

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 820

Heard at Montreal, Tuesday, April 14, 1981

Concerning

CANADIAN PACIFIC TRANSPORT COMPANY LIMITED

and

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

EX PARTE

DISPUTE:

Claim that Driver G. Strong should be paid mileage between Kelowna Flood and return, a total of four hundred and twelve miles at pro rata rate.

EMPLOYEES' STATEMENT OF ISSUE:

Memorandum of Agreement re brokers provide, and I quote in part – “A spot broker is only to be used when a Company tractor/truck and/or employee is not available.”

Driver Strong was available, also a tractor, on June 17th, 1980.

The Company dispatched a broker from Vancouver to Kelowna and return, June 17th, 1980.

On June 17th, 1980, a broker pulled an empty trailer to Vancouver ex Kelowna.

FOR THE EMPLOYEES:

(SGD.) R. WELCH

SYSTEM GENERAL CHAIRMAN

There appeared on behalf of the Company:

N.W. Fosbery – Director of Labour Relations, Toronto

And on behalf of the Brotherhood:

R. Welch – System General Chairman, Vancouver

D. Herbatuk – Vice-General Chairman, Montreal

AWARD OF THE ARBITRATOR

Article 1 of the Memorandum of Agreement with respect to the use of brokers is as follows:

A spot broker is only to be used when a Company tractor/ truck and/or employee is not available. In the event, say, either a tractor or an employee is not available, then the broker will only perform that portion of the run normally carried out by the employee he is replacing

On June 17, 1980, the Company required three loads to be moved from Vancouver to Kelowna. Two of these were moved with Company drivers. There being no other drivers available, a spot broker was used to deliver the third load. There is no issue raised as to that. Subsequently, the broker made a return trip to Vancouver, and there is no issue raised as to the propriety of that, either.

It is alleged, however, that while at Kelowna, and before making the return trip to Vancouver, a broker (a Mr. Olson – apparently the broker from Vancouver), made a trip with vehicle No. 50552 from Kelowna to Flood, returning to Kelowna with vehicle No. 24217. At that time, the grievor was available for duty in Kelowna, and it would appear that Company equipment was available as well.

The response made in the first instance to the claim was that it was invalid because “the broker you refer to was dispatched from Vancouver not Kelowna”. That is not, however, a sufficient answer to the claim. It was also said that the grievor was only on a spare run, but that again is no answer to the claim. Clearly, under Article 1 of the Memorandum, spot brokers are to be used only when Company employees or equipment are not available, and there is no distinction between regular or spare Company employees in this respect. It would be one thing for the Vancouver broker to make a return trip to Vancouver (a question which is not an issue here), but it would be another for him to make an additional trip out of Kelowna and back, while Company employees and equipment were available.

If, therefore, the trip in question was made by a broker (and the precise identification of the equipment is material only insofar as it may help establish the facts), then it was contrary to the Memorandum, and the grievor’s claim is entitled to succeed. It became apparent at the hearing of this matter that the real issue in the case is simply one of proof. There is an allegation made by the grievor. It is denied by the Company, although the Supervisor’s answer does not in fact deny it, and the presentation of the case by the Company was based on the theory that the broker “only performed the work of the employee he was replacing”. Such work, however, would not have included a separate trip from Kelowna to Flood and return.

Given that the true facts of the matter are within the Company’s knowledge, and considering as well the nature of the initial reply, it is my view that the appropriate award to make in this case is to allow the grievor’s claim, subject to the proviso that it shall be open to the Company not later than May 15, 1981, to show, from sufficient records, that no broker made a trip of the sort referred to at the time in question. Subject to the foregoing, the grievance is allowed.

(signed) J. F. W. WEATHERILL
ARBITRATOR