, they would meet to discuss the Company's plans regarding the possible re-opening of the Wheel Shop. The Union could proceed with the arbitration if the outcome of the assessment was unsatisfactory.

24. Pursuant to the obligation the Company undertook in the Memorandum of Settlement, CN commissioned NSH USA, Simmons' successor, to prepare two proposals for a new Wheel Shop at Transcona: one that would be fully automatic, the other semi-automatic.

25. NSH's proposals for the two alternatives was received by the Company on August 15, 2023. For the automatic Wheel Shop, the cost of refurbishment would be over $42.7 million. CN anticipated it would incur a further $14.6m in civil

engineering expenses to build a new Wheel Shop at Transcona. In total, CN estimated that building a fully automatic Wheel Shop would cost approximately $65 million. Such a shop would require only 36 employees.

26. For the semi-automatic Wheel Shop, the estimated total cost would be $54.5 million, with relatively few employees.

27. The Company concluded that that the cost of modernizing and reopening the Wheel Shop was not financially viable. It advised the Union of this, and the Union revived the arbitration.

Analysis

28. CN denies it violated the collective agreement by closing the Transcona Shops. Alternatively, if there was contracting out, the Company submits it complied with its obligations under Rule 51. Further alternatively, CN claims, if there was a breach it was merely technical in nature and no remedy is appropriate.

29. CN's argument is that it did not contract-out the work because the work was given to the third-party contractors in an emergency, for sound operational reasons, and in good faith.

30. There is no factual foundation for this argument. As can be seen from the figures provided above, work "presently and normally performed by employees who are subject to the provisions of this collective agreement" has steadily been contracted-out by the Company, starting in 2003 and increasing proportionately from 2010. Nonetheless, a substantial portion of the overall work continued to be done at the Transcona shops until the COVID-19 pandemic shutdown in 2020.

31. Following the initial emergency shutdown in 2020, there was a substantial

increase in contracted-out the work "presently and normally performed by employees" (see AH-453). Such contracting out is, *prima facie*, a breach of the Company's obligation not to contract-out the bargaining unit work.

32. CN argues that, to the extent work was contracted-out, that was permissible under Rule 51(d), which allows for contracting out when the capital and operating expenditures necessary to keep work within the bargaining unit cannot be justified in light of the nature and volume of the work involved.

33. What is not quite apparent from the facts is whether the Company needed to contract-out the bargaining unit work. The Company alleges that the Wheel Shop at Transcona had reached the end of its lifespan. However there is insufficient evidence that the Wheel Shop was in such a state of disrepair that it could no longer do the wheel work required of it. It certainly seems that a refurbished shop would perform better, but there was no indication to the Union during the period leading to the pandemic that the Wheel Shop's lifespan was ending. It is therefore unclear that it was a necessity to close down the Wheel Shop and the other Transcona Shops after the surplus product had been used up in the early part of the pandemic in 2020.

34. It was certainly better for business because the work could be done at a cheaper price by external contractors. But there is little to suggest that the Company could not have reopened the Transcona shops and continued operating as it did in 2019, with the same proportion of the work done at the shops and by third-party contractors. At some point it would become clear that the Wheel Shop would have to be substantively refurbished, but it is not evident from the information provided thus far that that was a necessity when the decision was made to keep it closed.

35. The Union claims that the first time the issue of the alleged end-of-life of the Wheel Shop was raised by the Company was in CN's submissions for this

arbitration. That issue was not discussed with the Union prior to the Company's decision to shutter the Wheel Shop. However, it was presumably discussed in the conversation between the parties on September 9, 2022, when the Memorandum of Settlement was concluded. That is because the Memorandum of Settlement had the parties agreeing to assess the possibility of reopening the Transcona shops "based on the cost of upgrading existing equipment and processes to appropriate safety standards with a view of exploring options for modernizing the shop". The Union now takes the position that the Wheel Shop can continue to be fully functional and that the contracted-out work can return to it.

36. The Union argues that the Company has destroyed the core work of the bargaining unit – the refurbishing of the wheels – by contracting it out and not having it done at Transcona. The Union argues this constitutes a permanent loss of bargaining unit work, without justification.

37. When making the decision to contract-out work, the Company had certain obligations under Rule 51.

38. Firstly, under Rule 51.2, it must "advise Union representatives in writing, as far in advance as practicable, but no less than thirty days except in cases of emergency, of its plans to contract out work which would have a material and adverse effect on the employees".

39. The Union accepts that the circumstances causing the sudden closure of the shops in May 2020 was an emergency. It has no complaint against the Company for acting as it did then. The Company had to adjust to the sudden drop in demand occasioned by the pandemic, in circumstances when it had an immediate surplus of replacement wheels and parts.

40. What the Union does complain of, with justification, is the decision not to

re-open the shops once the surplus product had been used up. It was then that the Company decided to expand its contracting out of work previously done by bargaining unit employees.

41. That decision required the Company to comply with Rule 51.2. The emergency had passed then. The full obligation existed, and it was not complied with. There was no notice in writing, never mind a notice, "as far in advance as practicable". The decision was made and acted on without any involvement of the Union. That was plainly a breach of Rule 51.2.

42. Rule 51.2 continues: "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."

43. There were no time constraints for the decision to expand the contracting out during 2020. The Company was obliged to hold discussions with Union representatives before implementing the decision to expand the contracting out. That did not happen. That was a further breach of Rule 51.2.

44. Rule 51.3 was similarly breached. That Rule requires the Company to give a description of the work to be contracted-out, with details of the anticipated duration, with reasons for doing so, with the approximate date when the contracting out would occur, and other pertinent details. None of that was provided.

45. The purposes of Rule 51.2 and Rule 51.3 are to give the Union an opportunity to make representations and to explore alternatives to contracting out with the Company. That opportunity was denied. The purpose of Rule 51 was therefore thwarted by the Company's failure to engage at all with the Union on the decision to permanently contract-out the work.

46. The purpose is stated in Rule 51.3: to give the Union the opportunity to "demonstrate that the work can be performed internally in a timely fashion as efficiently, as economically, and with the same quality as by contract". If the Union can do that, then the work "will be brought back in or will not be contracted-out". By failing to engage the Union, that opportunity was eliminated. There was, therefore, a violation of Rule 51.3.

47. Rule 51.4 gives the Regional Vice-President of the Union the entitlement to request information on the contracting out. That information must be supplied promptly. The Union made numerous attempts to obtain information on what was happening, on when the work would recommence, on what contracting out was being done, on what the Company's intentions were. All of those requests were met with silence until the Company finally engaged with the Union within a month of the arbitration hearing date, approximately a year later, in September 2022. That was a considerable period of time during which the Company neglected the Union and ignored its rights under Rule 51.4. That Rule was also plainly breached. The situation was as described by Arbitrator Hornung, at para. 42 of AH-701, "the failure of the Company to a provide the required information adversely affected [the Union's] ability to represent its members and compromised its ability to assess its position relative to the contracting out of the work at issue".

48. In presenting the economic justification for the contracting out, the Employer claims that Rule 51.1(d) applies: it may contract-out work "where the nature or volume of work is such that it does not justify the capital or operating expenditure involved". There has clearly been a significant saving in the operating expenditure involved by contracting out the work of the shops. There is also a significant saving by not having to incur the capital costs of transforming the Wheel Shop. The Company claims that the lifespan of the machine shop and other shops

was coming to an end and the expensive refurbishment had to be faced. In argument, CN suggested that to re-open the shops, after they were closed in 2020, would have required the expenditure of $55-$65 million. The Union disputes this assessment, claiming there was no need to keep the shops shut once the excess stock had been used.

49. There has not yet been any serious engagement between the parties regarding the Company's justification for the contracting out. That needs to occur in a genuine discussion of alternatives by the parties, as is contemplated in Rule 51.2. This is particularly the case when an employer has contracted out the core work of the bargaining unit, apparently on a permanent basis, so eroding the Union's bargaining unit (see SHP-575).

50. The seriousness of the various breaches of Rule 51 is such that a mere declaration is not sufficient remedy for the Union (see SHP-575 and SHP-715). To merely make a declaration with nothing further would effectively ignore, and thereby undermine, the agreement of the parties in Rule 51. Further consequences should flow from the brazen disregard of the Union's rights.

51. The Union refers to the award of Arbitrator M. Picher in SHP-409. There the arbitrator found that there was no justification for the contracting out of the bargaining unit and he ordered the Company to cease the contracting out of the bargaining unit work and to return that work to the bargaining unit. Further, there was an order that all affected employees be compensated for all wages and benefits lost, and the Union be compensated for any related union dues lost.

52. Arbitrator Picher's decision in CROA-1596 is similar. There the employer had no justification for the contracting out of the work other than saving on operational expenses. The award makes clear that contracting out is not permitted merely because to do so would be more profitable. Relying on CROA-713, the

arbitrator said that contracting out is justified on economic grounds only in circumstances "where some new or occasional venture is contemplated which require, if the employer's own forces were used, some capital or operating expenditure beyond those of the existing operations and which would not be justified for the venture contemplated".

53. CN's explanation for the contracting out is because of the financial savings. SHP-409, CROA-713 and CROA-1596 would suggest that this explanation may be insufficient to justify contracting out of bargaining unit work. CN's further justification is that the cost of refurbishing the machine shop would be prohibitively expensive, as has been explained. That explanation, if genuinely the reason for not re-opening the Transcona shops, could justify the contracting out, in light of Arbitrator M. Picher's finding in CROA-2869. There he found that the large capital or operating expenditure required to reopen a facility justified keeping it closed. A similar finding was made in SHP-117.

54. The Company considered the cost of refurbishing the machine shop in 2010. It was prohibitively expensive then. The Company's most recent investigation – with the cooperation of the Union – has revealed that the expense would be even more prohibitive now.

55. As I have said, what is not apparent is what the remaining life of the shops would be had they not been shuttered by the Company in 2020, and what other alternatives could be considered. More information is needed before a clear conclusion can be drawn on that issue. If it is clear that the closed shops can continue to operate effectively without the very substantive expenditure in refurbishing them, then their re-opening is a possible order to be made. If that is not the case, and the need for the refurbishment is such that "it does not justify the capital or operating expenditure involved", then the remedies will need to be

different, to address the Employer's flagrant breaches of Rule 51.

56. In all of the above circumstances, as was done in SHP-741, this award will make a finding of a breach of Rule 51 – which are substantive, and not merely technical – and it will direct the parties to meet to consider the appropriate remedies. As part of the conversation to resolve the issue of remedy, the parties must have a genuine discussion regarding the need and implications of the contracting out of bargaining unit work. The parties must jointly explore any alternatives to contracting out, including remedies for lost work.

57. If the parties are unsuccessful, I remain seized to deal with the remedies.

Award

58. I declare that the Company has violated Rule 51 in each of the ways described above.

59. I refer the additional remedies back to the parties.

60. To enable the Union to make an informed submission on remedy, and to engage properly in the attempted resolution of the remedy, the Company is directed to disclose all relevant information not already provided:

a. of the scope and nature of the contracted-out work;

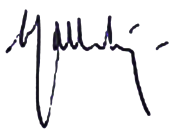
b. pertinent to the Company's claim that the state of the Transcona shops is such that the Company can no longer resume the bargaining unit work performed there until the shutdown in 2020, without incurring the substantial refurbishing costs described above;

c. of any Company proposals to address the question of the appropriate remedy.

61. The Company must hold itself reasonably available for the purpose of such engagement with the Union.

62. If the parties are unable to resolve the remedy, a further hearing will be held to determine what remedies are appropriate.

DATED at TORONTO on October 15, 2024.



Christopher J. Albertyn
Arbitrator