CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2264

Heard at Montreal, Wednesday, 15 July 1992

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim on behalf of Track Maintenance Foreman W.C. Joyce and Track Maintainer P.V. O'Neil for eight hours each for fire patrol performed by Assistant Track Supervisor B. Troy on May 5, 1990.

JOINT STATEMENT OF ISSUE:

The Brotherhood contends that: **1)** That the Company violated Article 34.3 and Appendix XV of Agreement 10.1 by permitting Assistant Track Supervisor Troy to perform work that is currently and traditionally performed by employees in the BMWE bargaining unit: **2)** That, in the alternative, the Company's argument that the BMWE membership has no proprietary interest in fire patrol yet must perform such work when called upon to do so is invalid in light of the fact that the collective agreement has no provision that creates such a position: **3)** That, if, however, the Company's argument as set out in paragraph 2 is found to be correct, a new position or classification was created and the Company violated the collective agreement by not fixing compensation for the position in conformity with the provisions of article 27.1 of agreement 10.1: **4)** That, if the Company's argument as set out in paragraph 2 is found to be correct, the Company violated article 15 of agreement 10.1 and article 3 of agreement 10.8 by not properly bulletining the positions in question.

The Brotherhood requests: That the grievors be compensated for eight hours each at their respective applicable rates.

The Company denies the Brotherhood's contentions and declines payment.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) R. A. BOWDEN	**(SGD.) M. M. BOYLE**
SYSTEM FEDERATION GENERAL CHAIRMAN	**for: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

D. C. St. Cyr	- Manager, Labour Relations, Montreal
R. Lecavalier	- Counsel, Montreal
D. C. Gignac	- System Labour Relations Officer, Montreal
M. S. Hughes	- System Labour Relations Officer, Montreal
N. K. Colasimone	- General Supervisor, Repair Facilities, Capreol

And on behalf of the Brotherhood:

D. A. Brown	- General Counsel, Ottawa
R. A. Bowden	- System Federation General Chairman, Ottawa
P. Davidson	- Counsel, Ottawa
J. Rioux	- General Chairman, Grimsby
A. Trudel	- General Chairman, Chomedy

AWARD OF THE ARBITRATOR

On July 18, 1992 this Office issued an award in this matter dismissing the grievance. That award was quashed by a decision of the Superior Court of Quebec dated January 5, 1993. The Court found that the Arbitrator failed to exercise his jurisdiction in respect of the issues raised by the grievance, nullified the award and directed that it be returned to the Arbitrator for a determination of each question raised in the Joint Statement of Issue. This award is, therefore, in compliance with that direction of the Court.

The issues raised in the Joint Statement of Issue will be dealt with in turn. The first contention is as follows:

> **1)** That the Company violated Article 34.3 and Appendix XV of Agreement 10.1 by permitting Assistant Track Supervisor Troy to perform work that is currently and traditionally performed by employees in the BMWE bargaining unit:

Article 34.3 of the collective agreement provides as follows:

> **34.3** 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.

In the case at hand there was no emergency or temporary urgency. It is agreed that the person assigned to do the fire patrol is an employee outside of the maintenance of way service. The only issue to be resolved is whether the work so assigned "properly belongs to the maintenance of way department". In other words, to establish a violation of article 34.3 of the collective agreement the Brotherhood must establish work ownership in respect of the assignment in question.

The language of article 34.3 has been interpreted and applied in a number of prior awards of this Office. Those awards draw a clear distinction between work which, by established practice, is performed exclusively by the employees of the maintenance of way department and work which has been performed by employees within the department as well as employees outside the department. The latter circumstance is generally referred as "shared jurisdiction". Where shared jurisdiction is established in practice, the Brotherhood cannot assert work ownership.

That was the conclusion of this Office in **CROA 1316**. That case concerned a claim by the Brotherhood against the Company that the work ownership provisions of article 34.3 (then article 33.3) of the collective agreement were violated where certain snow removal work was assigned to members of another union outside the maintenance of way department. This Office dismissed the grievance, reasoning, in part, as follows:

> The principle issue in this case is whether the work involved in the removal of snow at the Taschereau Yard Auto compound is bargaining unit work that properly belongs to the aggrieved trade union's bargaining unit. There is no dispute that the work was assigned to Tractor Operator G. Boissoneault, a CBRT&GW employee. The relevant provision of the collective agreement reads as follows:
>
> > **33.3** 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 parties appeared to indicate that both Maintenance of Way and CBRT&GW employees have a history of engaging in snow removal services at the company's yards. The trade union claimed that such work was properly Maintenance of Way Department work in circumstances where the snow is removed by use of a tractor. The company, on the other hand provided documentary proof showing that CBRT&GW employees have used tractors in the proper performance of work under that union's jurisdiction. In other words, it was clearly established that Maintenance of Way employees do not hold an exclusive monopoly on the use of tractors that are necessary in the discharge of tasks that properly belong to that union's work jurisdiction.
>
> ...
>
> As a result because there appears to be a shared jurisdiction by employees under both trade union agreements to discharge the same work I am precluded from holding that the said work properly belongs, for purposes of article 33.3, to the Maintenance of Way Department.
>
> The grievance is accordingly denied.

It is true that a board of arbitration is not bound by a doctrine of *stare decisis*. It can, in principle, depart from the interpretation rendered by a prior board of arbitration, however it should not lightly do so. This Office has long applied a generally accepted principle which holds that where a board of arbitration has rendered an interpretation of a collective agreement which is binding upon the parties, and they have since returned to the bargaining table and renewed their collective agreement without any change in its language, absent clear evidence to the contrary, the previously arbitrated interpretation should be taken as compelling evidence of their intention as to the meaning of that particular provision of their collective agreement. In the case at hand there has been renewal of article 34.3 since the award of this Office in **CROA 1316**, without any change whatever to the language of that provision. In the circumstances, I am satisfied that the parties accepted and intended that where there is shared jurisdiction in respect of a particular kind of work assignment, the union cannot assert that such work belongs to the maintenance of way department within the meaning of article 34.3.

The maintenance of way department is national in scope. It is not limited to one location or one region and neither is article 34.3 of the collective agreement. The evidence before the Arbitrator establishes, beyond controversy, that in a number of locations within the maintenance of way department fire patrols have been performed and continue to be performed by employees outside of the maintenance of way service. Within the maintenance of way department, fire patrol assignments have been performed both by fire rangers, who belong to no bargaining unit, as well as by assistant track supervisors, on the St., Lawrence Region and the Great Lakes Region respectively. In the circumstances the Arbitrator must find that the fire patrol work is work of shared jurisdiction, and is not work which properly belongs to the maintenance of way department within the contemplation of article 34.3 of the collective agreement (*see, **CROA 612, 1379, 1655** and **1803***). Nor can the Arbitrator accept the position implicitly advanced by the Brotherhood that the concept of the maintenance of way department within article 34.3 was intended to be confined to a particular region. That issue was dealt with in **CROA 1655, 1803** and **2026**, where it was found that for the purposes of work ownership the practices within the department must be examined on a national basis.

For the foregoing reasons the Arbitrator cannot find that the fire patrol assignment is work which properly belongs to the maintenance of way department within the contemplation of article 34.3 of the collective agreement, and no violation of that provision is disclosed.

Appendix XV of agreement 10.1 reads as follows:

> During national negotiations your Union expressed concern about non-schedule supervisors performing work normally done by employees covered by collective agreements between

> Canadian National Railway Company and the Brotherhood of Maintenance of Way Employees.
>
> This will confirm the opinion expressed by the Company's representative that the Main function of such supervisors should be to direct the work force and not engage, normally, in work currently or traditionally performed by employees in the bargaining unit.
>
> It is understood, of course, there may be instances where, for various reasons, supervisors will find it necessary to become so engaged for brief periods. However, such instances should be kept to a minimum.
>
> This matter will be brought to the attention of our operating officers.

Under the terms of the foregoing letter of understanding, the issue becomes whether the fire patrol can be said to be "... work currently or traditionally performed by employees in the bargaining unit."

The language of that provision is substantially similar to the language which protects bargaining unit work against contracting out, both in the instant collective agreement and in others within the railway industry. That language finds its genesis in the result of an arbitration of the Honourable Emmett M. Hall, dated December 9, 1974, concerning the contracting out of work. It provides that "... work presently and normally performed by ..." bargaining unit employees is not to be contracted out save in the circumstances provided, in accordance with certain defined exceptions. It would appear that the phrase "work currently or traditionally performed by employees in the bargaining unit" appearing in Appendix XV of the instant collective agreement is also found elsewhere in the industry.

The Arbitrator has difficulty with the submission of the Company that the work protected by Appendix XV is, in effect, only work which belongs exclusively to the bargaining unit. To so argue is to assert that the Brotherhood gained nothing by its agreement to Appendix XV which it did not already have by the operation of article 34.3 of the collective agreement.

The appendix would, I think, apply to prohibit, for example, the assignment of work which is regularly bulletined to bargaining unit employees to be done by supervisors even where that work might also be performed by employees of another bargaining unit. The tenor of Appendix XV would, I think, operate to prevent a supervisor from taking over the tools and work of an employee during his meal or rest break, other than in a circumstance of genuine necessity.

The material before the Arbitrator establishes, however, that track patrol is a normal assignment of an assistant track supervisor, such as Mr. Troy. When the need arose for a special fire patrol on May 5, 1990, which was a rest day for the grievors, the Company, in effect, deemed it appropriate to couple fire patrol inspection with track inspection duties for Mr. Troy on the day in question. In the result, the fire inspection which he performed, and which does not appear to have been in relation to any bulletined assignment, was incidental to his normal duties of track patrol, which are recognized as work normally done by an assistant track supervisor within the terms of a letter of understanding between the parties dated September 18, 1990. The case does not disclose the assignment of bulletined bargaining unit work to a member of supervision. Rather, work of a kind traditionally assigned on a shared basis to assistant track supervisors was assigned to Mr. Troy as incidental to his track patrol responsibilities. In the result, no violation of Appendix XV is disclosed.

I turn to deal with the next issue appearing in the Joint Statement of Issue. It is as follows:

> **2)** That, in the alternative, the Company's argument that the BMWE membership has no proprietary interest in fire patrol yet must perform such work when called upon to do so is invalid in light of the fact that the collective agreement has no provision that creates such a position:

The argument of the Brotherhood with respect to this issue fails to appreciate the differences between a position and an assignment. The material discloses that the collective agreement provides for the positions of

track maintenance foreman and track maintainer, which positions were held by the grievors. Within the prerogatives of the Company, a number of types of assignment can be made to employees in those classifications. There is no requirement in the collective agreement whereby the Company must establish a "position" for each and every assignment made to employees in the classifications contained therein. In the result, the fact that the collective agreement contains no reference to a position of "fire patrol" is neither here nor there for the purposes of the grievance at hand. The work in question was work which has, without protest, been assigned by bulletin to Track Maintenance Foremen and Track Maintainers for a number of years. There is clearly no obligation upon the Company to establish a separate position or classification in respect of that assignment.

The next issue raised in the Joint Statement of Issue is as follows:

> **3)** That, if, however, the Company's argument as set out in paragraph 2 is found to be correct, a new position or classification was created and the Company violated the collective agreement by not fixing compensation for the position in conformity with the provisions of article 27.1 of agreement 10.1:

Article 27.1 of the collective agreement provides as follows:

> **27.1** When additional positions or classifications are created, compensation shall be fixed in conformity with agreed rates for similar positions or by agreement between System Federation General Chairman and officers of the Company.

There is nothing in the material before the Arbitrator to establish that the Company has created any additional position or classification within the contemplation of the above-quoted article. As related above, fire patrol has long been considered an assignment which may be made to employees who hold existing classifications within the collective agreement. It is also an assignment occasionally performed by persons outside the bargaining unit, including assistant track supervisors in the Atlantic Region. The unchallenged evidence before the Arbitrator is that it is not unknown for assistant track supervisors in the Atlantic Region to perform fire patrol as part of their normal track inspection patrol. As noted above, on the Great Lakes Region fire patrol is normally performed by assistant track supervisors. In these circumstances there can be no question of a new position or classification being created, nor of any violation of article 27.1 of the collective agreement.

Lastly, the Brotherhood puts forward the following contention:

> **4)** That, if the Company's argument as set out in paragraph 2 is found to be correct, the Company violated article 15 of agreement 10.1 and article 3 of agreement 10.8 by not properly bulletining the positions in question.

This contention must be answered in the same manner as the second contention dealt with above. Article 15 of the collective agreement deals with the bulletining and filling of positions, as does article 3 of collective agreement 10.8 which specifically covers track employees. There is nothing in those provisions which would, in the circumstances disclosed in relation to the special fire patrol conducted on May 5, 1990, compel the Company to declare a vacancy and bulletin and fill the assignment in the manner provided in those articles. The provisions in question govern the procedures to be followed by the Company when it decides to bulletin a position, and, within article 3 of collective agreement 10.8, compels the bulletining of vacancies and new positions within a department on the first and fifteenth of each month, or as otherwise agreed. For the reasons related above, the case at hand does not involve the establishing of a position, but the filling of a one day assignment by persons already holding positions. While the assignment could have been given to the grievors in their capacity of Track Maintenance Foreman and Track Maintainer, it could also, for the reasons already expressed, be given to Assistant Track Supervisor Troy as a task incidental to his track inspection duties. In the result, there has been no violation of article 15 of collective agreement 10.8 or of article 3 of collective agreement 10.8, as the Company was under no obligation to bulletin the assignment of that day.

In the result, none of the four contentions advanced by the Brotherhood, and reflected in the Joint Statement of Issue, can be sustained by the Arbitrator. For these reasons the grievance must be dismissed.

June 11, 1993

MICHEL G. PICHER
ARBITRATOR