

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1429

Heard at Montreal, Wednesday, November 13, 1985

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

From December 9, 1984, to December 16, 1984, the Company provided flagging protection for contractor between M. 116.1 to M. 116.6, Brooks Subdivision, using L.T.M. Mr. R.P. Belisle instead of Track Maintenance Foreman W.W. Falk.

JOINT STATEMENT OF ISSUE:

The Union contends that: (1.) The territory assigned to Foreman N. W. Falk is from M. 106 to M. 144.4, Brooks Subdivision. (2.) Mr. NW. W. Falk should have been assigned the flagging duties and in not so doing, the Company violated Section 7.1 and 8.1, Wage Agreement 41. (3.) Mr. Falk be compensated for all overtime hours worked by Mr. Belisle from December 9 - 16, 1984, at the overtime rate of pay.

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

FOR THE BROTHERHOOD:

(SGD.) H. J. THIESSEN
SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) L. A. HILL
GENERAL MANAGER, OPERATION AND MAINTENANCE

There appeared on behalf of the Company:

R. T. Bay – Assistant Supervisor Labour Relations, Vancouver
R. A. Colquhoun – Labour Relations Officer, Montreal
W. C. Liddell – Engineer of Track, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen – System Federation General Chairman, Ottawa
L. M. DiMassimo – Federation General Chairman, Montreal

AWARD OF THE ARBITRATOR

Article 7.1 of the Collective Agreement reads as follows:

Where work is required by the railways to be performed on a day which is not part of any assignment, it may be performed by an available laid-off or unassigned employee who will otherwise not have forty hours of work that week. **In all other cases by the regular employee.**

(Emphasis added)

The only question that must be answered in this case is whether the grievor was entitled to perform flag protection duties on Mileage 116.1 to 116.6 at Cluny while contract work was being done. And, that question must be determined on the basis of whether Mr. Falk, in his capacity of Track Maintenance Foreman, was "the regular employee" who would otherwise be required to perform that work.

The uncontradicted evidence established that that territorial jurisdiction was shared between Track Maintenance Foreman Falk's Patrol Gang and Track Maintenance Foreman Tessman's Mobile Gang. Moreover, in light of the investigation of trackage duties performed by the Patrol Gang it appeared very unlikely that Mr. Falk or the one member of his crew would be called upon to perform on a regular basis flag protection duties. This is not to say that Track Maintenance Foreman Falk or a member of his crew are not from time to time required to perform flag protection duties. It simply suggests that it would not regularly form a part of their duties that would thereby entitle them to preference over other maintenance of way crews who would be so entitled. Accordingly, I have not been satisfied that the employer was in violation of Article 7.1 in assigning the overtime work in question to a member of Track Maintenance Foreman Tessman's crew.

Before leaving this case I find it necessary to make some comments about the company's submissions with respect to **CROA 1416**. It must be emphasized that that case dealt with the issue of whether Article 32.3 of the collective agreement conferred a preference for flag protection duties while contract work was being performed to maintenance of way department employees over bridge and building department employees. CP Rail Maintenance of Way Rules and Instructions, Rule 202(g) was quoted in order to support the conclusion that flag protection duties were M&W department employees' work because of the emphasis placed by the rule on the Track Maintenance Foreman's responsibility to ensure safe procedures (inclusive of flag protection duties) are followed.

CROA 1416 does not represent the principle that only the Track Maintenance Foreman is exclusively entitled to do such flag protection duties or that such duties cannot be performed by a member of his crew. Nor was there any evidence adduced in that case pertaining to a Letter of Understanding between the parties that might suggest that a preference was intended to be conferred upon a maintenance of way crew member over his foreman with respect to the discharge of flag protection duties. Indeed, the Letter of Understanding appears to confirm that a preference is intended to be conferred upon maintenance of way department employees over B&B department employees in the performance of flag protection work.

In the last analysis, when the conclusion was reached in **CROA 1416** that the Company had made an improper overtime assignment to a B&B Foreman, the Arbitrator had no choice but to award the grievor the work because the evidence indicated that he was the proper designated track maintenance foreman who would have been responsible for the flag protection duties in issue.

Because the documents that were adduced in evidence in this case were not before me in **CROA 1416**, I have had no reason put to me that would suggest any unfairness or incorrectness in the result that was reached.

In the grievor's particular circumstance in this grievance, I have not been satisfied that he was "the regular employee" entitled to the flag protection work in issue. The grievance is accordingly denied.

(signed) DAVID H. KATES
ARBITRATOR