CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1960

Heard at Montreal, Wednesday, 11 October 1989

Concerning

CP EXPRESS & TRANSPORT

And

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The interpretation of Article 5 of the Collective Agreement.

JOINT STATEMENT OF ISSUE:

Article 5 of the Collective Agreement, entitled RELIEF WORK, states in part: "Employees required upon proper authority to do relief work in the stationary department will receive the same rate of pay as the position relieved, provided that it is not less than his own. Such employees required upon proper authority to do relief work at a point removed from permanent place of employment, will be reimbursed for reasonable actual travelling expenses and resident expenses, when supported by proper vouchers. This paragraph applies to relief work performed in positions covered by this Agreement."

The Union contends that the meaning of this Article is that the employee doing the relief work would get the rate of pay of the position being relieved (provided it is not less than his own) or in other words, 100% of the rate of pay of the incumbent on the position being relieved, such rate having been set by the Collective Agreement. The Union also contends that there are no step rates for positions slotted at a certain level in the Collective Agreement. The Union further contends that Article 5 makes no reference to any other Article in the Agreement while clearly stating that the same rate of pay as the position relieved should be paid to the employee required to do the relief work.

The Company contends that the interpretation of Article 5 of the Collective Agreement is full rate of pay of the bulletin subject to Article 26.3 of the Agreement, referring in particular to the Rate on Hiring or starting rates.

The relief requested is pay on the basis of 100% of the incumbents (sic) rate (provided it is not lower than his own) for any employee required to do relief work.

FOR THE UNION:	FOR THE COMPANY:
(SGD) J. J. BOYCE	**(SGD) B. F. WEINERT**
GENERAL CHAIRMAN	**FOR: VICE-PRESIDENT, HUMAN RESOURCES**

There appeared on behalf of the Company:

P. A. Young	– Counsel, Toronto
B. F. Weinert	– Manager, Labour Relations, Toronto
D. Tarsay	– Witness, Toronto
N. Malizia	– Witness, Montreal

And on behalf of the Union:

H. Caley	– Counsel, Toronto
J. J. Boyce	– General Chairman, Toronto
J. Crabb	– Secretary/Treasurer, Toronto
M. Gauthier	– Vice-General Chairman, Toronto

At the request of the parties, the hearing was adjourned sine die.

On Tuesday, 8 January 1991, there appeared on behalf of the Company:

P. A. Young	– Counsel, Toronto
B. F. Weinert	– Director, Labour Relations, Toronto
D. Tarsay	– Manager, Personnel,Toronto
N. Malizia	– Manager, Personnel, Montreal

And on behalf of the Union:

H. Caley	– Counsel, Toronto
J. Crabb	– General Secretary/Treasurer, Toronto
H. Tryhorn	– Local Chairman, Toronto
G. Rendell	– Local Chairman, London
M. Allard	– Local Chairman, Montreal
G. Lemire	– Observer, Montreal

AWARD OF THE ARBITRATOR

Although this is a policy grievance, it is argued on the basis of the circumstances relating to the grievance of Warehouseman George Lauther of Truro, Nova Scotia. Mr. Lauther has a seniority date of November 2, 1987, and as an employee hired after January 1, 1983 he comes under a Special Agreement dated September 21, 1983, the terms of which are included within the current Collective Agreement. It is common ground that the wage rates of employees under the Special Agreement are found at page 72 of the Collective Agreement while Maritime employees hired prior to January 1, 1983 are covered by the higher wage rates found at page 44 of the Collective Agreement.

Under both wage schedules employees with less that 30 months of service are paid less than 100% of the basic rate for their position, on a graduated upward scale. At the time of the instant grievance Mr. Lauther's service entitled him to 70% of the basic rate for his position, which is the scale payable to an employee with less than ten months' compensated service.

Although the precise dates are not before the Arbitrator, it appears that Mr. Lauther relieved Warehouse Foreman Orland Tower in or about November of 1988. Mr. Lauther was then paid $6.68 per hour, being 70% of the base rate of $9.543, the foreman's rate found in the Special Agreement. The Union maintains that he was entitled to be paid 100% of the rate payable to Mr. Tower, whom he was replacing. That rate is $11.88 per hour, as provided in the wage schedule for employees whose seniority predates January 1, 1983, appearing in Article 26.3 of the Collective Agreement.

There are therefore two issues to be resolved. The first is whether Mr. Lauther's wages for his relief assignment are payable under Article 26.3 or under the separate wage grid contained in the Special Agreement found at page 73 of the Collective Agreement. The second issue is whether he is entitled to 100% of the base rate for the position of warehouse foreman appearing on either schedule, or to 70% of the basic rate in accordance with the rate step provision appended to both schedules.

Counsel for the Union raises, as a preliminary position, the argument that the Company is prevented by the terms of the Joint Statement of Issue from arguing that the wage schedule in the Special Agreement applies in the circumstances of Mr. Lauther. He draws to the Arbitrator's attention the penultimate paragraph of the Joint Statement, whereby the Company contends that the interpretation of Article 5 of the Collective Agreement is "... full rate of pay of the bulletin subject to Article 26.3 of the Agreement,". Counsel maintains that, having taken a position that Article 26.3 of the Collective Agreement applies in the circumstances of this grievance, the Company may not enlarge its position at arbitration in a way that effectively raises new positions or issues by denying that Article 26.3 applies. In this regard Counsel relies upon the first paragraph of Clause 12 of the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration, the terms of which are, in part, as follows:

> **12.** The decision of the Arbitrator shall be limited to the disputes or questions contained in the joint statement submitted to him by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions. ...

Counsel for the Company submits that the Union's position is overly technical, and that in a policy grievance of this kind it should not prevail. After careful review of the material the Arbitrator is not persuaded by that argument. The record reveals that the position appearing in the Joint Statement of Issue was not first taken in the context of the policy grievance, but has its origins in the Step 1 reply of Mr. Power, the local Company officer, who declined the grievance of Mr. Lauther stating, in part, that Article 5 is "... subject to Article 26.3 of the agreement". It therefore appears to the Arbitrator that from the outset the Company has adopted the position that Article 26.3 of the Collective Agreement applies to Mr. Lauther, a position which has found its way unchanged into the Joint Statement of Issue before me. In these circumstances I am compelled to sustain the position advanced by Counsel for the Union with respect to the application of the terms of Article 26.3 of the Collective Agreement to the claim of Mr. Lauther. On that basis I must find that his entitlement to the relief wage rate for the work performed falls under the terms of Article 26.3, and not under the provisions of the Special Agreement, and in particular the wage schedule found at page 73 of the Collective Agreement.

The second issue is whether Mr. Lauther would be entitled to 100% of the warehouse foreman's base rate of $11.888, as provided in Article 26.3, or to 70% of the basic rate, based on his own compensated service. In support of its position the Union relies on Articles 5.1 and 22.19 of the Collective Agreement which are, in part, as follows:

> **5.1** Employees required upon proper authority to do relief work in the stationary department will receive the same rate of pay as the position relieved, provided that it is not less than his own. ...
>
> **22.19** Lower-paid employees performing relief work in higher paid positions on account of vacations shall be entitled to higher pay of position filled during such vacation period.

The Arbitrator cannot sustain the position of the Union that Mr. Lauther was entitled to 100% of the basic rate for the position of warehouse foreman. In my view there in nothing the language of either of the above reproduced articles which personalizes the entitlement of the relieving employee, so that he or she gains the advantage of the compensated service of the person who is relieved. Clearly, as Counsel for the Company stresses, the hiring rates and rate steps provided as part of the wage schedules must be read in conjunction with Articles 5.1 and 22.19. The language of Article 5.1 speaks in terms of "... the same rate of pay as the position relieved", and not the same rate of pay as the person relieved. Similarly, Article 22.19 gives to the relieving employee the "higher pay of position filled during such vacation period." Again, the reference is to the position, and the rate of the position. There is nothing in either of these articles to suggest that they intended to override the more general provision whereby employees are paid at the rate of 70% of the basic rate of the position they occupy in their first 10 months of compensated service,

with increments of 10% with each succeeding 10 months of compensated service, until they reach 100% after thirty months' compensated service.

The Arbitrator is compelled to agree with Counsel for the Company that it would be inconsistent with these general terms of the Collective Agreement if the grievor, as a newly hired warehouse foreman, would only be entitled to 70% of the basic rate for that position, while he could claim 100% of that rate merely because he was replacing an employee who happened to have 30 months' compensated service. In the Arbitrator's view the language of the wage schedule, which is general to the application of the Collective Agreement, must be seen to qualify the provisions of Articles 5 and 22.19 in these circumstances. I am further satisfied that such evidence as has been put before me with respect to the practice of the Company is, at best, inconclusive and would not, on the balance of probabilities, be sufficient to support any contrary conclusion as to the intention of the parties.

For the foregoing reasons the grievance is allowed, in part. Mr. Lauther is entitled to be compensated at 70% of the basic rate of $11.888 for warehouse foreman, appearing in Article 26.3 of the Collective Agreement for the period of time which he worked in relief in that position, with commensurate redress to be available to other employees in like circumstances under the policy grievance.

January 11, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR