CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2191

Heard at Montreal, Thursday, 10 October 1991

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

The operation of locomotives by the use of a belt pack or otherwise falls within the work jurisdiction of the Brotherhood of Locomotive Engineers.

BROTHERHOOD'S STATEMENT OF ISSUE:

It is the Brotherhood's position that the use for which the belt pack is intended by the Company falls within the jurisdiction of Collective Agreement 1.2 and must be operated or manned by locomotive engineers pursuant to the provisions of Collective Agreement 1.2.

The Company refuses to assign the work to the locomotive engineers.

FOR THE BROTHERHOOD:

(SGD.) W. A. WRIGHT
ACTING-GENERAL CHAIRMAN

There appeared on behalf of the Company:

A. Giard	– Counsel, Montreal
R. Lecavalier	– Counsel, Montreal
M. Delgreco	– Director, Labour Relations, Montreal
D. W. Coughlin	– Manager, Labour Relations, Montreal
G. C. Blundell	– Manager, Labour Relations, Edmonton
M. S. Fisher	– Coordinator, Special Projects, Transportation, Montreal
M. Becker	– Labour Relations Officer, Edmonton

On behalf of the Brotherhood:

J. L. Shields	– Counsel, Ottawa
D. S. Kipp	– General Chairman, Kamloops
J. D. Pickle	– Canadian Director, Ottawa
G. Hainsworth	– Vice-President, Ottawa
C. Hamilton	– General Chairman, Kingston

And on behalf of the United Transportation Union:

M. Church	– Counsel, Toronto
L. H. Olson	– Vice-President, UTU - Canada, Edmonton
J. W. Armstrong	– General Chairperson, UTU, CN Lines West, Edmonton
B. Henry	– Vice-General Chairperson, UTU, CN Lines West, Winnipeg

[complete award parts 1, 2 & 3]

At the request of the parties, the hearing was adjourned to November 1991.

On Thursday, 14 November 1991, there appeared on behalf of the Company:

J. Coleman	– Counsel, Montreal
D. W. Coughlin	– Manager, Labour Relations, Montreal
D. L. Brodie	– Labour Relations Officer, Montreal

On behalf of the Brotherhood:

J. L. Shields	– Counsel, Ottawa
D. S. Kipp	– General Chairman, Kamloops
J. D. Pickle	– Canadian Director, Ottawa
G. Hainsworth	– Vice-President, Ottawa
C. Hamilton	– General Chairman, Kingston
G. Hallé	– General Chairman, Quebec

And on behalf of the United Transportation Union:

M. McBride	– Counsel, Toronto
L. H. Olson	– Vice-President, UTU - Canada, Edmonton
J. W. Armstrong	– General Chairperson, UTU, CN Lines West, Edmonton
B. Henry	– Vice-General Chairperson, UTU, CN Lines West, Winnipeg

PRELIMINARY AWARD OF THE ARBITRATOR

Upon a review of the material filed and the arguments presented, the Arbitrator is satisfied that the preliminary objection of the Company to the arbitrability of the grievance cannot be sustained. It is clear that the position of the Brotherhood is that the assignment of the control of a locomotive to any employee other than one covered by its collective agreement is in contravention of the implicit jurisdictional rights of the Brotherhood reflected in the entirety of the collective agreement. While no specific provision of the agreement can be pointed to to establish that jurisdiction, the agreement itself and decades of practice are relied upon to do so. It is common ground that there has never before been cause for a jurisdictional claim by the Brotherhood of Locomotive Engineers to protect work relating to the control of a locomotive. What results, therefore, is a case of first impression which must, in fairness, be approached in that context.

The Company submits that the Brotherhood has failed to comply with the requirements of article 91 of the collective agreement, in that it has not provided reference to any specific articles of the collective agreement which have been violated. If its position were to be strictly accepted, it would be arguable that no union could ever advance a grievance based on an implied term of a collective agreement. In fact, however, it is well established in Canadian jurisprudence that the scope of bargaining unit work is frequently to be derived solely by inference from the general terms of a collective agreement, including such provisions as job classifications, job descriptions, as well as evidence of past practice (*see generally, Brown & Beatty* ***Canadian Labour Arbitration*** *(3d) 5:1200*). There must, of necessity, be some latitude in the grievance documentation which relates a claim of work jurisdiction based on past practice and the implied terms of a collective agreement. It appears to the Arbitrator clear that the position of the Brotherhood has, from the outset, been that its collective agreement implicitly confers a jurisdictional right to perform work relating to the control and operation of a locomotive. I am satisfied that its *Ex Parte* Statement of Issue, and the correspondence between the parties which preceded it, have given a sufficient indication of its position, and must be viewed as being in substantial compliance with the requirements of article 91 of the collective agreement.

There is, moreover, no violation of the terms of clause 4 of the Memorandum of Agreement governing the operation of the Canadian Railway Office of Arbitration. It provides, in part, as follows:

> **4.** The jurisdiction of the Arbitrator shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of;
>
> **(A)** disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent,

> including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and ...

I am satisfied that in the instant case the position of the Brotherhood, that the totality of the terms of its collective agreement disclose an implied work jurisdiction, can be fairly said to fall within the ambit of a dispute respecting the meaning of any one or more of the provisions of the collective agreement within the contemplation of clause 4 of the Memorandum.

The Arbitrator appreciates the concern expressed by counsel for the Company with respect to the possible difficulty which might be encountered in attempting to prepare to meet an argument as broad as that being proposed by the Brotherhood. That difficulty, however, can be dealt with appropriately by a regulatory direction of the Arbitrator made pursuant to clause 6 of the Memorandum, as well as pursuant to the general procedural authority of the Arbitrator. In the circumstances therefore, to avoid unfairness through the risk of surprise and delay by reason of adjournments, the Arbitrator directs that the Brotherhood provide to the Company, not less than ten calendar days prior to the scheduled hearing of the merits of this grievance, a list of all articles of the collective agreement and arbitration awards, if any, it intends to rely on in the presentation of its case.

For the foregoing reasons, and subject to the above direction, the Arbitrator is satisfied that the grievance, as filed, is arbitrable. The grievance shall therefore be scheduled to be heard on its merits.

November 15, 1991 **(Sgd.) MICHEL G. PICHER**
ARBITRATOR

On Wednesday, 12 February 1992, there appeared on behalf of the Company:

J. Coleman	Counsel, Montreal
M. E. Healey	Director, Labour Relations, Montreal
D. W. Coughlin	Manager, Labour Relations, Montreal
M. S. Fisher	Coordinator, Special Projects, Transportation, Montreal

On behalf of the Brotherhood:

J. L. Shields	Counsel, Ottawa
D. S. Kipp	General Chairman, Kamloops
G. Hainsworth	Canadian Director, Ottawa
G. Hallé	Vice-President, Ottawa
C. Hamilton	General Chairman, Kingston

And on behalf of the United Transportation Union:

H. Caley	Counsel, Toronto
M. J. Hone	Research Director, UTU, Ottawa

INTERIM AWARD OF THE ARBITRATOR

The sole issue, for the purposes of this interim award, is whether the Arbitrator should refer this matter to the **Canada Labour Relations Board** pursuant to Section 65(1) of the **Canada Labour Code**. The Brotherhood takes the position that this Office should make such a referral, as the dispute is in the nature of a jurisdictional conflict between itself and the United Transportation Union, with regard to the assignment of the automated control of locomotives in Symington Hump Yard, by means of a remote control belt pack. The Company takes the position that the dispute should be referred to the Canada Board by this Office only if the grievance should succeed. The United Transportation Union, on the other hand, does not go so far. It submits that the Arbitrator should refer the matter to the **Canada Labour Relations Board** only if, having heard the case on its merits, it should appear to the Arbitrator that there is a case of some substance in support of the Brotherhood's position.

The parties drew the Arbitrator's attention to a number of arbitral awards, as well as decisions of the **Canada Labour Relations Board**, with respect to the exercise of the Arbitrator's discretion to refer a matter to the Board pursuant to the terms of Section 65(1) of the **Code**. The provisions of the **Code** which are pertinent are as follows:

> **65 (1)** Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the

> identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for a hearing and determination.
>
> **(2)** The referral of any question to the Board pursuant to Subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless the arbitrator or arbitration board decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding.

The cases referred to by the parties include **Bell Canada and Communication Workers of Canada**, (1980), 27 L.A.C. (2d) 163 [Adams]; Re Bell Canada and Communication Workers of Canada, (1982), 3 L.A.C. (3d) 14 [Burkett]; **Bell Canada and Communication Workers of Canada and Canadian Telephone Employees Association**, an unreported arbitration award dated June 8, 1984 [M. G. Picher]; **Canadian Broadcasting Corporation and National Association of Broadcast Employees and Technicians**, an unreported arbitration award dated August 31, 1987 [Burkett] and **Northern-Loram Joint Venture and Canadian Brotherhood of Railway, Transport & General Workers and International Brotherhood of Teamsters** 59 di, decision of **Canada Labour Relations Board** No. 498, Jan. 21, 1985.

It should be noted that in the instant case the Brotherhood has already made application, itself, to have this matter considered by the **Canada Labour Relations Board**, both under Section 18 and 65(1) of the **Code**. The Section 18 application was declined in a decision communicated to the parties by a letter of the Chief Registrar of the Canada Board, dated May 2, 1990. That letter reads, in part, as follows:

> Following consideration of the parties' submissions the Board finds that the situation described by the applicant does not warrant a review of its Certification.
>
> The Board is mindful of the fact that this issue might be better dealt with through arbitration. The Board is also aware of the fact that an arbitration award issued pursuant to one agreement might be in conflict with a parallel determination issued under another agreement.
>
> The Board is nonetheless confident that this matter can be totally resolved through arbitration. Should an arbitrator seized with the matter find that coming to a determination might conflict with other awards or require the involvement of the Board, then the arbitrator will be able to resort to section 65 of the Code, which is more suited to this kind of issue than is section 18 of the Code.
>
> The application is dismissed and the Board's file closed.

The application under Section 65 was similarly dismissed, by letter dated July 20, 1990 which reads as follows:

> This application filed by the Brotherhood of Maintenance of Way Employees (sic) on July 10, 1990, as well as the additional representations of all parties concerned has been considered by a quorum of the Canada Labour Relations Board comprised of Vice-Chairman Serge Brault and Members Fran‡ois Bastion and Michael Eayrs.
>
> I have been instructed to advise the parties that the Board panel has decided not to suspend arbitration proceedings scheduled for July 23, and to dismiss the present application. The Board refers the parties to its decision in Northern-Loram Joint Venture (1985), 59 di 180; 9 CLRBR (NS) 218, (CLRB No. 498), in which the Board stated that the Boards' jurisdiction under Section 65 of the Canada Labour Code (Part I – Industrial Relations) is not exclusive and that an arbitrator has the authority to answer questions that may be referred to the Board under the said section.

In the instant case the Brotherhood has not directed the Arbitrator to any provision of the collective agreement which expressly grants jurisdiction over the work in dispute to the Brotherhood. There is, therefore, at this point in the proceedings no clear indication that this grievance must necessarily lead to a result which will conflict with the agreement between the United Transportation Union and the Company with respect to the assignment of the work in question. The Brotherhood's grievance proceeds, in large measure, on the submission which it intends to make to the effect that the totality of the provisions of the collective agreement, taken together with the past practice of the parties, construed in light of the certificate which the Brotherhood holds from the **Canada Labour Relations Board**, establishes that it has jurisdictional rights to the work in question which are enforceable through its collective agreement.

At this point the Arbitrator is simply in no position to assess the merits of that submission. In the result, two outcomes are possible: the Brotherhood may fail to establish any claim to the work on the basis of the collective agreement or, secondly, it may establish such a claim. It is only if the second eventuality becomes likely that jurisdictional conflict with the United Transportation Union will have matured into a reality. For the reasons amply articulated in the jurisprudence, it is at that stage that the Arbitrator should consider referring the matter to the **Canada Labour Relations Board**, which has broader jurisdictional tools to resolve a labour relations conflict of that kind, in a manner which is final and binding on all parties concerned, and which avoids the anomaly of conflicting arbitral decisions made under two separate collective agreements.

In the circumstances, for the foregoing reasons, the Arbitrator deems it appropriate to reserve on the request of the Brotherhood to suspend the arbitration proceedings and to refer the matter to the **Canada Labour Relations Board**. I am satisfied that the interests of all parties are better served if the matter proceeds to be heard on its merits. The question of the referral under Section 65(1) may then be addressed in light of the fuller articulation of the Brotherhood's case at the conclusion of the hearing. The Arbitrator will then be in a better position to make a determination with respect to the Section 65(1) issue.

The matter shall therefore be docketed to be heard on its merits.

February 14, 1992

(Sgd.) MICHEL G. PICHER
ARBITRATOR

On Thursday, 15 July 1993, there appeared on behalf of the Company:

J. Coleman	– Counsel, Toronto
M. E. Healey	– Director, Labour Relations, Montreal
D. W. Coughlin	– Manager, Labour Relations, Montreal
V. J. Vena	– Coordinator, Transportation, Montreal
C. Johnstone	– Manager Yard Improvement Projects, Montreal
W. Goldberg	– Project Officer, Locomotive Control System, Montreal
N. Caldwell	– Assistant Chief Technical Research, CANAC, Montreal
P. J. Marquis	– Superintendent Symington Yard, Winnipeg
R. Eisenman	– Project Officer, Transportation, Edmonton
J. Perron	– Counsel, Montreal
L. F. Caron	– System Labour Relations Officer, Montreal

On behalf of the Brotherhood:

J. L. Shields	– Counsel, Ottawa
W. A. Wright	– General Chairman, Saskatoon
G. Hallé	– Canadian Director, Ottawa
L. Pelly	– Counsel, Ottawa
C. Hamilton	– General Chairman, Kingston
B. E. Wood	– General Chairman, Halifax
D. C. Curtis	– General Chairman, CP Lines West, Calgary
R. McKenna	– General Chairman, CP Lines East, Smiths Falls
M. Simpson	– Vice-General Chairman, Saskatoon

And on behalf of the United Transportation Union:

M. Church	– Counsel, Toronto
L. H. Olson	– Vice-President, UTU-Canada, Edmonton
J. M. Hone	– National Research Director, Ottawa
J. W. Armstrong	– General Chairperson, CN Lines West, Edmonton
M. P. Gregotski	– General Chairperson, CN Lines Central, Fort Erie
W. G. Scarrow	– General Chairperson, CN Lines Central (Yard), Sarnia
R. Lebel	– General Chairperson, CN Lines East, Quebec
L. O. Schillaci	– General Chairperson, CP Lines West, Calgary
D. A. Warren	– General Chairperson, CP Lines East, Toronto
B. J. Henry	– Vice-General Chairperson, Edmonton

F. Garant	– Vice-General Chairperson, Montreal
G. Binsfeld	– Vice-General Chairperson, Fort Erie
N. Guennette	– Witness

AWARD OF THE ARBITRATOR

The grievance before the Arbitrator relates to the claim of the Brotherhood of Locomotive Engineers that the remote control operation of locomotives by means of a "belt pack" in humping operations at Symington Yard falls within the work jurisdiction protected by its collective agreement. The remote control operation of locomotives as well as other related duties and responsibilities in the automated humping operation has been assigned to a member of the United Transportation Union, which has intervened in these proceedings. The Company and the Intervener maintain that the assignment of the work in question to the members of the United Transportation Union is proper and that there has been no violation of the Brotherhood's collective agreement.

Two previous awards have issued in this matter. On November l5, 1991 the Arbitrator dismissed the preliminary objection of the Company to the effect that the grievance was not arbritable. By a further award, dated February l4, l992 the Arbitrator reserved on the request of the Brotherhood to suspend the arbitration proceedings and refer the dispute to the Canada Labour Relations Board under the terms of Section 65(1) of the **Canada Labour Code**. The Brotherhood argued that the work in question fell under its collective agreement, and that if it also falls under the collective agreement of the United Transportation Union the appropriate forum of resolution of a jurisdictional dispute in relation to the work is the Canada Labour Relations Board. In deciding to reserve on the issue, the Arbitrator commented as follows:

> At this point the Arbitrator is simply in no position to assess the merits of that submission. In the result, two outcomes are possible: the Brotherhood may fail to establish any claim to the work on the basis of the collective agreement or, secondly, it may establish such a claim. It is only if the second eventuality becomes likely that jurisdictional conflict with the United Transportation Union will have matured into a reality. For the reasons amply articulated in the jurisprudence, it is at that stage that the Arbitrator should consider referring the matter to the Canada Labour Relations Board, which has broader jurisdictional tools to resolve a labour relations conflict of that kind, in a manner which is final and binding on all parties concerned, and which avoids the anomaly of conflicting arbitral decisions made under two separate collective agreements.
>
> In the circumstances, for the foregoing reasons, the Arbitrator deems it appropriate to reserve on the request of the Brotherhood to suspend the arbitration proceedings and to refer the matter to the Canada Labour Relations Board. I am satisfied that the interests of all parties are better served if the matter proceeds to be heard on its merits. The question of the referral under Section 65(1) may then be addressed in light of the fuller articulation of the Brotherhood's case at the conclusion of the hearing. The Arbitrator will then be in a better position to make a determination with respect to the Section 65(1) issue.
>
> The matter shall therefore be docketed to be heard on its merits.

In the result, the matter has now matured to be arbitrated. Should this Office determine that there has been no violation of the collective agreement between the Company and the Brotherhood by the assignment of the work in question to a member of the United Transportation Union, the grievance must fail. Further, in that eventuality there would be no basis on which to find a jurisdictional dispute which should be referred to the Canada Labour Relations Board. It should be stressed that in approaching that question the Arbitrator takes the view that the Brotherhood could ground a claim to the work based on a right to be implied from the totality of the collective agreement and history of practice in the industry, and in particular between the Brotherhood and the Company. Given the importance of the case, it should not, in my view, be resolved on unduly narrow or technical grounds, but rather should be resolved having regard to the industrial relations realities of the case, and with due consideration to the norms and traditions which have evolved within the industry, subject, of course, to the terms of the collective agreement.

The facts which are material to resolving this grievance are not in substantial dispute. On September 22, 1989 the Company gave notice to the Brotherhood under article 89 of the collective agreement, advising of the introduction of remote controlled locomotives at Symington Hump Yard in Winnipeg, Manitoba. The introduction of

remote control locomotives was part of the Company's general hump yard improvement program. It resulted in the abolishment of seven locomotive engineer positions at that location. Prior to the introduction of the hump yard improvement program humping operations at Symington Yard utilized the services of six classifications of employees. In addition to the locomotive engineer, represented by the Brotherhood, five classifications of employees represented by the United Transportation Union were involved: Yardmaster, Yard Foreman, Yard Helper, Car Retarder Operator and Switchtender. In 1988 the first phase of the improvement program was introduced at Symington Yard, with the initiation of the computerized Process Control System (PCS) and Signal Control System (SCS). These changes resulted in the elimination of the car retarder operator. Additionally, the duties of the yard foreman and the yard helper were combined into a new classification titled "Yard Operations Employee". At its inception the duties of the yard operations employee position were as follows:

- receiving instructions from the Yardmaster on yard display monitors in connection with correct car order and handling instructions for individual cars.
- setting out "bad order" and "do not hump" cars.
- applying and releasing hand brakes as required
- coupling and uncoupling air hoses to avoid delay to trains.
- bleeding air from car air brake system, as required.
- ensuring cars are secured at all times.
- humping
- aligning drawbars, as required.
- pulling pins, i.e., releasing cars in motion.
- other related duties, as may be required.
- trimming - shove or kick cars with engine only to make room in class tracks.
- communicate instructions to locomotive engineer with respect to direction, speed, and other requirements.

It may be noted that with the first phase of computerization the belt pack was not utilized and locomotive engineers continued to operate the yard engine utilized in the humping process. Subsequently, following the notice of September 22, l989 the belt pack was introduced. Since its introduction the yard engine has been unmanned and its movements have been controlled by the yard operations employee by means of a remote controlled radio system operated through the belt pack worn by the yard operations employee. Prior to the change the yard helper would instruct the locomotive engineer with respect to the movement of the switching locomotive by means of radio communication. As a general rule, the locomotive engineer would apply the throttle and brakes to advance cars on the hump as directed by the yard foreman or yard helper. With the introduction of the belt back there is no longer a need for a person on the locomotive to manipulate the throttle and brakes to manually control the movement of the locomotive and cars.

In the Arbitrator's view, it is important to appreciate the functions performed by the microprocessor which is part of the belt pack system. The automated locomotive is equipped with a number of features, including a radio receiver and a mobile controller which receives remote commands and relays control commands to the locomotive controls by means of a mobile interface. The yard operations employee directing the locomotive from a position on the ground, by means of the belt pack, can signal the engine to advance, reverse or stop, and has a certain discretion with respect to the speed of its movement. However, he or she does not become involved in locomotive 'handling' in the traditional sense. There is, in other words, no direct control of the throttle or braking functions by the operator of the belt pack. Rather, there is a simple direction made by radio communication through the belt pack as to the direction and speed of the yard engine's movement. The amount of throttle or braking required, having regard to the weight of the cars being pushed or the grade of track, is determined automatically by the microprocessor system. The necessary brake and accelerator functions are directed by a computer program, and not by any human operator, in a process that can be loosely analogized to the functioning of a cruise control mechanism in an automobile. In the result, the skills traditionally exercised by the locomotive engineer, namely how much throttle and brake to apply to ensure the appropriate movement of the locomotive and the cars it is handling are now performed automatically by the microprocessor system. While the operator of the belt pack may generally dictate the speed and direction of the locomotive, he or she does not directly operate the throttle and brake controls.

The Brotherhood advances a number of arguments in support of its position. Most fundamentally, it relies upon the certification order issued under the Wartime Labour Relations Board on March 8, l946 granting it bargaining rights in respect of: "locomotive engineers handling steam or other classes of motive power while employed as such

in Canada by [the Company]". The Brotherhood submits that the direction of the locomotive by means of the belt pack falls within the concept of "handling motive power". In its brief it characterizes the functions of the yard operations employee as complex, noting that the belt pack controls the locomotive's direction, speed, braking, bell and horn and incorporates a reset safety control similar to that found on a locomotive, whereby the emergency brakes are applied if no signal is received from the operator within a given period of time.

The Brotherhood stresses that the yard operations employee controls the movement of the locomotive much in the same way as the locomotive engineer used to do. It notes that the employee uses the belt pack to complete the coupling of cars by making a "stretch" or reverse movement to ensure that pins are properly in place. The employee then directs the locomotive and cars to the crest of the hump where he or she controls the slowing or stopping of the movement, enabling him or her to uncouple the cars and direct them downhill to the appropriate classification track. Counsel for the Brotherhood stresses that the greatest part of the yard operations employee's time is devoted to moving trains, a function which he submits is the essence of the locomotive engineer's work. He argues that the pulling of pins, a traditional function of the yard helper, is only a minor part of the work now performed by the yard operations employee.

Counsel for the Brotherhood also draws to the Arbitrator's attention the involvement of the yard operations employee with certain parts of the on-board equipment of the locomotive, particularly at the commencement of operations. The Brotherhood notes that the employee is trained in reading and operating the automatic independent and emergency brake valves, the control and fuel pump switch, the engine run switch, the generator field switch, the headlight switch, the gauge light switch, the ground and steplight switch, the electrical control panel as well as other gauges and controls on the locomotive unit. It notes that the operator is further trained in recognizing common locomotive problems such as governor shutdowns, high voltage ground faults, faulty battery charges and overheating. Its counsel also submits that the training manual for yard operations employees is, in many respects, substantially similar to the training manual for locomotive engineers.

Counsel for the Brotherhood stresses the dictionary meaning of the verb "to handle" which appears in the certification order which established the Brotherhood's original jurisdiction. He submits that handling a locomotive includes any aspect of managing, controlling or directing its movement. He further refers the Arbitrator to a number of prior awards of this Office which have concerned the assignment of work relating to various forms of locomotive operations to the members of the Brotherhood: **CROA 33, 470, 1090**.

It is common ground that there is no specific provision within the Brotherhood's collective agreement which gives exclusive jurisdiction over the operation of locomotives to members of the Brotherhood. In this regard, it may be noted that members of other trade unions, including hostlers and shop craft employees, have for many years been assigned to operate locomotives in other than yard or road service. Counsel for the Brotherhood submits, however, that past practice must weigh heavily in determining whether a given form of assignment is bargaining unit work. Citing **CROA 1726** in support of the Brotherhood's position, counsel notes that for more than fifty years locomotive engineers have controlled and directed the operation of locomotives in the hump yard at Winnipeg. By way of comparable authority, counsel refers the Arbitrator to the decision of the Special Board of Adjustment, No. 907 (December 11, 1981) in the **Brotherhood of Locomotive Engineers and the International Longshoremen's Association**. In that case, it was found that the use of remote control locomotives at a new unloading facility for ore at the docks in Toledo, Ohio was the work of train and engine crews, including locomotive engineers. Counsel submits that the actions of the Company in assigning the belt pack operation to persons other than locomotive engineers amounts to assigning bargaining unit work to employees outside the unit in a manner that threatens the integrity of the unit. In this regard he refers the Arbitrator to the following cases: **re Mountain King Productions, Inc. and International Alliance of Stage Employees, Local 891**, (1988), 3 LAC (4th) 286 (Greyell); **re Orenda Ltd. and International Association of Machinists, Lodge 1922**, (1972), 1 LAC (2nd) 72 (Lysyk); **re United Steel Workers (Local 1817) and Fittings Ltd.** (1969) 20 LAC 249 (Weatherill).

The Company denies any violation of the collective agreement, and submits that there is nothing in its actions which derogates from the right of the members of the Brotherhood to perform bargaining unit work. It argues, firstly, that the operation of the belt pack is not work which falls within the scope of the Brotherhood's bargaining unit. Further, it submits that the humping process which is now automated is so simplified that there is no need for a locomotive engineer to be involved in the operation. Finally, it stresses that the collective agreement between the Company and the Brotherhood contains no express or implied provision which would give exclusive jurisdiction over the work in question to the Brotherhood.

Counsel for the Company states that there is nothing unusual in the introduction of the technology of automation resulting in the elimination of traditional positions in the railway industry. He points to a long history of such changes, commencing with the introduction of diesel locomotives and the removal of firemen helpers from duties on a locomotive. He further points to the introduction of radios, hot box detectors, automated signaling and switching and end of train units in substitution for cabooses as further examples of technological changes which have led to the disappearance of previously performed jobs. In citing those examples counsel for the Company stresses the importance of technological advance in the furtherance of productivity in an increasingly competitive industry. As a practical matter, counsel also argues the mitigating effect of the fact that the members of the Brotherhood who might be adversely affected by the changes which are the subject of this grievance all have seniority in the ranks of the United Transportation Union. Members of the United Transportation Union who are adversely affected by the introduction of the hump yard improvement program do not, as a general rule, have the same ability to take shelter in work available within another bargaining unit, while locomotive engineers may exercise their seniority to seek positions as trainmen, conductors or yard operations employees in the bargaining unit of the United Transportation Union. Counsel stresses that in fact no locomotive engineers were faced with unemployment as a result in the changes implemented at Symington Yard.

As its first position, the Company maintains that the microprocessor, and not the operator, has taken over the functions of the locomotive engineer. The train handling skills of the engineer, the manipulation of the throttle and brakes as required, subject to the verbal instructions of the yard helper or the yard foreman, have been removed by the introduction of the new technology. Further, the Company stresses that the great majority of the duties assigned to the yard operations employee are duties unrelated to the remote control operation of the yard locomotive. By its estimate ninety to ninety-five percent of the yard operations employee's time is devoted to what were previously the core duties of the yard helper and yard foreman, including receiving instructions from the yardmaster, setting out cars, applying and releasing hand brakes, coupling and uncoupling air hoses, bleeding air from the cars' air brake systems as required, ensuring the security of cars, aligning drawbars, pulling pins and all other duties traditionally related to the humping process. In the Company's submission the additional responsibility for the operation of the belt pack does not alter the core functions of the yard operations employee's job, which are preponderantly within the functions traditionally performed by employees within the bargaining unit of the United Transportation Union. Conversely, the Company stresses that the core functions of the locomotive engineer, such as monitoring pressures, braking and applying appropriate throttle levels are now performed automatically by the microprocessor.

In support of its subsidiary positions, that the classification of locomotive engineers is no longer required and that, in any event, there is no provision to protect the work jurisdiction in question within the collective agreement, counsel for the Company refers the Arbitrator to a number of prior arbrital decisions: **re Boise Cascade Ltd. and the Canadian Paper Workers Union** (1990) 17 LAC (4th) 347 (Palmer) **re International Association of Machinists, Lodge 54 and Aluminum Company of Canada Ltd.** (1964) 15 LAC 72 (Anderson); **re United Transportation Union and Canadian National Railways**, an unreported decision of the instant arbitrator dated May 2, 1989; **CROA 1160**; **re Canteen of Canada Ltd. and Retail Wholesale and Department Store Union, Local 414**, (1984) 12 LAC (3d) 289 (Kates); **re Western Pulp Inc. and Pulp Paper and Wood Workers of Canada, Local 3**, (1984), 17 LAC (3d) 228 (MacIntyre).

The Company relies heavily on the fact that the collective agreement contains no provisions which expressly give locomotive engineers work entitlement or work ownership in the sense traditionally found in many collective agreements. It notes that notwithstanding demands made at the bargaining table in the past, no recognition or scope clause has been incorporated into the collective agreement which would grant work ownership to the Brotherhood. Its counsel further notes that hostlers, who operate and move locomotives within yard limits in certain circumstances have, for many years, operated locomotives while employed in at least three other bargaining units.

In the Arbitrator's view much of the thrust of the Company's position is captured in the following passage from the award of Judge Anderson in the **Aluminum Company of Canada Case** at pp. 74-76 where the following comments appear:

> One of the questions that this arbitration raises is how far work jurisdiction follows a given operation after equipment has been redesigned or remodeled and after the operation has been simplified so that it no longer requires the same skill and tools as formerly required to be used. If there was in the case before this board a removal of work involving certain craft skills from one craft to a production worker it might very well be implied that there was such a departure from past

> practice that it amounts to a violation of an implied understanding between the parties, but if a change in technology calls for different skills, tools or processes or a de-skilling of the operation, the right to assign workers to work still rests with the company. The fact that changes in technology design or rearrangement of a machine have lessened work for a given craft does not mean that there has been a contract violation. Article 43 in management's rights in this contract specifically gives to management the right to introduce technical improvements and methods of operation, and under the general management's rights clause this surely includes management's right to allocate and reassign jobs in the light of technological changes.
>
> It seems to the board that management has the right, when exercised in good faith, to transfer duties from one classification to another, especially when the work has been simplified by reason of technological improvement, and that to do so does not mean that the company is in violation of the agreement. Jobs, like technological processes and changes in design, cannot remain static. Simplification of jobs has been going on in industry a long time and must continue in the interest of efficiency and to enable companies to remain competitive. ...
>
> It seems to your board that in the absence of a clause in the contract prohibiting it, that the company has the right to decide that a job, which originally required the skills possessed by members of a craft union and has become routine and repetitive and simplified by reason of new design and equipment and this from the management's point of view requiring less skill so that it is more nearly allied to ordinary work of a production worker, should be assigned to the production workers.

The Company further referred the Arbitrator to an award between **BC Rail and the Teamsters' Local Union No. 31** (Carshops Unloading Arbitration) an unreported award of Arbitrator Hope dated October 3, 1989; **re ACS Flexible Inc. and Graphic Communications International Union, Local 500M** (1991), 13 LAC (4th) 66 (Mitchnick); **CP Rail and the United Transportation Union** (Grievance re Revelstoke and Golden Yardmasters, an unreported award of the instant Arbitrator dated May 8, 1989 as well as **CROA 322, 337, 1655** and **1803**.

Counsel for the Intervener, the United Transportation Union, expresses support for a number of the propositions advanced by the Company and makes a number of additional submissions. He emphasizes that ninety percent of the work performed by the yard operations employee involves tasks traditionally performed by members of the United Transportation Union. He reiterates the submission of the Company that it is not the operator, but rather the automated technology which has taken over the core functions of the locomotive engineer. As counsel for the Intervener puts it, the yard operations employee now communicates directly with the engine by way of the belt pack, rather than having his or her verbal instructions relayed to the engine through the locomotive engineer by radio, as previously was done.

The Intervener submits that if the Brotherhood should establish a *prima facie* case to work jurisdiction over the operation of the belt pack, the matter should be referred to the Canada Labour Relations Board for resolution, as there would then be a conflict between the jurisdictional provisions of the collective agreements of the two Unions. Its counsel submits, however, that no *prima facie* claim is disclosed in the material before the Arbitrator. In this regard he notes that there is no work jurisdiction clause in the collective agreement of the Brotherhood of Locomotive Engineers, nor any reference to the operation of the belt pack or any similar device.

Counsel for the Intervener submits that there is a clear *prima facie* case that the work in question belongs to the bargaining unit of the United Transportation Union. Noting that the Intervener holds a number of collective agreements with respect to running trades employees working in various classifications in the Company's train yards across Canada, including car retarder operators, switchtenders, yard foremen and yard helpers, as well as engine hostlers, counsel submits that there is ample scope for the work in question to fall within the traditional bargaining unit of the Intervener.

Counsel for the Intervener further refers the Arbitrator to a number of arbitration awards which have dealt with similar issues in the United States. Among them is **Kennecott Copper Corporation, Chino Mines Division and the United Transportation Union**, an unreported decision of Arbitrator Gorsuch, dated June 24, 1969. That case, not unlike the case at hand, involved the introduction of an automated locomotive in the surface operations of a mine. In that case, the United Transportation Union represented the locomotive engineers previously assigned to operate mine locomotives. It protested the removal of locomotive engineers for the operation of a remote control

"black box", not unlike the belt pack in the case in hand, by an employee from another union, the Brotherhood of Railway Trainmen. In that case the arbitrator sustained the Company's action and found that the assignment of the work to the trainmen was not a violation of the collective agreement governing locomotive engineers. Similarly, in **U.S. Steel Corporation**, 76 L.R.R.M. 1064 (1970) the National Labour Relations Board found that the assignment of remote control locomotive operations to conductors represented by the United Association of Iron, Steel and Mine Workers was not a violation of the collective agreement of the United Transportation Union, which held the bargaining rights for locomotive engineers employed by the steel company.

The Intervener further cites the decision of Arbitrator Eigenbrod, an unreported award dated September 15, 1972 between the **United States Steel Corporation (Fairfield Works) and the United Transportation Union, Local 1484 and United Steelworkers of America, District 36**. In that case it was found that the classification of "train operators" established to operate remote control locomotives, who were part of the Steelworkers bargaining unit pursuant to the decision of the National Labour Relations Board referred to above, could operate locomotives manually when the automated system broke down, without violating the collective agreement of the United Transportation Union which represented locomotive engineers, firemen and hostlers. Additionally the Intervener draws to the Arbitrator's attention a number of agreements negotiated within American railways, whereby automated locomotive operations have been assigned to yard employees in switching operations. These include the Louisville and Nashville Railroad Company, the River Terminal Railway Company of Cleveland, Ohio (industrial switching) the Cuyahoga Valley Railway Company of Cleveland (industrial switching) and the South Buffalo Railway Company (industrial switching). Counsel for the Intervener further notes that the United Transportation Union holds bargaining rights for employees who operate remote control locomotives on the property of the Algoma Steel Corporation in Sault Ste. Marie, Ontario. He argues that the industry practice, as reflected in the examples cited, as well as prior arbitration decisions and labour board decisions, fully support the Company's actions in assigning the belt pack operation to yard service employees represented by the United Transportation Union.

I turn to consider the merits of the parties' submissions. In doing so it should, I think, be emphasized that the case at hand does not involve a situation in which one union can said to be a "winner" over another. As noted above, manual humping operations previously involved six employees, five of whom were represented by the United Transportation Union. With the automated system only two employees remain. In the result, one position has been lost to the Brotherhood of Locomotive Engineers and three have been lost to the United Transportation Union. Moreover, the newly created position of yard operations employee is one which may be available to negatively affected locomotive engineers by the exercise of their vested seniority in the bargaining unit of the United Transportation Union. What the case discloses is the natural evolution of railway operations in a yard setting by the introduction of more advanced technology. No one disputes the right of the Company to maximize productivity and efficiency by the introduction of remote control switching and automated locomotive operations in its hump yards. The narrow issue in the case at hand is whether the assignment of belt pack operations to the new classification of yard operations employee, a position within the bargaining unit of the United Transportation Union, violates the collective agreement between the Company and the Brotherhood of Locomotive Engineers.

As indicated above, there is no express language in the Brotherhood's collective agreement that would confer to that union exclusive jurisdiction in respect of the remote control operation of locomotives in yard service. The agreement is replete with provisions which deal with the rights, obligations and benefits which accrue to locomotive engineers who are employed to operate locomotives in yard service, and indeed in other forms of service, as assigned. It is fair to say, of course, that, in their origins, the provisions of the collective agreement were not negotiated in contemplation of the introduction of automated locomotives.

At the outset, it appears to the Arbitrator that it is difficult to ground a jurisdictional claim on behalf of the Brotherhood in the certificate issued by the Wartime Labour Relations Board on March 8, 1946. That document entitles the Brotherhood to act as exclusive bargaining agent for

> "locomotive engineers handling steam and other classes of motive power ..."

The foregoing designation does not, on its face, speak to exclusive jurisdiction in respect of locomotive operations, but rather to the representation of persons who work as locomotive engineers handling motive power.

Nor does the history of the industry, or of practice within the Company, support the Brotherhood's claim of exclusive jurisdiction over locomotive operations. As noted above, it is not disputed that the Brotherhood has not held exclusive bargaining rights in respect of all locomotive movements. In certain yard and shop settings, hostlers,

represented by several trade unions, have for decades manually operated locomotives. That reality tends to undermine the submission of the Brotherhood to the effect that its collective agreement implicitly confers a degree of exclusive work jurisdiction in favour of the Brotherhood in respect of locomotive operations. That is not, of course, to say that the Company can disregard the Brotherhood's collective agreement with impunity in making assignments of work in road and yard service which are clearly contemplated to fall within the terms of the collective agreement of the Brotherhood of Locomotive Engineers.

In the Arbitrator's view this case must, to a great degree, turn on its own particular facts. Firstly, the Arbitrator is impressed with the degree to which the newly established position of yard operations employee encompasses the duties and responsibilities previously assigned to the yard foreman and yard helper. The basic function of identifying and marshaling cars, applying and releasing hand brakes, manipulating air hoses, aligning drawbars and pulling pins remains substantially unchanged and can fairly be said to occupy the preponderance of the working time of the yard operations employee. By any account, in my view, the core functions of the yard operations employee's job are those which were traditionally performed by the yard foreman and yard helper prior to the introduction of the automated humping process.

The above finding would not, of itself, be an answer to the grievance if, in fact, any significant part of the assignment performed by the yard operations employee could be said to be work falling within the exclusive jurisdiction of locomotive engineers. What, then, do the facts reveal in that regard? The evidence raises substantial doubt with respect to the assertion of the Brotherhood that the yard operations employee is "handling" a locomotive in the sense that a locomotive might be handled in manual operations by a locomotive engineer. The manual operation of a locomotive requires a high degree of skill and training, including the ability to read gauges and manipulate throttle and braking functions as required by changing circumstances and conditions. Under the automated process, locomotive handling is not performed in any meaningful sense by the operator of the belt pack. For the reasons touched upon above, it is the microprocessor which automatically makes the necessary adjustments to ensure the proper operation of the locomotive. While it is true that the yard operations employee can determine the speed and direction of the train by means of the belt pack, much as she or he previously did by radio communication with the locomotive engineer, it cannot be said that the yard operations employee is handling or operating the locomotive with anything approaching the degree of control and refinement previously exercised by a locomotive engineer. In my view it is more accurate to say that the locomotive engineer's position has been abolished and that that employee has been replaced by a microprocessor and interface system which automatically performs the functions previously assigned to the locomotive engineer. At most, the job of moving the locomotive has, to borrow Judge Anderson's phrase, been de-skilled to the point where the locomotive engineer's function has been eliminated.

The foregoing realization is, I think correctly, reflected in the reasoning of Arbitrator Gorsuch in the **Kennecott Copper Corporation award**, cited above. In supporting the assignment of the remote control operation of a locomotive to a yard service employee, and finding that it did not violate the collective agreement governing locomotive engineers, the Arbitrator reasoned, in part, at pp. l6 - 17 as follows:

> The true key to the undersigned's reasoning is to be found in his belief that with the institution of the remote control system, the job classification of engineer was abolished. To state this finding another way, the Arbitrator believes that the remote control system constitutes true automation, the operation of which terminates the traditional job of the engineer. The utilization of the "black box" is not merely a technological change in the normal sense of the phrase. Certainly, as the Union contended,, the work involved of causing the locomotive to be operated still remained under the remote control system. Nevertheless, the Arbitrator does believe that the physical job of the engineer was thereby terminated. ...
>
> The operator of the remote control performs his duties in such a manner that no engineer apparently is needed to be present in the cab of the locomotive to operate the traditional manual levers, etc. The new job of operating the "black box" is not a similar job to the job previously performed by the engineer. Whereas the parties' collective bargaining agreement indicates the skilled nature of the job of the engineer, and therefore sets forth certain training and qualifying prerequisites for it, the testimony brought forth at the hearing shows that the operation of the "black box" can be performed by one after only a short period of training.

In the Arbitrator's view the foregoing remarks are apposite to the facts at hand. The yard operations employee does not, in my view, truly operate or handle the locomotive. He or she does not perform the functions traditionally

assigned to a locomotive engineer. Those functions are automated and are now performed by the microprocessor unit upon commands initiated by the yard operations employee through the belt pack. While the analogy may not be perfect, it seems to the Arbitrator that the yard operations employee using the belt pack is no more responsible for the work of a locomotive engineer than a person who now makes a directly dialed long distance call on a digital telephone can be said to be performing the tasks of a long distance telephone operator. It is in fact an automated system which has taken over the core functions of the job which was abolished.

For all of the foregoing reasons the Arbitrator is satisfied that the facts presented do not disclose a violation of the Brotherhood's collective agreement. The duties and responsibilities of the yard operations employee are, for the most part, the same as were performed by the yard foreman and yard helper under manual humping operations. The fact that the yard operations employee may signal the locomotive to perform certain movements at prescribed speeds by means of the belt pack, rather than verbally by radio as was done previously, does not alter the essential nature of the job being performed. Most significantly, it does not involve taking over the handling or operation of a locomotive or the functions previously performed by the locomotive engineer. The knowledge of the locomotive and its component parts which the yard operations employee has is clearly incidental to the core functions which he or she performs. It is marginal and is not, in essence, substantially different from the knowledge or tasks of a hostler in a yard or shop. With respect to those elements of the job, the Brotherhood could not assert more than a shared jurisdiction.

On a review of the evidence, and of the terms of the Brotherhood's collective agreement, the Arbitrator cannot find that the Brotherhood has established a *prima facie* case with respect to the alleged violation of its collective agreement. In my view there is no basis upon which a tribunal, applying normal canons of construction and principles of evidence in relation to grievances could find a violation of any work jurisdiction belonging to the Brotherhood. For that reason I am also satisfied that this is not a case where this dispute should be referred to the Canada Labour Relations Board.

For all of the foregoing reasons the grievance must be dismissed.

September 17, 1993

(sgd.) MICHEL G. PICHER
ARBITRATOR

beltpack