

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1655

Heard at Montreal Tuesday, June 9, 1987

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

This is a claim by the Union that the Company has violated the collective agreement by assigning work of the bargaining unit, namely track inspection, to supervisory personnel, and in the alternative, that it has issued a Rule which is unreasonable.

BROTHERHOOD STATEMENT OF ISSUE:

On October 10, 1986, the Company issued Bulletin #21 to all Track Maintenance Foremen in the Alberta South (Lethbridge) division amending its then current SPC #32 by assigning track inspection and patrolling performed by Track Maintenance Foremen to the Roadmaster and/or his Deputy.

The Brotherhood contends that the patrolling and inspection of track has been historically performed by the Track Maintenance Foreman and hence, falls under the Maintenance of Way Scope of work. Article 32.3 of the Agreement prohibits the employer from assigning such work outside the bargaining unit to supervisory personnel. In the alternative, if such work may be assigned to Deputy Roadmasters, these Deputy Roadmasters perform work to such an extent as to bring within the bargaining unit.

The Brotherhood further contends that, if such assignment is permitted, SPC #32 constitutes an unreasonable Rule in that it requires a level of responsibility on the part of Track Maintenance Foreman which is incompatible with the restricted scope of that position.

FOR THE BROTHERHOOD:

(SGD.) H. J. THIESSEN

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

M. Shannon	– Lawyer, Montreal
B. L. Mittleman	– Lawyer, Montreal
E. J. Rewucki	– Deputy Chief Engineer, Montreal
K. W. Sutherland	– Director, Maintenance of Way, System
I. J. Waddell	– Manager, Labour Relations, Montreal
F. R. Shreenan	– Supervisor, Labour Relations, Vancouver
R. A. Colquhoun	– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen – System Federation General Chairman, Ottawa
M. Gotthell – Assistant to the Vice-President, Ottawa
D. McKee – Legal Counsel, Toronto
A. R. Terry – Witness
G. Schneider – System Federation General Chairman, CN Lines West, Ottawa

AWARD OF THE ARBITRATOR

It is not disputed that in the Alberta South (Lethbridge) Division, as in other territories of the Company, a certain amount of track inspection was regularly carried out by Track Maintenance Foremen, who are members of the bargaining unit. Such inspections are under the direction of the Roadmaster to whom the Track Maintenance Foreman reports. That arrangement is reflected in Standard Practice Circular #32 which generally describes the responsibilities of Roadmaster and Track Maintenance Foreman. That document provides, in part, as follows:

2. The Roadmaster responsible for the territory has the responsibility and jurisdiction to authorize additional inspections that, in his opinion, may be required to ensure the safety of railway operations.

3. The following are minimum requirements for track inspection and do not relieve the Track Maintenance Foreman of responsibility to carry out additional track patrols where required due to emergency conditions such as strong winds, high water, snow, fire, or rock falls. Certain conditions on each territory may require additional inspections. Each track of two or more main tracks must be inspected separately.

4. **FREQUENCY**

a) Primary and secondary main lines.

A minimum of three inspections per week spaced in such a way that elapsed time between inspections does not exceed two calendar days. At least one inspection per week is to be performed by the Track Maintenance Foreman on his assigned territory.

b) Important branch lines two inspections per week as follows:

- i) Monday or Tuesday, and
- ii) Thursday or Friday.

At least one of the inspections is to be performed by the Track Maintenance Foreman on his assigned territory.

It is also not disputed that for many years, at least since 1951, a significant portion of track inspection has been performed directly by Roadmasters and Assistant Roadmasters who occupy supervisory positions excluded from the bargaining unit, although no Assistant Roadmasters appear to have been utilized on the Alberta South Division. The frequency with which Assistant Roadmasters were employed varied from location to location, and generally related to the scheduling or frequency of inspections dictated by the weight of traffic. The evidence establishes that approximately ten years ago the Company introduced the position of Deputy Roadmaster, initially in the Pacific Region, to help cope with the heavier inspection load necessitated by heavy coal traffic in that area. The duties and responsibilities of the Deputy Roadmaster appear to be identical to those of the Assistant Roadmaster, although the Deputy enjoys a higher rank and salary level. Deputy Roadmasters were eventually introduced in other regions of the Company's system, particularly in main lines and in heavy traffic areas.

Prior to October 10, 1986, there were no Deputy Roadmasters on the Lethbridge Subdivision. On that date the employer released Bulletin number 21 which stated the following:

BULLETIN NO. 21

RE: REORGANIZATION OF TRACK FORCES – ALBERTA SOUTH (LETHBRIDGE) DIVISION

Now that the track forces on the Lethbridge portion of the Alberta South Division have been reorganized, the prime responsibility for track inspections lies with the Roadmaster and Deputy Roadmaster.

Therefore, effective immediately on this reorganized territory only, that portion of Standard Practice Circular, Track, Circular No. 32, Clause 4(a) and (b) which requires one inspection per week by the Track Maintenance Foremen may be deleted.

The mandatory three inspections per week for primary and secondary main lines and two inspections per week for important branch lines must still be performed and will be made by the Roadmaster and/or his Deputy unless they are unable on occasion, at which time the Track Maintenance Foreman must fill in.

The above, however, does not relieve the Track Maintenance Foreman from arranging for and making special inspections when needed during storms, high water and temperature extremes, and when other conditions prevail which could make the track unsafe.

J.S. Kubik
Division Engineer
Alberta South (Lethbridge) Division

The foregoing bulletin came in the wake of a reorganization of track Maintenance functions on the Lethbridge Subdivision. This included the creation of five new Deputy Roadmaster positions on September 12, 1986. As a result of the reorganization and the effect of Bulletin #21, the number of Track Maintenance Foremen on the Subdivision was reduced from 28 to 16.

The Union maintains, among other things, that the Company's action is in violation of article 32.3 of the collective agreement, which provision is as follows:

PERFORMANCE OF MAINTENANCE OF WAY WORK BY EMPLOYEES OUTSIDE OF DEPARTMENT

32.3 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 language of article 32.3 has been retained, without amendment in the collective agreement between the parties since at least 1951. At that time it was the subject of a grievance decided in case no. 612 of the Canadian Railway Board of Adjustment #1, a decision dated Tuesday, March 11, 1952. In that case the Union protested the assignment of Roadmasters and Assistant Roadmasters to perform track inspection duties. The use of Roadmasters and Assistant Roadmasters in that capacity was apparently prompted by the introduction of the 40-hour week on June 1, 1951. The Company argued, among other things, the need to have the fundamental requirements of track inspections performed by persons in supervisory authority. The grievance was dismissed, without reasons.

It is difficult, in the Arbitrator's view, to distinguish the issue before the **Board of Adjustment in Case #612** and the instant dispute, particularly given the identical language within both collective agreements. It is, in other words, doubtful that by preserving the language of article 32.3 in the wake of, the decision in **Case #612** the parties could have done other than acknowledge that the article would not be violated in the event that a Roadmaster or an Assistant Roadmaster exercising supervisory authority within the Maintenance of Way service is assigned to perform track inspection which is also done on occasion by bargaining unit employees.

The same conclusion is supportable on more general principles. number of decisions of this Office have held that clear and specific language is required to establish that Bargaining Unit work may not be performed by supervisory personnel. Absent such language grievances of this kind have been rejected. See e.g., **CROA 322, 324, and 1379**. In the latter case the Union protested the assignment of a Roadmaster and Deputy Roadmaster to track patrol functions on a holiday weekend. In rejecting that grievance the Arbitrator made the following observation:

Nor can I find that there was any standing order that required the grievors to report for work – in order to discharge track inspection duties pursuant to the Maintenance of Way Rules and Instructions. Those duties are only imposed upon the Track Maintenance Foreman to the extent he is instructed by the Company to discharge those functions ... (see also **CROA 793**)

The authorities cited, and general arbitral jurisprudence, do not, however, stand for the proposition that work which has been exclusively performed by bargaining unit members can freely be transferred into the hands of non

bargaining unit employees. It is generally accepted that when a supervisor performs bargaining unit work in a substantial degree, he or she may thereby be brought within the bargaining unit. If it were otherwise, the very concept and integrity of the bargaining unit would be substantially undermined. (See generally, Brown & Beatty, **Canadian Labour Arbitration**, 2nd ed. (Aurora 1984) at pp. 218-20). In the instant case, however, those principles do not apply, as the work of track inspection has for many years been performed both by Supervisors and by bargaining unit members, as assigned.

In the instant case it was within the prerogatives of the Company to amend standard practice circular #32, an engineering document issued unilaterally by the Company. There is, as noted, nothing in the language of the collective agreement to prohibit the amendment of the standard practice of that circular by Bulletin #21, as applied to the Lethbridge Subdivision. The evidence establishes that for many years on that Subdivision, as elsewhere on the system, supervisors have conducted the track inspection on a regular and substantial basis. While that function was also substantially delegated to Track Maintenance Foremen, the Company did not, by any provision of the collective agreement, surrender its right to reduce the extent of that delegation.

For the foregoing reasons the grievance must be dismissed?

(signed) MICHEL G. PICHER
ARBITRATOR