CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 218

Heard at Montreal, Tuesday, June 9th, 1970

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

EX PARTE

DISPUTE:

The reinstatement of Motorman L.R. Sparkes with full rights and all loss of wages.

EMPLOYEES' STATEMENT OF ISSUE:

The Motor Vehicle Unit driven by Mr. L.R. Sparkes was overturned near mileage ---, T.C.H. Newfoundland on December 13 ,1969. An investigation was held on December 15, 1969 and by phone on December 1?, 1969 initiated by Mr. L.R. Sparkes he was advised he was being held out of service. Another investigation was held on January 6, 1970 in connection with the same accident. He was held from service for three months. The Brotherhood claims both investigations defective and that the penalty was not warranted. The Company denied the Brotherhood's request that Mr. L.R. Sparkes be reinstated with full rights and all loss of wages.

FOR THE EMPLOYEES:

(SGD.) E. E THOMS
GENERAL CHAIRMAN

There appeared on behalf of the Company:

P. A. McDiarmid	– System Labour Relations Officer, Montreal
H. E. Dickinson	– Terminal Traffic Manager, St. John's
W. F. Harris	– System Driving Supervisor, Montreal
L. V. Collard	– System Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

E. E. Thoms	– General Chairman, Freshwater P.B.
M. J. Walsh	– Local Chairman, St. John's
M. Peloquin	– Administrative Assistant to International Vice-President, Montreal

INTERIM AWARD OF THE ARBITRATOR

THIS CASE WAS SUBSEQUENTLY WITHDRAWN FROM THE JURISDICTION OF THE ARBITRATOR AFTER HIS INTERIM AWARD AND CONSEQUENTLY NO AWARD ON THE MERITS WAS ISSUED BY THE ARBITRATOR.

However main aspects of the presentation made June 9th, 1970 were considered by the Arbitrator to have interest for all parties who might in the future be engaged in the presentation of cases of a like nature for adjudication by the Arbitrator.

The comments of the Arbitrator which follow are therefore directed to both railway companies and labour organizations which are party to the Canadian Railway Office of Arbitration.

The company has raised the preliminary objection that this grievance is not arbitrable. It is alleged that the matter was not processed to arbitration in accordance with the provisions of article 10.3 of the collective agreement.

Article 10.3 provides as follows:

> The request for arbitration must be made in writing by either party to the other within twenty one calendar days from the date decision was rendered by the Company in the last step of the Grievance Procedure. If request is not so made the matter will be considered to have been satisfactorily settled and shall not be processed to arbitration.

My jurisdiction under article 7 of the agreement establishing the Canadian Railway Office of Arbitration permits me to hear cases which have been processed in the manner set out in the appropriate collective agreement. In the instant case, the issue which arises is whether the request for arbitration, which was made in writing by the union to the company, was made "within twenty-one calendar days from the date decision was rendered by the Company in the last step of the Grievance Procedure".

This matter arose as a result of an incident occurring in December, 1969, with discipline imposed on the grievor in January, 1970. A grievance was filed and the matter was processed through the several steps of the grievance procedure set out in the collective agreement. No question arises as to these. Step 5 of the grievance procedure, an appeal to the Labour Relations Section of the Personnel and Labour Relations Department at System Headquarters was invoked by the union by letter dated February 28, 1970. Step 5 imposes no precise time limit on the company to make its reply. In fact, the company did reply to the step 5 appeal by letter dated (and presumably mailed) on March 24, 1970. By the close of business on March 30, the letter had not been received by the union. The union's general chairman was away from his office on business from the close of business on March 30, until April 14, 1970, when he returned to his office and found the company's reply in his mail. He made the request for arbitration by letter dated and mailed on April 15, 1970, and this letter was received by the company on April 17.

There is no evidence as to the precise date on which the letter was delivered to the union office. The company quite rightly points out that the presence or absence of the general chairman is not a material consideration what may be material is the date on which the letter was delivered to the union office. Whether it was promptly attended to from that point on is a matter of internal union management. It seems clear at least, however, that the letter was not delivered by March 30. It was delivered some time between March 31 and April 14, inclusive, and for purposes of this case I proceed on the assumption that the letter was delivered on March 31, the first date not accounted for by the union.

The essential point of time to be ascertained is "the date decision was rendered by the Company", for it is from that date that the twenty-one calendar day period referred to in article 10.3 begins to run. In the company's submission, that date was March 24, 1970. If this is correct, then the time expired on April 14, the day before the union's request for arbitration was sent to the company, and three days before it was received. In that case the company's objection must be sustained.

The point in issue was referred to in **Case No. 149**, although the final decision in that case went on other grounds. In that case as in this, the collective agreement required a request for arbitration to be made within twenty-one calendar days following the decision rendered by the Labour Relations Section. There, the decision of the Labour Relations Section was set out in a letter to the union dated January 16, 1969. In the award it is said that the time limits expired on February 6, 1969, that is, twenty-one days after the date of the company's letter. It is important to note that the date of expiry was not an issue in the case. The question (one of several dealt with in the award) was whether the union's request for arbitration, made on January 29, 1969, was sufficient. The award states that if that letter had been received in the usual course of post, then the request for arbitration would have been timely. The award goes on to note that the requirement of that collective agreement was for the filing of notice with the Office of Arbitration, a procedure which was not followed.

Case No. 149, therefore, raised but did not dispose of the problem which has arisen in this case. The material portion of the award is the following:

> This raises a difficult question as to the sufficiency of communication by mail, and as to the nature of the onus on any party whose responsibility it is to give sufficient notice in proceedings of this sort. It would appear from the general law that the party whose responsibility it is to give notice bears the risk of breakdown in the method of communication he selects; the matter was not argued, however, and there are no precedents in the labour arbitration area before me.
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> The "rendering" of a decision by the company, in any sense in which that term would be apposite in this context, connotes some form of delivery over, or submission for consideration or

> acceptance. In my view, it implies a communication by one party to the other. Since the rendering of the decision is the moment from which the time limit begins to run, it would seem unfair to subject the other party to a time limit of which he was, without fault of his own, unaware. This would be particularly so, it seems to me, in the context of a collective agreement. Similar reasoning, of course, would apply with respect to the making of the union's request for arbitration. Such request could only be said to be properly made where it is in fact received by the other party within the appropriate time limits.

In the instant case, I find that the company's decision at stage 5 was not effectively rendered until March 31, 1970, at the earliest. The request for arbitration was effectively made by April 17, and was timely. This conclusion is made having regard to the circumstances of the instant case, the material provisions of the collective agreement, and the arguments presented.

This conclusion, of course, is not an inevitable one, and might be reconsidered in a proper case. It is quite arguable that delivery to the mail ought to be equivalent to delivery to the other party: see **E. W. Bliss Co. 45 L.A. 1000**. Or it could be said that some assumption as to delivery in the ordinary course of post should be made – although the circumstances of this case might rebut it. Use of registered mail might give rise to other considerations. It may finally be observed that there is no evidence as to the date of mailing of the company's letter. On this ground alone, it would be possible to conclude that the objection was not made out.

For the foregoing reasons, it is my conclusion that the matter is arbitrable. The matter will be listed for hearing on its merits.

(signed) J. F. W. WEATHERILL
ARBITRATOR