CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 507

Heard at Montreal, Tuesday, May l3, 1975

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The Brotherhood alleges that the Company violated the provisions of Article 24.S (b) of the agreement when it declined to pay various claims at the Concord Terminal within the time limits of the grievance procedure. (L.F. Allison, P. Francois, E.J. Golden, D. Hipkin, T. Parker et al)

JOINT STATEMENT OF ISSUE:

The Brotherhood alleges that the Company missed the time limits at the first step of the grievance procedure and seeks payment under Article 24.8(b) for nine separate grievances affecting Express and Intermodal Service staff at the Concord Terminal. The Company challenges the Brotherhood allegations contending that the grievances are not claims for unpaid wages as such and that the grievances were answered by the Company within the time limits of the grievance procedure.

These grievances have been progressed through the various steps of the grievance procedure and ultimately to arbitration.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD) J. A. PELLETIER	**(SGD) S. T. COOKE**
NATIONAL VICE-PRESIDENT	**ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

P. A. McDiarmid	– System Labour Relations Officer, Montreal
W. W. Wilson	– Labour Relations Assistant, Toronto
K. W. Landers	– Manager, Concord Terminal, Toronto
A. H. Rivard	– Administrative Assistant, Concord Terminal, Toronto

And on behalf of the Brotherhood:

J. D. Hunter	– Regional Vice President, Toronto
J. A. Pelletier	– National Vice President, Montreal
T. N. Stol	– Representative, Toronto
D. Fisher	– Local Chairman, Toronto
A. J. Power	– Local President, Toronto

AWARD OF THE ARBITRATOR

Article 24.8(b) of the collective provides as follows:

> **(b)** Effective July 14, 1971, when a grievance based on a claim for unpaid wages is not progressed by the Brotherhood within the prescribed time limits, it shall be considered as dropped. When the appropriate officer of the Company fails to render a decision with respect to such a claim for unpaid wages within the prescribed time limits, the claim will be paid. The application of this rule shall not constitute an interpretation of the collective agreement.

As appears from what was said in **Case No. 487**, there are really only two questions to be determined in a case such as this: **1)** whether the claims involved are claims "for unpaid wages" within the meaning of Article 24.8(b); and **2)** whether the Company rendered a decision with respect to these claims within the prescribed time limits. At the hearing, the Company raised a further question relating to the status of the collective agreement at the time these claims were made. The Union objected to this last question being raised, since it is not referred to in the Joint Statement of Issue. A fundamental question of jurisdiction may, however, be raised at any time, and I propose to deal briefly with this matter, which was raised, but not pressed.

An arbitrator's jurisdiction in labour relations matters arises either under statute or under a collective agreement or both. The jurisdiction of the arbitrator in the Canadian Railway Office of Arbitration is, as is consistent with the applicable statute, based on a memorandum entered into between the founding parties, and on each collective agreement on which a dispute submitted to the Office may be based. The collective agreement which is relied on in this case makes the following provision with respect to its duration, in Article 34.

> **Duration of Agreement**
>
> This Agreement shall remain in effect until December 31, 1972, and thereafter subject to 60 days' notice in writing from either party to the agreement of its desire to revise, amend or terminate it. Such notice may be served at any time subsequent to October 31, 1972.

The events on which the claims now before me are based occurred in the summer of 1973. Article 34, it appears, contemplates the possibility of the collective agreement's continuing in force after December 31, 1972. While the events here in question appear to have occurred during a period of negotiations and even of strikes, so that it may perhaps be assumed that some sort of notice was given under Article 34, there is no evidence before me as to the nature or effect of any such notice, which would not necessarily have the effect of terminating the collective agreement. If indeed there was no collective agreement in effect at the material times, then, in the absence of some statutory or other binding provision to the contrary, it would be my view that there was no grievance procedure, and that I would have no jurisdiction in the matter. In fact, however, it is clear that there had been a collective agreement in effect, that the provisions of that agreement may well have continued in effect at the material times, that there has been no proof of its expiry by those times, and that the parties themselves regarded these matters as properly subject to the grievance procedure. In these circumstances, and there being no assertion by the Company of lack of jurisdiction, I conclude that the matter is properly before me for determination pursuant to the provisions of the collective agreement.

Of the nine grievances referred to in the Joint Statement of Issue, the Brotherhood, in its presentation at the hearing, dealt with only five. The remaining claims were not withdrawn, but it was asserted they fell under the same principle. They were dealt with in the Company's presentation, and accordingly that material (insofar as it deals with the nature of the claims) will be relied on. It should be added that the Union did not deal with the merits of the claims, but advanced the case simply on the basis that they were entitled to succeed by the provisions of Article 24.8(b).

On the first question, whether or not these are claims "for unpaid wages", it is not the case that every claim for compensation, even though involving an assertion that wages ought to have been paid, constitutes a claim "for unpaid wages" within the meaning of Article 24.8(b). see, for example, **Case No. 461**, where this point is made with respect to a similar provision in another collective agreement. In **Case No. 487**, on which the Union relies, the claim was "a claim to be paid what is asserted (rightly or wrongly) to be the appropriate rate of wages for certain work performed". Such claims, often associated with the submission of time tickets covering claims for specific types of service at certain specific times, have been agreed by the parties to be payable where they are not promptly denied. This special relief, which may result in the payment of incorrect claims, is to be confined to the class of cases for which, as I have indicated it appears to be intended. Thus, a claim that an employee has performed certain work for a

certain time and should be paid is, clearly, a claim "for unpaid wages". On the other hand, a claim that an employee ought to have been assigned work, but was not and should therefore be paid, is not a claim "for unpaid wages", but is rather a claim of improper discipline, a seniority claim, a contracting-out claim, or whatever the case may be. In such cases, failure to reply has the effect of allowing the case to go to the next stage of the grievance or arbitration procedure., it does not of itself preclude consideration of the merits and require payment.

It is necessary, then, to consider the nature of each of the claims submitted. The first, that of Mr. Allison, raises a difficult question in terms of the problem posed in the preceding paragraph. Mr. Allison reported for work, not having been advised of layoff and, ignoring a note to report to his supervisor, began working. He was laid off at 9:30 a.m. Had he reported as requested, he would have been laid off earlier. He was paid for the time actually worked, but he claims eight hours' pay in respect of the day. (He could be entitled, if successful, to the difference between eight hours' pay and the amount he in fact received). In my view, this would appear to be a claim under Article 4.5, a claim similar to that for "reporting pay" as it is sometimes called. In such a case, where the employee has actually reported and has, arguably, established a claim for payment for a certain time at a certain rate, the substantial equivalence of such a claim to any other "claim for unpaid wages" seems clear. In my view, the amount so payable does constitute a "wage" as that term is properly used in an industrial relations context, and claims of this sort are properly considered as coming within the scope of Article 24.8(b).

The second claim, that of Mr. Francois, is to be paid in respect of work which, it is alleged, he should have been offered on the morning of August 9, 1973. This, clearly, is a claim relating to the exercise of seniority rights, and is not one to which Article 24.8(b) applies. This grievance, therefore, must be dismissed.

The third claim, that of Mr. Golden, appears to be two-fold. One part relates to his claim for payment for August 13 when, although he had apparently reported for work following his vacation, he was not allowed to do certain work to which it appears he was entitled, because another employee had already begun the assignment. While there is in this an element of what I have called a seniority claim, it remains, on the material before me, that Mr. Golden had reported on August 13, and that he would, as in the case of Mr. Allison, be entitled to payment under Article 4.5. His claim in respect of August 14, however is simply a seniority claim, and as such is not one to which Article 24.8(b) applies. Accordingly, insofar as the claim of Mr. Golden relates to August 14, 1973, it is dismissed. Insofar as it relates to August 13, it may be considered as subject to Article 24.8(b).

The fourth claim is made on behalf of employees of the Express Garage at Concord, and involves a claim that they should be recalled to perform certain work. For the reasons given earlier, this is in the nature of a seniority or work-assignment claim, and is not one to which Article 24.8(b) applies. It must therefore be dismissed.

The fifth claim is that of Mr. Szucs. From the material before me, this would appear to be a claim similar to that made by Mr. Golden with respect to August 13. Mr. Szucs, it seems, was prevented from performing work to which he was entitled because another employee had begun it. A claim under Article 4.5 would be, as I have said, one subject to Article 24.8(b).

The sixth claim is brought on behalf of all employees then placed out of work, and alleges that there was work available which they might do. This, again, is clearly a seniority and work-assignment question and is not a "claim for unpaid wages" within the meaning of Article 24.8(b). This claim must therefore be dismissed.

The seventh claim is that of Mr. Burns, who claims in respect of August 14, 1973, when he advised the Company that his chauffeur's license had been suspended. He could not therefore carry out his normal work. He was advised to report to the time office to see if there was other work available for him. Mr. Burns was unable to find any other work. This claim does not appear to be one coming under Article 4.5, and indeed, its basis is generally unclear. I am satisfied that it cannot properly be described as a "claim for unpaid wages", and it must accordingly be dismissed. Other grievances filed on behalf of Mr. Burns, alleging improper discipline, are likewise clearly outside the scope of Article 24.8(b), and are dismissed.

The eighth and ninth claims, those of Messrs Hipkin and Parker relate to the nature of the assignments given these men. The relief sought is that they be given certain assignments, and that other employees be recalled to perform the work they had been given. These are, for the reasons given above, clearly not claims for unpaid wages, and they are dismissed.

From the foregoing, it appears that the claims of Messrs. Allison and Szucs and the claim of Mr. Golden relating to August 13, are claims "for unpaid wages". With respect to these claims, then, I now turn to the second question which must be asked in a case such as this, namely, whether the Company rendered its decision with respect thereto

within the prescribed time limits. Article 24.5 requires that a decision on a grievance filed at step one must be given within fourteen days of its receipt. At step one, a grievance may be presented either orally or in writing. In fact, the parties were, at the time these grievances arose, going through a time of considerable turmoil, and it had been agreed that the Chairmen (or their representatives) of the three local unions involved would meet together with the Administrative Assistant representing the Terminal Manager, who at that time would normally have dealt with step one grievances.

All of the grievances were presented by the three Local Chairmen to the Administrative Assistant. In some cases, the grievances were written out by one of the Local Chairmen, and in other cases they were presented orally and written down by the Administrative Assistant. In all cases, copies were then made and distributed to the Local Chairmen. The decisions on these cases were taken by the Terminal Manager, but communication of these decisions was left to the Administrative Assistant. Step one permits the presentation of oral or written grievances, and no doubt the decision at that stage may likewise be oral or written. The grievances were, as has been seen, reduced to writing but unfortunately the decisions were not rendered in that form.

The grievance of Mr. Allison was submitted on August 7, 1973. It is the Company's evidence that a decision was given – orally – on August 10. The Union's evidence is that no decision was given within the time limits specified. The grievance of Mr. Golden was submitted on August 15, 1973. It is the Company's evidence that an oral decision was given on August 23, while the Union's evidence is that no decision was given within the time limits. Mr. Szucs' grievance was submitted on August 22, 1973. It is the Company's evidence that an oral decision was given on August 23, while the Union's evidence is that no decision was given within the time limits.

The copies of grievances retained by the Company bear a notation written by the Terminal Manager, to the effect that the Union was advised, on the dates mentioned, that the grievances were declined. Certainly the Terminal Manager made these notations in good faith, relying, quite properly, on advice to that effect by the Administrative Assistant. I am persuaded that the Administrative Assistant believed that he had indeed advised the Union that the grievances were declined, and on the dates mentioned. It must be said, however that if such advice was given, it was simply in terms of the code numbers assigned to the grievances, that it was given in an informal way, in that no special meeting seems to have been called for the purpose and that it was not given to all three of the Union Chairmen who constituted the group with whom the Company was dealing with respect to grievances. No written memorandum of the decisions was given out, and the notation made by the Terminal Manager, on the advice of the Administrative Assistant, is not the sort of "record" which can be considered as having much probative value in the circumstances.

While much of the apparent conflict in the evidence can thus be resolved, there remains, unfortunately, an unavoidable conflict as between some of the evidence of the Administrative Assistant, and some of that of one of the Local Chairmen, who generally acted, it seems, as the chief spokesman on the Union's behalf. I agree that the test to be applied in such circumstances is that of the harmony of the one account or the other with the preponderance of probabilities which a practical and informed person would recognize as reasonable having regard to the existing conditions. On this test, I think it must be concluded that there was in fact no effective communication to the Union of the decisions in these cases which the Company had made. This was no doubt more a failure of communication than anything else, and I do not in the least doubt the sincerity of the testimony of the Company's witness. On all of the evidence however, it is my conclusion that the Company did not comply with the time-limit requirements of the collective agreement.

Accordingly, pursuant to Article 24.S (b) of the agreement, the grievances of Messrs. Allison and Szucs, and the grievance of Mr. Golden relating to August 13, are allowed. It is my award that each of the three grievors be paid eight hours' pay at the then prevailing rates. This award implies no finding as to the merits of their claims. The remainder of the grievances are dismissed.

(sgd.) J. F. W. WEATHERILL
ARBITRATOR