CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2006

Heard at Montreal, Wednesday, 14 March 1990

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

EX PARTE

DISPUTE BROTHERHOOD:

The Brotherhood alleges the Company violated Articles 12 and 13 of Agreement 5.1 when it utilized employees on Employment Security under Article 7 of the Employment Security and Income Maintenance Plan (The Plan) dated July 29, 1988, to clean outside areas around the Gordon Yard Diesel Shop, which was work normally performed by regularly assigned employees.

The Company denies the alleged violation.

DISPUTE COMPANY:

The Brotherhood alleges the Company violated Articles 12 and 13 of Agreement 5.1 when it utilized employees on Employment Security under Article 7 of the Employment Security and Income Maintenance Plan (The Plan) dated July 29, 1988, to clean outside areas around the Gordon Yard Diesel Shop.

The Company denies the alleged violation.

BROTHERHOOD'S STATEMENT OF ISSUE:

Commencing on October 17, 1988, and for approximately a two-week period, the Company utilized seven (7) employees on Employment Security to perform various clean-up duties in the area outside the Gordon Yard Diesel Shop.

The Brotherhood initiated a grievance claiming that the work performed belonged to employees represented by the Brotherhood and that the Company should have advertised these positions under the provisions of Article 12 of Agreement 5.1 or provided the work to spare and relief employees under the provisions of Article 13 of Agreement 5.1, prior to utilizing employees on Employment Security.

The Brotherhood has requested that the senior spare and relief employees and/or laid-off employees be compensated the wages paid to the employees on Employment Security which were utilized by the Company.

It is the Company's position that employees on Employment Security are active employees and may be utilized to perform the duties associated with "make-work" projects. The work in question was not normally performed by employees represented by the Brotherhood, and, therefore, the provisions of Article 12 and 13 of Agreement 5.1 are not applicable. As such, it is the Company's position that there has been no violation of any provisions in Agreement 5.1 or The Plan and there is no basis for this grievance.

COMPANY'S STATEMENT OF ISSUE:

Commencing on October 17, 1988, and for approximately a two week period, the Company utilized employees on Employment Security to perform various clean up duties in the area outside the Gordon Yard Diesel Shop. The duties performed by these employees had not in the past been performed by any employees assigned to the Diesel Shop. In other words, this was a "make work" project for which the Company decided to utilize some employees on Employment Security.

The Brotherhood initiated a grievance claiming that the work performed belonged to employees represented by the Brotherhood and that the Company should have advertised these positions under the provisions of Article 12 of Agreement 5.1 or provided the work to spare and relief employees under the provisions of Article 13 of Agreement 5.1, prior to utilizing employees on Employment Security.

The Brotherhood has requested that the senior spare and relief employees and/or laid-off employees be compensated the wages paid to the employees on Employment Security which were utilized by the Company.

It is the Company's position that employees on Employment Security are active employees and may be utilized to perform the duties associated with "make-work" projects. The work in question was not normally performed by employees represented by the Brotherhood and, therefore, the provisions of Article 12 and 13 of Agreement 5.1 are not applicable. As such, it is the Company's position that there has been no violation of any provisions in Agreement 5.1 or The Plan and there is no basis for this grievance.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD) TOM MCGRATH	**(SGD) W. W. WILSON**
NATIONAL VICE-PRESIDENT	**FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

M. M. Boyle	– Manager, Labour Relations, Montreal
W. W. Wilson	– Director, Labour Relations, Montreal
G. C. Blundell	– Regional Manager, Labour Relations, Moncton
S. Grou	– System Labour Relations, Montreal
D. McMeekin	– System Labour Relations Ofifcer, Montreal
W. D. Agnew	– Human Resources Officer, Moncton
J. F. Jessulat	– Equipment Officer, Moncton

And on behalf of the Brotherhood:

G. T. Murray	– Regional Vice-President, Moncton
T. McGrath	– National Vice-President, Ottawa
R. Storness-Bliss	– Regional Vice-President, Vancouver
T. A. Barron	– Representative, Moncton
Y. Gauvin	– Local Chairman, Moncton

AWARD OF THE ARBITRATOR

As the statement of facts tendered by the Brotherhood reveals, its claim is predicated on its assertion that the clean up duties assigned to employees on Employment Security "belonged to employees represented by the Brotherhood". With that assertion the Arbitrator has some difficulty.

An extensive line of decisions issuing from this Office has confirmed that Collective Agreement 5.1 does not confer a proprietary right to bargaining unit work to the Brotherhood. The awards have acknowledged that in some circumstances the creation of a job or assignment which involves essentially performing little more than the duties of a position falling entirely within the bargaining unit could result in a finding that the person performing the work must be treated as performing work within the bargaining unit. That, however, is not tantamount to saying that the Company is prohibited from assigning tasks which are sometimes performed by employees in the bargaining unit to non-bargaining unit employees. As Arbitrator Weatherill observed in **CROA 527**:

> I was not referred to any provision in the collective agreement (and there appears to be none) which would require the Company to continue to assign particular work to employees in the bargaining unit, or which would prevent it from "contracting out" certain work, or from assigning it to employees in another area, or in another bargaining unit, or to employees not coming from any bargaining unit.
> (*See also* ***CROA 117, 118, 246, 322, 381, 693, and 1160***)

Given the above noted jurisprudence, the Brotherhood cannot assert that the work in question in the instant case belongs to bargaining unit members, and cannot be assigned to other employees. It follows that the Brotherhood cannot compel the Company, in these circumstances, to declare the existence of a temporary vacancy within the meaning of Articles 12.6 or 12.7 of the Collective Agreement. While those provisions describe the obligations of the employer and rights of employees where temporary vacancies are declared to exist, they do not remove the prerogative of the employer to make the determination, in the first instance, that vacancies within the bargaining unit exist and are to be filled. It has long been recognized that, absent clear language to the contrary, the determination that a vacancy exists within the framework of a particular bargaining unit is a decision falling within the discretion of management (*see* ***City of Armstrong*** *(1987) 32 L.A.C. (3d) 412 (Chertkow);* ***Ottawa-Cornwall Broadcasting Ltd. (CJOH-TV)*** *(1982) 4. L.A.C. (3d) 283 (Carter);* ***Toronto Electric Commissioners*** *(1974) 6 L.A.C. (2d) 243 (Carter) and, see also* ***Ford Motor Co. of Canada Ltd.*** *(1970) 22 L.A.C. 130 (Weatherill)*).

As there is nothing in the Collective Agreement which would require the Company to assign the clean up work in question to bargaining unit employees, notwithstanding that it may have done so in the past, or to prevent it from assigning it to other employees, I can find no prohibition against the actions of the Company in assigning a make-work project to employees on Employment Security status. Moreover, while the terms of the Employment Security and Income Maintenance Agreement between the Company and the Brotherhood stipulates the obligation of employees on Employment Security status to fill available permanent vacancies in certain circumstances, there is nothing in that agreement of which the Arbitrator is aware that would prevent the assignment of temporary or make-work jobs to such employees. On the material before me I can find no basis to conclude that the Company was under an obligation to declare and advertise temporary vacancies in respect of the work in question, and to award it on the basis of the procedures contemplated in Article 12.6 and 12.7 of Agreement 5.1.

For these reasons the grievance must be dismissed.

March 16, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR