CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 195

Heard at Montreal, Tuesday, December 9th, 1969

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION (T)

EX PARTE

DISPUTE:

Claim of Conductor L.J. Oliver and crew, Moose Jaw, for 87 miles reduced when claiming 100 miles for time held in excess of 16 hours at away-from-home terminal, Broadview, January 7th and 8th, 1969.

EMPLOYEES' STATEMENT OF ISSUE:

This crew was off duty at Broadview at 1645 on January 7th and was first out after Conductor Kemp's crew was ordered for Train No. 949 at 0800 on January 8th. At 0900 traffic conditions indicated that Conductor Oliver's crew would be deadheaded back to Moose Jaw and as Train No. 949 had not yet left, they were informed they could return on that train although it would not be held to accommodate them. Conductor Oliver was not ordered to deadhead as specified in Article 14, Clause (e)., first paragraph, which reads:

> (e) When a crew is ordered to deadhead, it will be ordered for a definite time and, except as provided in Clause (H), the first crew out will deadhead and hold its turn out at the distant terminal.

and contended that the principle of Article 14, Clause (f) applied. Clause (f) reads as follows:

> (f) When a freight crew in pool service is ordered to deadhead on freight to its home terminal and is permitted to go on a passenger train, it will take its turn out of the home terminal from the time of arrival of its caboose.

The next train following Train No. 949 from Broadview was passenger train No. 1 which left Broadview at 0650 on January 9th. Conductor Oliver considered this as the first train on which he could properly be deadheaded and submitted his claim for being held at other than home terminal in accordance with the leaving time of Train No. 1 and as provided in Article 15, First Paragraph, which reads:

> Trainmen in pool freight and in unassigned service held at other than Home Terminal will be paid on the minute basis for the actual time so held after the expiration of sixteen hours from the time relieved from previous duty at a rate per hour of 1/8th of the daily rate paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period from the time relieved, they will be paid for the actual time so held during the next succeeding eight hours, or until the end of the second twenty-four hour period, and similarly for each twenty-four hour period thereafter.

This crew was operating under the terms of the Memorandum of Agreement providing for Run-Through (Pooled) Cabooses and the claim was rejected on the grounds that Clause (O) applied under these circumstances. Clause reads:

(O) When cabooses are operated under the terms of this agreement, existing rules which are in conflict there with will have no application.

The Union contends that declination of this claim violates the first paragraph of Article 15.

FOR THE EMPLOYEES:

(SGD) S. McDONALD
GENERAL CHAIRMAN

There appeared on behalf of the Company: Tuesday, December 9th, 1969

P. A. Maltby	– Supervisor, Labour Relations, Winnipeg
C. F. Parkinson	– Labour Relations Assistant, Montreal

And on behalf of the Brotherhood:

S. McDonald	– General Chairman, Calgary
R. T. O'Brien	– Vice-General Chairman, Calgary
J. Ferguson	– Local Chairman, Kamloops

INTERIM AWARD OF THE ARBITRATOR

The Company has raised a preliminary objection going to the arbitrability of this matter. This award deals only with the preliminary objection.

The union has proceeded to arbitration "ex parte" and seeks to submit a separate statement, as contemplated by Article 8 of the agreement dated June 25, 1969, amending and renewing the founding agreement establishing the Canadian Railway Office of Arbitration. The Company's objection is that the Union failed to give the requisite forty-eight hours' notice in making its application to submit a separate statement.

Article 8 of the founding agreement is as follows:

> The Joint Statement of Issue referred to in Clause 5 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement has been misinterpreted or violated. In the event that the parties cannot agree upon such Joint Statement either or each upon forty-eight (48) hours' notice to the other may apply to the Arbitrator for permission to submit a separate statement and proceed to a hearing. The Arbitrator shall have the sole authority to grant or refuse such application.

On September 6, 1969, the General Chairman of the Union wrote to the Regional Manager of the Company requesting the Company to join with the Union in submitting the dispute to the Office of Arbitration and enclosing a proposed "Dispute" and "Joint Statement of Issue". There was an exchange of correspondence and of telephone calls between the parties relating to the matter, and it would appear that the General Chairman sought to expedite the matter in order that it might be concluded prior to his pending retirement. The Company indicated its willingness to accommodate the General Chairman in this respect. However, the parties were unable to agree on a Joint Statement of Issue, and each seems to have considered that the other was behaving unreasonably with respect to the formulation of its position on the matter. It may be observed that the grievance relates to a claim for payment made in January, 1969. On October 27, 1969, the General Chairman advised the Supervisor of Labour Relations that he would proceed "ex parte" if no joint statement was achieved, and on November 3 he advised him that he would not wait beyond November 5 to do so. On November 4 and 5 the Company attempted to arrive at a Joint Statement of Issue to which the parties could agree, and it advised the Union by telephone on November 5 of its proposal, but this was not accepted, and the Union's application was mailed on November 5.

At the hearing of this matter much of the parties' concern was with the fairness or unfairness of each others' position, but the determination to be made does not relate to fairness or unfairness, reasonableness or unreasonableness, but only to the matter of compliance with the requirements of Article 8, and in particular with the question whether the requisite forty-eight hours' notice was given. In the circumstances of this case, the question is whether what was said by the General Chairman to the Supervisor of Labour Relations on November 3, 1969, constituted proper notice. If it was so, the application was made at least forty-eight hours thereafter, and would be proper.

The sufficiency of the form of any notice is to be determined having regard to the purpose of the notice, and the circumstances in which it is expected to be given. In Article 5 of the founding agreement, it is provided that a request for arbitration shall be made by filing notice thereof with the Office of Arbitration within certain time limits. A notice of this sort, capable of being "filed", and for the purpose of instituting proceedings in this office, would, in my view, be required to be in writing. It does not follow that the notice called for by Article 8 must be in writing, and no substantial reason was suggested – nor does any appear – why it should. One of the purposes of Article 8 is clearly to enable one of the parties to expedite proceedings where it appears that a Joint statement cannot be reached, or at least cannot be reached quickly. It should be remembered that this stage of the proceedings is reached only after the grievance procedure set out in the collective agreement has been completed. There will be no dearth of documentation with respect to it, and spoken notice that a party who is otherwise entitled to proceed with the grievance will seek to do so by way of separate statement seems to be to be quite proper. Whether or not the other party would prefer more time to consider the matter is irrelevant. The parties are not prevented, in any event, from presenting a joint statement to the Arbitrator if one is subsequently achieved.

In my view the notice given on November 3, 1969, was sufficient notice of the application for permission to file a separate statement, and I so find. Permission for the submission of such statement is granted, and the matter will be set on for hearing in the usual course.

(signed) J. F. W. WEATHERILL
ARBITRATOR

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

P. A. Maltby	– Supervisor, Labour Relations, Winnipeg
J. Ramage	– Special Representative, Industrial Relations, Montreal

And on behalf of the Brotherhood:

R. T. O'Brien	– General Chairman, Calgary

AWARD OF THE ARBITRATOR

Conductor Oliver and his crew were in unassigned pool freight service operating from Moose Jaw, their home terminal, to Broadview, their away-from-home terminal. Conductor Oliver and crew went off duty at Broadview at 1645 on January 7, 1969, and then stood second out in pool service at Broadview. They were entitled to payment for time held at Broadview after sixteen hours, by virtue of the first paragraph of article 15, set out in the employee's statement of issue. In fact, they departed Broadview, deadheading back to Moose Jaw on train No. 949, at 0930 on January 8. Accordingly, they were paid for forty-five minutes held time, being the time they were held at Broadview in excess of held time. It is the company's contention that this payment met in full its obligations under the first paragraph of article 15.

The union contends that the grievors were entitled to a greater payment in respect of held time, on the ground that they were not properly ordered to deadhead, and that they were entitled to claim for held time as though they had gone out from Broadview on train No. 1, which left Broadview at 0650 on January 9. Now the grievors had not been ordered to deadhead in strict compliance with article 14 (e), which requires that a crew be ordered for a definite time. Instead they were hurriedly advised they could deadhead to Moose Jaw on train No. 949. Normally, it seems they would have been ordered for a later train themselves, but due to unforeseen circumstances occurring elsewhere, there was a substantial delay in westward movements from Broadview. They were therefore permitted to deadhead back on train No. 949. While the procedure was not in strict accordance with article 14 (e), the grievors did in fact take advantage of the opportunity to return to Moose Jaw on train No. 949. They were entitled to pay for the deadhead trip, and in submitting their claim, showed themselves as deadheading on train No. 1, and booked that train's arrival time at Moose Jaw as their own, in order to establish their turn out of Moose Jaw accordingly. The parties appear to be in agreement that this was a correct procedure.

It does not follow, however, that they should be deemed to have stayed in Broadview until the departure of train No. 1 on January 9. Had they in fact remained in Broadview (through no fault of their own), it would seem they would be entitled to held time. This would have been the case if they had been unable to board train No. 949, which, they were advised, would not be held for them. However, the fact is that they did board train No. 949, and were not held in Broadview after 0930 on January 8. Payment under the first paragraph of article 15 is for the "actual time" held at an away-from-home terminal, after the expiry of sixteen hours from the time relieved from previous duty. The

actual time the grievors were so held was forty-five minutes, for which they were paid. Article 15 provides for payment in certain actual situations, and not on the basis of what might have been. In fact the grievors were not held at other than their home terminal for the time claimed, and they are therefore not entitled to the payment.

For the foregoing reasons the grievance must be dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR