CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 189

Heard at Montreal, Wednesday, November 12th, 1969

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

EX PARTE

DISPUTE:

Concerning the establishment of positions of Quality Control Inspectors in Express Service at Calgary, Edmonton and Vancouver.

EMPLOYEES' STATEMENT OF ISSUE:

The positions referred to above are not shown as "excepted positions" in Appendix I of Agreement 5.1.

Furthermore, the duties of the said positions are not of a confidential or supervisory nature.

The Brotherhood has requested the Company to bulletin these positions to employees covered by Agreement 5.1.

The Company has declined the request of the Brotherhood.

FOR THE EMPLOYEES:

(SGD.) J. A. PELLETIER
EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:

D. O. McGrath	– System Labour Relations Officer, Montreal
P. A. McDiarmid	– System Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

J. A. Pelletier	– Executive Vice-President, Montreal
R. Henham	– Regional Vice-President, Vancouver
A. Cerilli	– Representative, Winnipeg
F. C. Johnston	– Regional Vice-President, Toronto

PRELIMINARY AWARD OF THE ARBITRATOR

The company has raised two preliminary objections going to the arbitrability of this matter. The first objection is that "the agreement has not been violated, the Brotherhood has not claimed that there was a violation and the correspondence from the Brotherhood cannot be interpreted as a grievance within the grievance procedure". This objection, as can be seen, is in three parts. The first, the assertion that the collective agreement has not been violated, does not raise any question of arbitrability, but is really a statement of the conclusion which the company feels ought to be reached in the arbitration. As to the second part, it is apparent from the Employees Statement of Issue that the Brotherhood alleges a violation of the agreement, although the precise section of the agreement relied on is not set out. The third part of this objection does raise what is properly a preliminary matter namely, that there has not been a proper "grievance". This objection, however, does not appear to have been raised earlier, and was not strongly pressed. There was no reference to any particular provisions of the grievance procedure. Certainly the Union did raise, in writing, the matter complained of, and there can be no suggestion that the company did not know the case which it was asked to meet. In these circumstances, it is my conclusion that objection on this ground cannot now be brought.

The second objection is, in essence, that the positions in question – those of quality control inspectors – do not come within the scope of the bargaining unit. This objection certainly goes to the question of whether the matter is arbitrable. It is perhaps misleading to refer to it as a "preliminary" objection, however, for it is indeed the substantial issue in the case. The Union's claim that these jobs should be bulletined depends of course on their coming within the scope of the collective agreement. If they do not come within the scope of the agreement, then the matter is not arbitrable. It is necessary for me to determine that question in the first instance, however, and that question – whether certain persons are within the scope of the agreement – is itself an arbitrable question. It is a question primarily of fact, to be determined having regard to the particular circumstances of the employee of the persons concerned, and to the appropriate provisions of the collective agreement. This is a very different question from that which would arise before a labour relations board in a certification case. My jurisdiction of course is founded only in the collective agreement between the parties, and my duty is to determine whether that agreement applies to certain facts, and if so, what is its effect.

In the instant case the union alleges that there are certain persons in the employ of the company in its Mountain Region who are classified as quality control inspectors. The union asserts that these positions fall within the scope of the collective agreement. The collective agreement provides for the "recognition and scope" of a certain bargaining unit of employees in Article 2.1, in which the unit is said to consist of "all classes of employees enumerated in Appendix II; subject to the exceptions enumerated in Appendix I" The classes of employees enumerated in Appendix 11 are identical to those set out for purposes of seniority groupings in Article 10, and it is agreed that Article 10 may be referred to for the purpose of this case as though it were Appendix II, which is not reproduced in the copy of the agreement before me. The union alleges that the persons in question fall within one or more of the classes of employees enumerated. It is not suggested that they fall within any of the exceptions enumerated in Appendix 1. Therefore, if it can be shown that the employees in question do fall within the classes of employees enumerated in Appendix II (or Article 10) then those persons will be subject to the collective agreement, and a matter relating to their jobs would be arbitrable. If they do not fall within the enumerated classes, the matter is not arbitrable.

The matter may be considered another way. This is a case in which the union asserts that certain jobs should be bulletined. In this, the union is asserting a claim on behalf of employees within the bargaining unit, a claim that certain employees are entitled to that advantage by reason of the provisions of the collective agreement. This is obviously an arbitrable matter. In its answer to that claim the company may take the position that the jobs need not be bulletined, because they are outside the enumerated classes. If the company is correct, that is the end of the matter, but it should be clear that the question whether these jobs come within or without the scope of the agreement is a question which must be determined in the course of an arbitrable grievance.

Appendix II (or Article 10) contains a long list of classes of employees. Article 10.5 sets out the classes for which the union is bargaining agent in the Mountain Region. There are no classes of employees listed within a "regional grouping", although such employees are so listed for the Atlantic Region, the Great Lakes Region, and the Prairie Region. Classes of employees in the Mountain Region are listed only by areas. There are three areas in the Region, and in each case the lists include "Employees in: Freight Offices, Freight Sheds, Express Agencies, Express Freight Service …".

There is no doubt that the company has employed certain persons whom it has classified as quality control inspectors. The union asserts that these persons are employees in express agencies or in express freight service, and that accordingly they are covered by the collective agreement, and their work comes within its scope. The company, on the other hand asserts (and it is not denied) that these persons are on the staff of and report to the General Superintendent of Express at Edmonton. That is, they are said to be "regional" rather than "area" employees, and therefore not within the scope of the collective agreement.

In my view, the mere fact that an employee is "on the staff of" or "reports to" the General Superintendent cannot be conclusive of the question before me. The question arises under the collective agreement, and it is the application of the provisions of the agreement to the particular facts which must be determined. The question is whether the quality control inspectors are properly said to be employees "in" express agencies or express freight service within the meaning of the collective agreement. To determine this question it is necessary that the provisions of the agreement be carefully considered in the light of a full review of the circumstances relating to the employment of these persons. Thus, while the mere fact of their reporting to the General Superintendent may not be conclusive, it is, in my opinion, relevant. It may also be observed that the mere fact of attendance within an "express agency" might not be conclusive: the case depends upon a consideration of all of the circumstances.

The material before me is insufficient to permit the determination of this question. The parties proceeded, by agreement, on the understanding that the matter of arbitrability be argued first. For the reasons I have given, however, it is necessary that the substantive question of employment within the bargaining unit be determined. The matter will therefore be listed for hearing on this issue. It would, of course, be most helpful if the parties were able to agree on a joint statement relating to the duties and responsibilities, and the circumstances of employment, of the persons in question.

(signed) J. F. W. WEATHERILL
ARBITRATOR

On Tuesday, January 13, 1970, there appeared on behalf of the Company:

D. O. McGrath	– System Labour Relations Officer, Montreal
R. J. Wilson	– Regional Labour Relations officer, Edmonton
H. Berge	– Senior Project Officer, Express & Highway Services, Montreal

And on behalf of the Brotherhood:

J. A. Pelletier	– Executive Vice-President, Montreal
R. Henham	– Regional Vice-President, Vancouver
A. Cerilli	– Representative, Winnipeg
D. A. Dalby	– Local Chairman, Vancouver

AWARD OF THE ARBITRATOR

At the continued hearing of this matter, the parties presented argument on the issue whether the quality control inspectors come within the bargaining unit represented by this union, and as set out in the collective agreement. Although the parties had not agreed on a joint statement of facts, there is no substantial dispute as to the material facts relating to the duties and responsibilities of the employees in question. In determining whether or not quality control inspectors come within the bargaining unit, I am not concerned with the question whether they are appropriate for inclusion in this or any other bargaining unit. The question is simply whether they come within the unit set out in this agreement, and in particular whether they are "Employees in: Freight Offices, Freight Sheds, Express Agencies, Express Freight Service …", being certain of the classes of employees referred to in article 10.5 of the collective agreement.

That the quality control inspectors are employees, there is no doubt. The substantial question is whether they are employed "in" freight offices, etc., within the meaning of the collective agreement. In my view, the fact that the quality control inspectors perform the bulk of their work within the geographical area of a freight office or freight shed is not decisive, although it is material. The word "in" is not used in this context to refer to the physical location of employees, so much as the type of work in which they are engaged. The word thus has the same effect in relation to freight "offices" and "sheds" as it has to "agencies", or "Express Freight Service". The fact that an employee

performs the bulk of his work within the confines of a freight “shed” suggests, but need not conclusively prove that he is an employee “in” a freight shed in this sense. Other tests than geographical locations may be applied; the real question is, is the employee engaged in “freight office work”, or “freight shed work”, etc.

The quality control inspectors come within a recently-created classification whose work consist primarily in the checking of, and reporting on, the accuracy and efficiency of the company’s express operations. It was said that at times quality control inspectors had actually performed the work of employees within the bargaining unit. In the course of their duties, it is apparently necessary for them to handle loads, and it may be that to some extent their work seems to duplicate that of bargaining unit employees. To the extent that they actually perform the work of members of the bargaining unit, they would appear to be acting outside the scope of their classification, however, it is my view that these employees are not working “in” freight or express services within the meaning of the collective agreement.

The quality control inspectors visit express terminals in the region on a rotating basis, and perform a series of quality control procedures, including spot-checking of vehicles by checking waybills against traffic, inspection of shipments to detect routing errors, sampling of delivery records, waybills and shipping documents, verification of rates and extensions, and the like. They have responsibilities in the training of terminal staff, the analysis of traffic handling methods and of terminal and office procedures, and even the assessment of job personnel. They prepare reports for local, area and regional management, and may initiate corrective action. These duties go beyond those of the typical inspector or checker. Having regard to the whole of their duties, and in particular to their substantial authority and responsibility, it is my conclusion that they do not come within those groups of employees which constitute the bargaining unit.

In reaching this conclusion I do not suggest that new classifications might not come within the bargaining unit: they might well do so, it being a question of fact in each case whether, on a consideration of the duties and responsibilities of the persons involved, they come within the broad classes enumerated in the collective agreement. While the instant case is a difficult one, it is my conclusion that the quality control inspectors do not come within the groups of employees referred to in article 10.5 of the collective agreement, and accordingly are not within the bargaining unit. It was therefore not necessary for the company to bulletin these positions.

For the foregoing reasons, the grievance must be dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR