CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1310

Heard in Montreal, Tuesday, December 11, 1984

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Mr. A. M. Vitullo, a B&B employee at St. Luc, was laid-off as a painter on February 15, 1984. He subsequently displaced into the bridgeman classification. Commencing the week of February 20, 1984, employees from the Car Department painted a washroom, and entrance to the St. Luc Car Department. Mr. Vitullo claims that he should have been employed as a painter to do the painting.

JOINT STATEMENT OF ISSUE:

The Union contends that: **(1.)** The Company violated Section 32.3 by having the Car Department employees doing the painting that is normally done by B&B painters. **(2.)** The Company violated Section 15.7 and 15.9 when they did not recall A. M. Vitullo as painter for this work. **(3.)** Mr. Vitullo be compensated for the difference in wages between that of painter and that of bridgeman for a total of 40 hours account not being recalled as painter during the week of February 20th, 1984.

The Company denies the Union's contention and declines payment.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) H. J. THIESSEN	(SGD.) G. A. SWANSON
SYSTEM FEDERATION GENERAL CHAIRMAN	GENERAL MANAGER

There appeared on behalf of the Company:

J. H. Blotsky	– Assistant Supervisor, Labour Relations, Eastern Region, Toronto
R. A. Colquhoun	– Labour Relations Officer, Montreal
J. Serena	– General Car Foreman, St. Luc, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen	– System Federation General Chairman, Ottawa
G. Valence	– General Chairman, Sherbrooke

AWARD OF THE ARBITRATOR

This is a claim made by Mr. A.M. Vitullo for payment at the painter's rate for painting work performed at the St. Luc Car Shop. There is no dispute that approximately 30 hours of painting work was performed, as alleged, by two employee members of the Shopcraft unit at the Company's Car Department at the St. Luc Shop. It is also common ground that the grievor's position as painter had been abolished and he had exercised displacement privileges with respect to a bridgeman's position at the material time the painting work was performed at the St. Luc Car Shop. At issue is whether the work protection provision contained in article 32.4 of Wage Agreement No. 41 supports the grievor's claim:

> **32.4** Performance of Maintenance of Way Work by Employees Outside of Department.
> Except in cases of emergency or temporary urgency, employees outside of the maintenance of way service shall not be assigned to do work which properly belongs to the maintenance of way department, nor will maintenance of way employees be required to do any work except such as pertains to his division or department of maintenance of way service.

The Company does not claim that the painting work performed was done in circumstances that could be described as an emergency or temporary urgency. Rather, the argument is made that because there exists a past practice of Shopcraft unit employees performing painting work (i.e. maintenance work) at the St. Luc Car Shop, the impugned assignment in this case was not work which "properly belongs" to the Maintenance and Way Department. The Trade Union insists that the practice, as shown in the Company's brief, was done without its knowledge or acquiescence. It therefore followed that that practice cannot be relied upon by the Company to its members' prejudice in evading the protection afforded under article 32.4.

The Company does not deny that large painting projects on Company buildings have traditionally been treated as the work of the Maintenance and Way department. Nonetheless it is submitted that the aggrieved Trade Union, based on the Company's practice, has no proprietary interest in maintenance work that is performed by the Shopcraft unit with respect to its own building. Or, at least, article 32.3 of Wage Agreement 41 does not afford the Maintenance of Way Department the protection it is seeking.

In this regard I find that the Company's position is without merit. Article 58.2 of the Shopcraft Agreement, to the extent that Carmen's work is defined, restricts painting, varnishing, decorating, lettering, cutting stencils and removing paint to work performed on rolling stock (i.e. cars). There is nothing contained in that provision that authorizes the Car Department to perform painting (even though it may pertain to maintenance and cleaning) on Company buildings. In other words, the practice the Company relies upon is not supported by the Shopcraft collective agreement.

On the other hand, article 1.1 of the Maintenance of Way Agreement defines Maintenance and Way Employees as "employees working in the track and bridge and building department, for whom rates of pay are provided in this agreement". And, of course, as Mr. Thiessen pointed out, article 26.1.1 does provide rates of pay "for the various classes of employees in the Maintenance and Way Department". Included amongst those classes in "the B&B Force" is the painter's rate of pay.

In short, it is clear that the collective agreement contemplates that the "painting" of Company buildings, particularly when it is for maintenance purposes, is work that properly belongs to the Maintenance and Way Department. Since the only exception allowed under article 32.3 for the deviation of such assignments away from the maintenance and way employees are cases of emergency or temporary urgency, I am compelled to find that the Company has improperly assigned the work in question to non-bargaining unit employees. In this regard it must be emphasized that, save for emergency situations, article 32.3 does represent an express curb on management's discretion to assign work. And merely because the Company has established a contrary practice is no reason to arrive at a different conclusion unless it can be clearly established that the Trade Union has acquiesced in that practice and has waived its rights under the collective agreement. This, of course, has not been shown to be the case.

For all the foregoing reasons, the grievance succeeds. The Company is directed to pay the grievor, as claimed, for the work performed at the painter's rate of pay. I shall remain seized for the purpose of implementation.

(signed) DAVID H. KATES
ARBITRATOR