CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 11

Heard at Montreal, Monday, September 13th, 1965

Concerning

CANADIAN NATIONAL RAILWAYS

and

BROTHERHOOD OF RAILROAD TRAINMEN

DISPUTE:

Claims of Conductor G.R. Ashman and crew for 8 hours' pay at yard rates for switching performed at Brockville, Ontario, November 25, 1962.

JOINT STATEMENT OF ISSUE:

Conductor G.R. Ashman and Brakeman H.V. Fahey and R.W. Morris were ordered to report for duty at Brockville at 3:15 a.m. Sunday, November 25, l962 to operate westbound train 3rd 493. Prior to leaving Brockville the crew were required to switch out and place 10 cars and the caboose on train 3rd 493 and to set off one car from train 3rd 493. The work involved required about 2 hours and the Conductor, in addition to payment received under the provisions of Article 10, Rule (a), submitted a claim for 8 hours' pay at yard rates for each member of the crew under the provisions of Articles 35 and 140 of the Agreement, on the grounds that the work performed was yardmen's work. The Company declined payment of the claims.

Similar claims were submitted by trainmen on 5 other occasions and by yardmen on 5 occasions between December 12, 1962 and August 2, 1964 when road crews were required to perform similar service prior to leaving Brockville. The Company also declined payment of these claims.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) G. W. MCDEVITT	(SGD.) T. A. JOHNSTONE
GENERAL CHAIRMAN	ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

T. A. Johnstone	– Assistant Vice-President, Labour Relations, Montreal
R. St. Pierre	– Labour Relations Assistant, Montreal
A. D. Andrews	– Senior Agreements Analyst, Montreal
A. J. DelTorto	– Labour Relations Officer, Montreal
R. J. Wilson	– Senior Agreements Analyst, Montreal
G. A. Fournier	– Superintendent – Montreal Yard, Montreal
D. McGillivray	– Trainmaster – Road Foreman, Belleville
J. Mansfield	– Labour Relations Officer, Toronto

And on behalf of the Brotherhood:

G. W. McDevitt	– General Chairman, Toronto
W. G. Flood	– Assistant General Chairman, Toronto
P. LaRochelle	– General Chairman, Quebec
V. L. Hayter	– Secretary, G.G.C., Stratford
G. R. Ashman	– Vice-Chairman, G.G.C., Belleville
G. E. McLellan	– Secretary, G.G.C. Yard, Ottawa

AWARD OF THE ARBITRATOR

Article 140 of the agreement provides, in part:

> Switching, transfer and industrial work, wholly within the recognized switching limits, will at points where yardmen are employed, be considered as service to which yardmen are entitled, but this is not intended to prevent trainmen from performing switching required in connection with their own train and putting their own train away (including caboose) on a minimum number of tracks.

Article 35 of the agreement, under the heading "Trainmen relieving yardmen" reads:

> Trainmen relieving yardmen, or performing yardmen's work, as defined in Article 140, at points where yardmen are employed, will be paid yardmen's rates and overtime conditions.

The term "yardmen" refers to yard foreman, yard helpers and/or switchtenders. The term "trainmen" is applied to conductor, baggagemen or brakemen.

The term "closed yard" indicates yardmen are employed; "open yard" indicates they are not.

The yard in this case and those in the three other claims to be dealt with are all closed yards.

The core of Mr. McDevitt's argument on behalf of these claimants was that where yardmen are employed in closed yards the work of marshalling of trains and industrial switching belongs to those in that classification; that if roadmen are required to do as were those making this claim, they must be paid an additional amount, based on yardmen's rate.

In his very complete presentation Mr. McDevitt underlined how Article 140 had been modified in certain instances in certain areas by railway officials, resulting in claims made under it being granted. The majority of these examples occurred before l962, when the existing provision was renegotiated to change the wording from its former pattern:

> Switching, transfer and industrial work, wholly within the recognized switching limits, will, at points where yardmen are employed, be considered as service to which yardmen are entitled, but this is not intended to prevent trainmen from performing switching incidental to their own train or assignment.

Thus the word "incidental" was deleted, to be replaced by the words "in connection with". Also added were the words "… and putting their own train away (including caboose) on a minimum number of tracks."

For the Company Mr. St. Pierre and Mr. Johnstone presented a comprehensive brief, in which each point made by Mr. McDevitt was anticipated and dealt with at length.

The Company's basic theme was there was no ambiguity in the language used in Article 140; that a proper interpretation had been placed upon it; that what had occurred in isolated instances as result of special circumstances was within the prerogative of management and in no way indicated an intention to vary the mutually negotiated provision for all future application.

In the Brotherhood's presentation there was a suggestion that the lack of practical experience in railroading on the part of some of those administering Article 140 had perhaps led to the difficulties created in this problem.

An understanding of the problems of the employees concerned, based upon a thorough understanding of railroading in general, is of primary importance to officials of the Brotherhood in assessing the justification of claims made by employees and then in attempting to gain for them the additional benefits or protection they seek during negotiating opportunities.

Once those negotiations cease, however, and the results have been finalized in a collective agreement, what becomes of greater importance is a comprehension of the law of contracts and canons of interpretation in order to permit a proper assessment of the scope of the applicable provision and the extent that it achieves what the membership sought. Intimate knowledge of switching fades in value by comparison with a recognition of the binding effect and scope of the language negotiated.

Before commencing an analysis of the Articles in question, there might be emphasised a few basic principles of interpretation that have a bearing upon the presentations made:

> First, what has happened in the past in the administration of a provision in a collective agreement is not to be considered in the interpretation unless there is ambiguity in the language used. If ambiguity does exist, "past practice" as it is commonly called becomes important in attempting to determine what the parties had in mind in designing the provision.

It is well established by arbitration judgements that even though a company, over a considerable period, has improperly interpreted a provision in an agreement to its own detriment, it has the right to revert to a proper course once that became apparent.

In view of representations as to rulings made by Company officials at certain points in connection with the application of Article l40, it should be understood that either party to an agreement may modify its rights for the benefit of the other in a particular situation without jeopardising the prerogative to revert to the normal meaning in future. It is to be noted that the examples given to the Arbitrator never took the form of a mutually agreed memorandum of interpretation or understanding, such as often occurred in questions arising between these parties. Such a memorandum, mutually executed, would, of course, govern all future matters they concern.

Again, because of representations made, it is necessary to emphasise that it is not the understanding a party had while a provision is being negotiated that must govern. It is the language finally used and the meaning it implies that charts the course for one asked to interpret it.

The following extract from a judgement delivered by Mr. Justice Gale in a matter concerning **U.A.W. and Massey-Harris Company**, 4 L.A.C. 1579, emphasizes the foregoing:

> Our duty is to interpret the provision of Clause 98 as it affects pay for statutory holidays when a layoff is called. Accordingly, we must ascertain the meaning of what is written into that clause and to give effect to the intention of the signatories to the agreement so expressed. If, on its face, the clause is logical and is unambiguous, we are required to apply its language in the apparent sense in which it is used, notwithstanding that the result may be obnoxious to one side or the other. In those circumstances it would be wrong for us to guess that some effect other than that indicated by the language therein contained was contemplated or to add words to accomplish a different result.

Proceeding from that premise a great deal of the representations both as to past history and negotiating discussions can be set aside until the first important point is determined: whether the language used in the articles in question is ambiguous; that is, whether by applying the ordinary meaning to the words used there is difficulty in ascertaining the intent of the parties, apart from claims made by either side.

If Article 35 made no reference to Article 140 there would be expressed the intention of the parties that all such work done by trainmen was to be paid for at yardmen's rates and under overtime conditions. However, the reference to Article 140 makes it necessary to examine it to ascertain the extent of the qualification negotiated.

In Article 140 we find:

> Switching, transfer and industrial work, wholly within the recognised switching limits will at points where yardmen are employed be considered as service to which yardmen are entitled …

If those words closed the provision these claims would be granted. Such a provision would manifestly give yardmen sole rights to any work performed in the areas described. However, and unfortunately for the view taken by the Brotherhood, it does not end there. This follows:

> … But this is not intended to prevent trainmen from performing switching required in connection with their own trains and putting their own train (including caboose) on a minimum number of tracks.

By the addition of those words a total or exclusive right of yardmen to such work is reduced to the extent plainly stated. They are not entitled to do switching, transferring and industrial work that trainmen are required to do in connection with their own train.

Therefore the words in Article 35 "… or performing yardmen's work as defined in Article 140" emerge as providing for occasions when trainmen are required to do switching, transferring or industrial work in closed yards other than in connection with their own train.

The next logical question in interpreting Article 140 is who has the right to "require" trainmen to do such work in connection with their trains. Obviously, unless the agreement curtails that right, and it does not, it would be management. Therefore, whatever switching, transferring and industrial work required by management of trainmen in connection with the train for which they are the crew must be done by them. In doing so, because of this contractual assignment, they are not infringing upon the rights of yardmen.

There is no ambiguity in the language used in Article 140. A broad, all-inclusive obligation was agreed to by the parties "… switching required in connection with their own train …" As Professor Bora Laskin put it in [Board of Adjustment] **Case No. 804**:

> Switching includes pick-up as well as set-off of cars (as article l8 shows) and where a road crew lifts cars destined for forward travel as part of its train, picking them up from a marshalling track area, whether it be on one track or on more than one, the work can only be described as 'switching incidental' to their own train or assignments.

I would add to Professor Laskin's description as to the forward part of a trip, with which he was particularly concerned, such switching as is necessary upon arrival when it is done "in connection with the train for which they are the crew."

It is to be understood if such switching is done by trainmen, they receive additional pay for performing such duties, as provided in Article l0, Rules (a) and (b).

Emphasis was placed in one of the claims made under Article l40 to the words "… putting their own train away (including caboose) on a minimum of tracks."

In view of the finding that under this Article trainmen are required to do switching in connection with their own train, and to the fact that no negotiated limit has been placed upon that requirement the term "minimum number of tracks" must remain a matter for determination by management in pursuance of their obligation to carry on an efficient operation.

Comment has been made that conversations during the course of negotiations and understandings gained therefrom by either party have no legal bearing upon the construction of the written provision. During the negotiations of 1961-62 the Brotherhood did attempt to have the words then contained in Article l40 "performing switching incidental to their own train or assignment" deleted. In that they were unsuccessful. Those words, of course, cannot now be deleted by the Arbitrator. If yardmen are to gain complete proprietary rights in yards over all switching, transferring, etc., it remains a matter for future negotiations. Further, if trainmen required to do this work at the initial or terminal stage of a trip in connection with their train, are to receive in addition to the extra pay now provided for in Article l0, yardmen's compensation that, too, remains a matter for future negotiation. It has not been achieved by the existing provisions.

Applying this reasoning to the facts set forth in this particular case, I find all switching claimed for was done "in connection with their own train" as provided for in Article l40. This claim must therefore be disallowed.

With respect to the claims of yardmen, it should be clear from the foregoing that they have no claim upon switching, transferring, or industrial work when it is performed by trainmen in closed yards in connection with their trains.

Those claims are also disallowed.

(signed) J. A. HANRAHAN
ARBITRATOR