CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1637

Heard at Montreal Wednesday, April 15, 1987

Concerning

CP EXPRESS AND TRANSPORT

And

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

DISPUTE:

The failure of payment of drops and hooks to employee E. Franz, Mileage-rated Driver, Obico Terminal, Ontario.

JOINT STATEMENT OF ISSUE:

On October 10, 1986, mileage-rated driver E. Franz began booking drops and hooks en route, which were refused payment by the Company.

The Union filed a grievance requesting payment in line with article 33 of the collective agreement.

The Company denied the Union's claim.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) J. J. BOYCE	(SGD.) B. D. NEILL
SYSTEM GENERAL CHAIRMAN	DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

R. C. Filion	– Counsel, Toronto
B. D. Neill	– Director Labour Relations, CP Trucks, Toronto
G. H. Nicholson	– Director, Transportation
N. W. Fosberry	– Witness

And on behalf of the Brotherhood:

H. Caley	– Counsel, Toronto
J. J. Boyce	– General Chairman, Toronto
J. Bechtel	– Vice General Chairman, Toronto
W. Whalen	– Grievor, Toronto

The hearing was adjourned to July 15, 1987, at which time there appeared on behalf of the Company:

R. C. Filion	– Counsel, Toronto
B. D. Neill	– Director Labour Relations, CP Trucks, Toronto
G. H. Nicholson	– Director, Transportation
N. W. Fosberry	– Witness
B. F. Weinert	– Observer
D. Bennett	– Observer

And on behalf of the Brotherhood:

D. Watson	– Counsel, Toronto
J. J. Boyce	– General Chairman, Toronto
J. Bechtel	– Vice-General Chairman, Toronto
J. Crabb	– General Secretary Treasurer, Toronto

AWARD OF THE ARBITRATOR

The grievor is a mileage-rated spare board highway driver working out of the Company's terminal in Toronto. He claims an added allowance for dropping and hooking up trailers as of October 10, 1986.

The current collective agreement, in effect from January 1, 1985 to December 31, 1987 saw the introduction of spare board operations into the Company's terminals in Ontario and Quebec. The collective agreement is national in scope, and contains special provisions which apply in different geographic regions of Canada. Article 33.24.13 provides the mileage rates which apply in the provinces of Ontario and Quebec. Article 33.24.14 upon which the Company relies provides as follows:

> When mileage-rated highway vehiclemen are requested to hook up and or drop units, payment for such work will be included in the mileage rate.
>
> Where double or triple equipment is operated and the mileage-rated highway vehicleman is required to hook up and/or drop the second and third unit he will be paid on a minute basis for all time taken in excess of 10 minutes for each hook up and/or drop at his regular hourly rate.

The Company maintains that the entitlement of a mileage-rated highway vehicleman to payment for "drops and hooks" is limited to the circumstances described in the second paragraph of the foregoing provision, namely where the hooking up or dropping off of pup trailers is involved, and then only for time in excess of 10 minutes for each one. It explains that exception on the basis that the hooking up of second and third tandem trailers requires the use of a dolly and is more complicated and time-consuming or dropping a single trailer directly from the tractor unit.

The Union takes a different view of the application of this provision. It maintains that the article only applies to drops and hooks at a vehicleman's home terminal, and is not to govern the allowance payable to him for drops and hooks en route. This circumstance, which is the factual context of the instant grievance, the Union maintains is specifically dealt with by the terms of article 33.24.3 which provides as follows:

> Work time shall include loading and unloading and repairing equipment and shall be paid for on the actual minute basis. This clause shall apply also to peddle run vehiclemen who work at terminals where there are no terminal employees. Work time shall also include dropping and/or picking up trailers en route and a minimum allowance of 15 minutes shall be paid for the performance of one drop or pick-up on a minute basis thereafter.

On the face of the two provision, a reader is compelled to an initial impression that the interpretation advanced by the Union must be correct. Article 33.24.3 plainly applies to mileage-rated spare board highway operations in Ontario and Quebec, as reflected in the heading to article 33.24 which is headed "Provinces of Ontario & Quebec Mileage-rated Spare Board Highway Operations". While article 33.24.3 and article 33.24.14 both refer to hooking up and dropping units, only article 33.24.3 specifically refers to that process "en route". This would suggest that the Union's view, and the grievor's claim, are more correct in that special circumstance.

The Company concedes that there is an apparent contradiction or ambiguity in the two provisions and therefore seeks to rely on extrinsic evidence in aid of the interpretation of these provision. In particular, it adduced evidence of negotiating history and past practice, citing **Leitch Goldmines Limited v Texax Gulf Sulphur Company Inc.** (1968), (3d) L.R. 3rd, 161 (Ont. C.A.). The Company further pleads estoppel maintaining that during negotiations the Union represented to the Company that article 33.24.3 would not be relied on for the interpretation which it now asserts. While the Union maintains that the language is clear and unambiguous, the Arbitrator is satisfied that the apparent inconsistency between the provisions would justify the admission of extrinsic evidence with respect to what was said during the course of negotiations. It should be noted that, in any event, that evidence would be admissible for the collateral purpose of establishing an estoppel, as one party could not presumably entrap another into including a particular written provision in an agreement, on a given understanding and thereafter during the currency of the agreement renege on that understanding to the prejudice of the other party.

It in the Arbitrator's view, the extrinsic evidence in this case is, however, equivocal at best in supporting the Company's interpretation. Pivotal to the employer's position is the evidence of Mr Noel W. Fosbery, who in 1985 was the Company's director of labour relations, and has since retired. Mr. Fosbery, an experienced and respected professional in the field of industrial relations is a witness of unquestioned integrity who, in the Arbitrator's opinion, sought to relate the events with candour and to the best of his recollection. The crucial event is a series of meetings of a subcommittee established after the negotiation of the principal memorandum of settlement dated June 4, 1985. An issue which the parties were unable to resolve was the question of spare board operations, which they agreed to refer to a joint sub-committee for resolution.

Mr. Fosbery testified that, as a member of a sub-committee, he had personal concerns about the apparent conflict between the terms of articles 33.24.3 and 33.24.14 and that he mentioned these on more than one occasion during the several meetings of the sub-committee. According to his recollection, at the final meeting, when the terms of these articles were finally agreed upon, he raised that problem once again, and was assured by Mr. Jack Boyce, General Chairman of the Union, that there was no question of inconsistency because article 33.24.3 applied only to peddle runs. It is common ground that peddle runs, which involve the picking up and dropping off of parcels en route, do not operate in Ontario.

Mr. Boyce testified that he gave no such undertaking, and that in his view, article 33.24.3 was intended to have the same application in Ontario and Quebec as it does in Western Canada where drops and hooks have consistently been paid for under a similar provision found separately in article 33.4 of the collective agreement.

The misunderstanding between Mr. Fosbery and Mr. Boyce speaks volumes about the importance of clarifying language of doubtful application or interpretation, in writing prior to concluding a collective agreement. While gentlemen's understandings and mutual trust may be essential to any viable ongoing bargaining relationship, complete reliance on verbal exchanges can lead to serious difficulties in subsequent disputes about the mutual understanding of the parties. In this case, Mr. Fosbery did not preserve the notes which he made at the time of the sub-committee's deliberations. While he expressed the strongest conviction that he would never agree to allowing both articles to stand without the undertaking which he believed he had from the Union, there is no documentation or other evidence to corroborate his recollection, and the recollection of Mr. Boyce, whom the Arbitrator judges to be an equally fair and honest witness, is squarely to the contrary.

The evidence of Mr. George Nicholson, the Company's Director of Transportation, who was at the table along side Mr. Fosbery does little to support the Company's version of what transpired. While Mr. Nicholson testified that he could recall that during the deliberations of the sub-committee there was some discussion of drops and hooks, and that Mr. Fosbery wanted a change made in the provision, he did not testify to having overheard any undertaking on the part of Mr. Boyce or any other Union spokesman consistent with the interpretation now asserted by the Company.

Subsequent events, also forming part of the extrinsic evidence adduced, cast still further doubt on the Company's case. It appears that for a substantial period of time, extending to October of 1986, the Company's practice with respect to paying for the claims of employees for separate payments for drops and hooks made on their trip sheets was somewhat inconsistent. While on the whole it appears that these claims were denied, there were areas where they were generally honoured, as for example, in Brockville, Ontario. Counsel for the Company submits that in fact the preponderance of the Company's practice was to decline the claims, in support of his argument that the failure to file any grievance before October 1986 supports the Company's view that the parties shared its interpretation of these provision. The Union counters that that position is not solidly grounded. It is not disputed that prior to October 1986 the trip sheets were not returned to the vehiclemen and, as their pay stubs did not separately itemize any allowance for drops and hooks, the employees were generally not in a position to verify, or indeed to know, whether their claims had been paid or denied.

The uncertainty surrounding the practice in respect of drops and hooks led to a meeting between the parties on October 9, 1986, a purpose of which was to resolve this issue. The evidence establishes an understanding that articles 33.24.1 to 33.24.23, inclusive, would be reviewed as to their meaning, with the agreed interpretation to be reflected in minutes of the meeting. The minutes were kept, by agreement, by Mr. John Crabb, Secretary and Vice-General Chairman of the Union. His evidence establishes, without contradiction, that as each article was discussed he wrote down the interpretation and read it back to the meeting. In addition, at the conclusion of the meeting, he read over all of the minutes previously reviewed a second time. The hand-written document so produced was then photocopied and circulated to all in attendance, including the four representatives of the Company including Mr.

Nicholson. I am further satisfied that one week later a typewritten copy of the minutes was given to Mr. Nicholson by the Union's representatives. Both the hand-written and typewritten version of the minutes were filed in evidence. The entry under the heading of "article 33.24.3" is as follows:

> All drops are paid for en route. This means from first dispatch until either put to bed or returned to home terminal.

As noted, the Arbitrator has initial difficulty with the Company having originally executed the terms of article 33.24 in a form which it knew to be inconsistent with the meaning which it intended the agreement to have. That difficulty is, to say the least, more than compounded by the subsequent acquiescence of the Company's officers in the interpretation of article 33.24.3 reduced into writing on October 9, 1986, when it was both read aloud and circulated in photocopy form to the Company's officers.

It is trite to say that while the spoken word may fade, the written word endures. In a circumstance such as this, with the fullest appreciation for the candour and integrity of the witnesses on both sides, and more than a little understanding of the limitations of human communication and the frailties of memory, an arbitrator is compelled to view the written record, in its entirety, as the best evidence of what the parties intended their collective agreement to mean. Both the wording of article 33.24.3 as it appears in the collective agreement, and the common interpretation reflected in the minutes of the meeting of October 9, 1986 support the interpretation advanced by the Union. In the Arbitrator's view, if the parties had intended, whether in the initial negotiation of the collective agreement or in its subsequent clarification in the meeting of October 9, 1986 to give to article 33.24.3, which governs in Ontario and Quebec, a different meaning from that which applies to the identical language in Western Canada, appearing in article 33.4, they could, and should, have done so expressly. Failing any such distinction and having regard to the extrinsic evidence as well as to the express terms of the collective agreement, I must, on balance, accept the interpretation advanced by the Union.

For these reasons, the grievance must be allowed, to the extent that it refers to events after October 9, 1986. From that date onward, any uncertainty respecting the meaning of article 33.24.3 was conclusively resolved by the written understanding between the parties. This award should not be taken as a basis to justify any claims declined prior to that date as it appears to the Arbitrator that a substantial number of employees knew that their claims were not being consistently honoured as, by the Union's own evidence, there was a substantial degree of unrest about this issue. To that extent, the Company's argument about the Union's delay must succeed.

The grievance of vehicleman E. Franz relating to October 10, 1986 is therefore allowed. He shall be paid, forthwith, for drops and hooks which he booked from that date forward according to the terms of article 33.24.3 as interpreted herein. The Arbitrator remains seized of this matter in the event of any dispute between the parties respecting the interpretation or implementation of this award.

(signed) MICHEL G. PICHER
ARBITRATOR