CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2284

Heard at Montreal, Tuesday, 13 October 1992

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Removal of Company owned boarding cars used as accommodation for Grade I Maintainers at the West Toronto Work Equipment Repair Shop.

BROTHERHOOD'S STATEMENT OF ISSUE:

A bulletin was issued April 1, 1991 advising all employees that effective June 1, 1991, the boarding cars presently at the West Toronto Work Equipment Shop will be removed from the premises and that employees currently residing in these cars must vacate them by June 1, 1991.

The Union contends that: **1.)** It has been a long ongoing practice to provide accommodation for employees and supervisors alike, who required the accommodation while employed at the West Toronto Shop. **2.)** Past bulletins have advertised for Grade I Maintainers at West Toronto with accommodation provided. **3.)** The Company unjustly treated the employees by having the boarding cars removed. **4.)** The Company has violated Section 21.8 of Wage Agreement No. 41, by removing the employees regular boarding outfits. **5.)** The removal of the boarding cars is an operational change having adverse effects on the employees and a notice in accordance with Article 8.1 of the Job Security Agreement should have been served, if it is the Company's desire to have the cars removed.

The Union requests that: **1.)** The Company reimburse any employee incurring expenses for accommodation subsequent to May 31, 991 who would normally reside in the cars. **2.)** The Company compensate any employee who could not afford to work their position in the Shop, due to the boarding cars being removed and the unrealistic cost of housing and accommodation in the Toronto area and for all lost wages they incurred.

The Company denies the Union's contentions and declines the Union's requests.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. T. Cooke	– Labour Relations Officer, Montreal
R. M. Smith	– Solicitor, Legal Services, Montreal
C. Bartley	– Labour Relations Officer, IFS, Toronto
V. L. Rock	– Manager, Work Equipment, IFS, West Toronto
S. D. Moore	– Supervisor, Work Equipment Shop, West Toronto

G. A. Allison – Supervisor, Field Maintenance, West Toronto

And on behalf of the Brotherhood:

J. J. Kruk – System Federation General Chairman, Ottawa
D. McCracken – Federation General Chairman, Ottawa
P. Davidson – Counsel, Ottawa

AWARD OF THE ARBITRATOR

It is common ground that prior to the bulletin of April 1, 1991 the Company allowed employees who were permanently assigned to the Toronto Work Equipment Shop to occupy boarding cars at that location during the summer months. While additional boarding cars were brought to the Work Equipment Shop to accommodate larger numbers of employees during the winter, when the overhaul of equipment is performed, for many years a number of boarding cars were kept on the premises and made available through the summer to employees permanently assigned to the West Toronto Work Equipment Shop.

The Brotherhood argues a number of positions. It submits that the employees adversely affected by the change, some of whom have been required to surrender their employment at Toronto, have been unjustly dealt with and are therefore entitled to redress through the grievance and arbitration provisions of the collective agreement. It further submits that there has been a violation of Section 21.8 of Wage Agreement No. 41. It also argues that the Company is estopped from changing the long standing practice of providing boarding car accommodation to the employees affected. Lastly, it submits that the removal of the boarding cars constitutes an operational change which requires a notice in compliance with article 8.1 of the Job Security Agreement.

The Company submits that the collective agreement contains no provision which guarantees boarding car accommodation to permanent employees at the West Toronto Work Equipment Shop, and that the practice in effect prior to April 1, 1991 was in the nature of a privilege extended on an *ex gratia* basis, which the employer was at liberty to withdraw for valid business purposes. Its representative stresses that the reason for having boarding car accommodation at that location is, historically, to accommodate employees temporarily assigned to the shop during the winter overhaul season, and that the boarding cars were never intended for the purpose of accommodating permanent employees assigned to the shop on a year-round basis. In this regard he submits that, with the possible exception of one, the job bulletins relating to permanent positions at the West Toronto Work Equipment Shop have not indicated that accommodation would be provided. By contrast, the employer's representative stresses that job bulletins for temporary winter positions have indicated that boarding car accommodation would be available. On the whole, he argues that there was no legal obligation undertaken by the Company, no representations made by it to employees that would ground an estoppel and nothing in the action taken by the Company which constitutes a violation of Section 21.8 of the wage agreement. The Company further argues that the action taken does not constitute an operational change within the contemplation of article 8.1 of the Job Security Agreement.

The Arbitrator has some difficulty with the initial submission of the Brotherhood, namely that the grievance is arbitrable solely on the basis that the Company has "unjustly treated" the employees who were affected by its action. Particularly, the Arbitrator cannot agree with the submission of the Brotherhood that the decision of the Quebec Superior Court dated February 13, 1992 in a case involving the Brotherhood, this Office and Canadian National Railways is to be taken as settled law that any employee who feels that he or she has been unjustly dealt with is entitled to the full procedures of the grievance and arbitration provisions of the collective agreement. Firstly, the Court's decision concerned a different employer and a different collective agreement. Secondly, the decision of the Court was not based on any discussion of the well-established practice in the railway industry and the jurisprudence with respect to the provisions of the collective agreement relating to appeals by employees who feel that they have been unjustly dealt with. There was no reference to those provisions in the joint statement of issue, or in the brief presented by the Brotherhood before the Arbitrator in **CROA 2187**. Perhaps most significantly, the Court did not address article 19.1 of the collective agreement in that case, which is identical to article 19.1 of the agreement at hand.

Section 18 of the Collective Agreement governs the initial stages of complaints by employees or the Brotherhood. Article 18.6 provides as follows:

18.6 Effective April 1, 1989, a **grievance** concerning the interpretation, or alleged violation of this agreement, **or an appeal** by an employee who believes he has been unjustly dealt with shall be handled in the following manner. (emphasis added)

Step I
The aggrieved employee, the Local Chairman or his duly authorized representative shall present the grievance in writing to his immediate supervisor* within twenty-eight calendar days from the date of the cause of the grievance and a decision shall be rendered in writing within twenty-eight calendar days of receipt of the grievance.

*Division Engineer
(All Maintenance of Way Employees who would normally appeal at Step II to the Division Superintendent).
*Employees headquartered at Windsor Station – Mananger, Building Services, Montreal, Que.
*Employees headquartered at Winnipeg (150 Henry & 181 Higgins) – Building Superintendent, Winnipeg.

Step II
Within twenty-eight calendar days of receiving the decision under Step I, the Local or General Chairman may appeal the decision in writing to the designated Railway officer on the respective Railways as follows:

CP Rail
All maintenance of way employees except as otherwise stipulated – Superintendent
Employees headquartered at Windsor Station and Employees headquartered at Winnipeg (150 Henry & 181 Higgins) – Manager, Facilities Operations, Montreal
Work Equipment Repair Shops, Rail Yards – Regional Engineer
Transcona Rail Yard and Rail Butt Welding Plant – Engineer of Track, Montreal
Angus Shops, Weston Shops – Works Manager
Quebec Central Railway – Mananger
Dominion Atlantic Railway – Manager

Step III
Within twenty-eight (28) calendar days of receiving the decision under Step II the System Federation General Chairman or his authorized representative may appeal the decision in writing to the designated railway officer on the respective railway as follows:
CP Rail
Quebec Central Railway – Dominion Atlantic Railway
All Maintenance of Way Employees except as otherwise stipulated – General Manager.
Employees headquartered at Windsor Station and Winnipeg (150 Henry & 181 Higgins) – Director, Facility Management, Montreal, Que.
Angus Shops, Weston Shops – Chief Mechanical Officer
Transcona Rail Yard and Rail Butt Welding Plant – Chief Engineer, Montreal

Arbitration is governed separately by section 19 of the agreement which provides, in part, as follows:

19.1 **A grievance** which is not settled at the last step of the grievance procedure may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work. (emphasis added)

As is apparent from the foregoing, the collective agreement makes a distinction between two forms of complaint: on the one hand there are grievances concerning the interpretation or alleged violation of the collective agreement. On the other hand, there are appeals by employees who believe that they have been unjustly dealt with. The distinction between a grievance and an appeal is long standing with the railway industry in Canada. As is reflected in the language of section 19.1, it is only a grievance, that is to say a complaint concerning the interpretation or alleged violation of the collective agreement, which may proceed to be heard by the Canadian Railway Office of Arbitration.

This aspect of the jurisprudence of this Office was addressed, in the context of another collective agreement between the Brotherhood and VIA Rail Canada Inc., which made a similar distinction. In **CROA 2235** the Arbitrator made the following observation:

> As is apparent from the foregoing, it is only a grievance concerning the interpretation or alleged violation of the collective agreement, or against an alleged unjust measure of discipline or discharge which may be referred to this Office for arbitration. The more general complaint of an employee that he or she has been "unjustly dealt with" in a manner unrelated to the collective agreement is, in accordance with Article 24.21 of the collective agreement, limited to being heard through the first three steps of the grievance procedure, and may not, by the agreement of the parties, proceed to arbitration.
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> This is a long recognized practice in the industry. Needless to say any contrary interpretation would open the arbitration process to each and every complaint of an employee who might feel unjustly dealt with in a myriad of ways entirely unrelated to the rights and obligations circumscribed by the collective agreement. For obvious reasons, grounded in the rational administration of the grievance procedure and arbitration system, an interest vital to unions and employers alike, no such right has ever been established either by statute or by contract in the realm of reported industrial relations in Canada. Before finding that the parties intended that employees should have unlimited access to arbitration over issues unrelated to their collective agreement, such as the location of their lockers, the size of their parking space or the height of their chair, on the basis that they have been "unjustly dealt with", an arbitrator must find clear and unequivocal language to support such an extraordinary result.

While the decision of the Superior Court of Quebec is plainly binding on this Office for the purposes of the case with which it dealt, it cannot, in the Arbitrator's view, be taken as considered judicial authority for the sweeping proposition advanced by the Brotherhood in the instant case. (*See also **CROA 924** and **2157***) Absent clear and unequivocal language in the terms of sections 18 and 19 of the instant collective agreement to support the position of the Brotherhood, the Arbitrator cannot sustain the position so advanced. The Brotherhood next argues a violation of section 21.8 of Wage Agreement No. 41, which provides as follows:

> **21.8** Employees taken off their assigned territory or regular boarding outfits to work temporarily on snow or tie trains, or other work, shall be compensated for boarding and lodging expenses they necessarily incur. This shall also apply under similar conditions to pump repairers when taken away from their headquarters and to pumpmen when away from their regularly assigned territory.

In the Arbitrator's view the foregoing provision does not speak to the circumstances giving rise to the dispute at hand. The complaint of the Brotherhood is not made on behalf of employees who have been taken off their assigned territory or regular boarding outfits to work temporarily on snow or tie trains or other jobs. Plainly, section 21.8 is intended to deal with the circumstances of employees who are physically removed from one location to another, as a consequence of which they are entitled to certain compensation for boarding and lodging expenses. That has not occurred in the case at hand.

I turn to deal with the allegation of the Brotherhood that the removal of the boarding cars was implemented in contravention of article 8.1 of the Job Security Agreement. In the Arbitrator's view this submission gives greater pause. Article 8.1 of the Job Security Agreement requires the Company to give notice to the Brotherhood of any technological, operational or organizational change which is permanent in nature and which will have adverse effects on employees. The article then goes on to provide for a process of negotiation and, if necessary, arbitration to establish terms and conditions to minimize the adverse impact of the changes in working conditions. Can it be said that the elimination of the boarding car accommodations available to permanent employees at the West Toronto Work Equipment Repair Shop constitutes an operational or organizational change within the contemplation of the provisions of the Job Security Agreement?

A number of prior awards of this Office have considered the kinds of changes which can be said to fall within the purview of a provision such as article 8.1 of the Job Security Agreement. Such events as changes in home terminals (***CROA 101***), the discontinuance of assignments (***CROA 271***), the cancellation of trains **(*CROA 289***), an alteration of an assignment due to track relocation (***CROA 531***), the transfer of work to another bargaining unit

resulting in the abolition of positions (**C*ROA 1221***) have, to cite but some examples, all been found to constitute operational or organizational change.

The cases generally reflect the understanding of the parties that a material change in working conditions within the meaning of article 8 of the Job Security Agreement must, as a general matter, be such as to generally impact the employment security of the persons affected. Such adverse impacts as the abolishment of positions, the requirement of employees to exercise their seniority rights to lesser paid positions, or to relocate are typical of the impacts considered in the reported cases. The kinds of changes generally giving rise to the application of the article, however, are general in their impact on employees and do not, as a rule, depend upon the personal circumstances of individual employees. While it is true that relatively minor changes in operations, such as the introduction of radios in yard operations which could reduce the complement of employees (***CROA 221***) have been found a constitute a material change, they normally fall within the category of changes which impact the employment security of employees generally, regardless of their personal or individual circumstances. In light of these cases, it would be difficult to argue, for example, that the relocation of a facility within a given municipality, albeit a hardship to employees whose commuting costs are thereby affected, is necessarily a material change in working conditions of the kind contemplated within article 8.1 of the Job Security Agreement.

Can it be said that the decision of the Company to no longer provide boarding car accommodation to some permanent employees at the West Toronto Work Equipment Shop qualifies as a change in working conditions of the kind contemplated within article 8 of the Job Security Agreement? Having regard to the principles reflected in the prior decisions of this Office interpreting that article and similar articles in other collective agreements, I must find that it does not. The evidence before the Arbitrator discloses, firstly, that the availability of boarding car accommodation was an incidental privilege utilized by a small minority of employees at that location, and not a working condition which was extended to all of them. It is common ground that some five permanent employees continued to reside in the boarding car accommodation during the summer months, while fifteen employees who also held permanent positions headquartered at West Toronto did not do so. There is plainly nothing in the language of the collective agreement which would confirm the entitlement of any employees at West Toronto to continued boarding car accommodation during the summer months, although it does not appear disputed that such accommodation is provided for employees located there, on a temporary basis, for the winter overhaul season. Putting the Brotherhood's case at its highest, the most that can be said is that a small group of employees enjoyed an incidental advantage in that the Company allowed them to continue to occupy boarding car accommodation during the summer months on a gratuitous basis.

A further consideration is the evidence with respect to job bulletins. As noted above, with the exception of one job bulletin, there is no indication on bulletins concerning permanent assignments to West Toronto which would confirm the availability of boarding car accommodations as a condition of employment. The one exception before the Arbitrator concerns a bulletin dated September 11, 1985. The Company suggests that it is equivocal, in that it refers to overhaul work, and might in fact pertain to a winter season assignment. I find it unnecessary to resolve that question. In my view it is sufficient to conclude that the Brotherhood, which bears the burden of proof, has not adduced evidence to rebut the position of the Company, which is that the preponderant practice in respect of bulletins for permanent positions at West Toronto is not to indicate that accommodation is provided, as contrasted with bulletins which relate to the temporary winter season assignments. On this basis, therefore, the Arbitrator cannot conclude that the providing of boarding car accommodation was a general condition of employment for the assignment at the West Toronto Work Equipment Repair Shop.

Nor can I find that the conditions to support an estoppel are established. This is not a case where the employer seeks to enforce the letter of the collective agreement, having previously undertaken not to. It is more analogous to the withdrawal of a gratuity, such as a gift at Christmas, which is unrelated to the collective agreement or to the terms and conditions of employment.

There can be little doubt that the change implemented by the Company had negative impacts on the employees who had previously taken advantage of the privilege allowed to them by the Company. The fact that the privilege was extended, for a substantial number of years, does not however, elevate it to a collective agreement right which the employer is without power withdraw for a valid business purpose. Moreover, it was open to the parties to negotiate boarding car accommodation for employees at West Toronto into the terms of the collective agreement, if they so desired. They did not do so, however, and, in the absence of any such provision, the grievance must be dismissed.

October 16, 1992

(Sgd.) MICHEL G. PICHER
ARBITRATOR