CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2403

Heard at Montreal, Wednesday, 13 October 1993

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

EX PARTE

DISPUTE:

Claim by the Brotherhood that the Company violated Article 28.9 of Agreement 5.1 when it abolished four positions at the Fairview Diesel Shop at Halifax, Nova Scotia.

EX PARTE STATEMENT OF ISSUE:

On February 28, 1989, the Company abolished the positions of four Classified Labourers at the Fairview Diesel Shop. The Brotherhood contends that the change involved the transfer of the work as outlined in Article 28.9 to employees outside of the 5.1 bargaining unit (Machinists) in violation of Article 28.9 (1 through 8) of Agreement 5.1, and past practice.

The Brotherhood requests that the work outlined in Article 28.9 of Agreement 5.1 and other related work be performed by Classified Labourers under the 5.1 bargaining unit. Furthermore, the Brotherhood requests that the four positions of Classified Labourer abolished on February 28, 1989 be reinstated and that the Company make whole any loss of wages and/or benefits sustained by Messrs. G.W. Laybolt, D.F. Boutilier, P.J. Hamilton and F.T. Gilfoy.

The Company denies the grievance on the basis that the work in question continues to be performed by Classified Labourers and that Agreement 5.1 does not contain any provisions that provides employees represented by the CBRT&GW with exclusive work ownership.

FOR THE BROTHERHOOD:

(SGD.) T. N. STOL
NATIONAL VICE-PRESIDENT

There appeared on behalf of the Company:

O. Lavoie	- System Labour Relations Officer, Montreal
R. Paquette	- Manager, Labour Relations, Montreal
M. M. Boyle	- Director, Labour Relations, Montreal
J. Watt	- System Labour Relations Officer, Montreal
F. D. Orchard	- General Equipment Supervisor, Motive Power & Car Equipment, Halifax Diesel Shop

And on behalf of the Brotherhood:

T. Barron	- Representative
G. T. Murray	- Regional Vice-President, Moncton
J. Bechtel	- Witness
R. Hay	– Witness

AWARD OF THE ARBITRATOR

The Arbitrator cannot accept the submission of the Brotherhood to the effect that article 28.9 of the collective agreement provides work ownership in respect of duties performed by the classified labourers at the Fairview Diesel Shop. While the article provides a general description of tasks normally assigned to bargaining unit employees, it does not, on its face, provide for a form of exclusive work ownership. With respect to collective agreement 5.1, the governing principles were expressed in the following terms in **CROA 2006**:

> An extensive line of decisions issuing from this Office has confirmed that Collective Agreement 5.1 does not confer a proprietary right to bargaining unit work to the Brotherhood. The awards have acknowledged that in some circumstances the creation of a job or assignment which involve essentially performing little more than the duties of a position falling entirely within the bargaining unit could result in a finding that the person performing the work must be treated as performing work within the bargaining unit. That, however, is not tantamount to saying that the Company is prohibited from assigning tasks which are sometimes performed by employees in the bargaining unit to non-bargaining unit employees. As Arbitrator Weatherill observed in **CROA 527**:
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> > I was not referred to any provision in the collective agreement (and there appears to be none) which would require the Company to continue to assign particular work to employees in the bargaining unit, or which would prevent it from "contracting out" certain work, or from assigning it to employees in another area, or in another bargaining unit, or to employees not coming from any bargaining unit.
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> (*See also* ***CROA 117, 118, 246, 322, 381, 693,*** *and* ***1160***)
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> Given the above noted jurisprudence, the Brotherhood cannot assert that the work in question in the instant case belongs to bargaining unit members, and cannot be assigned to other employees. ...

The foregoing conclusion is not, however, the end of the matter. As the above passage reflects, when a collective agreement contains classifications and job descriptions, and an employer purports to abolish a job and assigns essentially the same duties to a person outside the bargaining unit, it may be found that in fact there has been no abolishment and that a person who performs little more than the functions falling entirely within the terms of the collective agreement must be viewed and treated as performing bargaining unit work. In at least one prior award, **CROA 2279**, this Office found in favour of a claim by the Brotherhood that a person represented by another bargaining agent in fact fell within the Brotherhood's bargaining unit, to the extent the preponderance of the duties assigned to that individual fell within the core duties of the classification found in the Brotherhood's collective agreement. In that case, it was found that an operator or agent located at Hallnor, Ontario, in the service of the Ontario Northland Railway, performed the functions of a clerk within the Brotherhood's collective agreement, and must be treated as falling within its bargaining unit. In that award the Arbitrator made the following observations:

> The material before the Arbitrator establishes beyond substantial doubt that the overwhelming preponderance of the functions performed by the agent at Hallnor are those which are regularly and normally performed by employees in the bargaining unit of the Brotherhood. The Company submits that the Brotherhood cannot assert work ownership in the circumstances, because of the mixed practice whereby operators at remote locations, who are members of another bargaining unit, have performed the clerical functions over the years. With respect, the Arbitrator is of the view that that characterization of the events and issues is not appropriate in the unique circumstances of this case.
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> The awards of this Office have confirmed that the language of collective agreements similar to that of the Brotherhood in the instant case does not contain a work ownership clause. On that basis, in cases involving other railways, the Brotherhood has been unsuccessful in a number of cases which objected to the assignment of work of a type which has, traditionally, been performed by a variety of employees, including employees from other bargaining units and non-unionized employees. **By the same token, the cases have recognized that where it is established that the functions of a given position are, for all practical purposes, tasks which relate entirely to classifications under the terms of the Brotherhood's collective**

> **agreement, it may be found that the individual performing such works is, in fact, a member of the bargaining unit covered by the collective agreement of the Brotherhood** (*CROA 2006, 2149*).
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> What the material at hand discloses is that at present, with extremely minor exceptions not material to the outcome, the Agent at Hallnor performs duties which are entirely within the ambit of the job classifications contained in the collective agreement of the Brotherhood. These include such functions as keeping records of cars, assessing demurrage, preparing accounts, checking loads, preparing train documents and bills of lading, tracing cars and advising as to car repair work required, to name a few. The only functions performed which do not conform to bargaining unit functions of the Brotherhood involve the collection of revenue cheques, making bank deposits and the preparation of cash sheets. As noted above, the Agent at Hallnor performs no functions traditionally associated with those of an Operator.
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> [emphasis added]

What does the evidence in the case at hand disclose? Upon a review of the material filed and the submissions made at the hearing, the Arbitrator is satisfied that upwards of 60% of the work performed by machinists at the Fairview Diesel Shop is work which was previously assigned to classified labourers in conformity with article 28.9 of the collective agreement. The tasks involved include manning railway fuel pumps, fueling locomotive equipment, checking fuel oil, filling sand boxes and water tanks, mixing compound and supplying it to diesel units, cleaning locomotives and stocking them with supplies, seeing to their secure storage, as well as transcribing any related inspection records and documents. In the work of machinists at the Fairview Diesel Shop, those tasks which can be said to be traditionally performed by machinists, such as trip inspections and brake servicing, amount to little more than two hours of an eight hour working day. In the result, in the case at hand the Arbitrator is compelled to conclude that, although the machinists continue to perform a relatively small proportion of their jobs in machinists' functions, the preponderance of the work assigned to them involves the core functions of the job classification of classified labourers falling under the Brotherhood's agreement. On balance, the Arbitrator is satisfied that this is a case where, in the words of **CROA 2006**, the Company has created a job or assignment, "... which involves essentially performing little more than the duties of a position falling within the bargaining unit."

What remedy is appropriate in the case at hand? It appears to the Arbitrator that the Company has not in fact abolished four classified labourers' positions at the Fairview Diesel Shop, as it purported to do. It is not clear on the material before me, however, how many "jobs of work" for fully employed classified labourers in fact remain, given the undisputed representations that a certain amount of work was in fact removed from that location to a VIA Rail facility. In the circumstances the Arbitrator need not yet determine whether the work of four full positions remains effectively unabolished. It remains the prerogative of the Company to organize its work force in the most efficient way possible, subject of course to the provisions of the collective agreement. For the purposes of the instant award I deem it sufficient to find and declare that, insofar as the present division of labour is concerned, the Company has not, as a matter of law, abolished the four classified labourers' positions at the Fairview Diesel Shop. The machinists who have been assigned to that work for the preponderance of their working time must be treated as employees falling within the bargaining unit.

The violation of the collective agreement may have occasioned economic loss to the four grievors, in respect of which they are entitled to compensation. However, the manner in which the work may be organized in light of this award is something which should, I think, be remitted to the parties for discussion and, hopefully, resolution upon agreement, having regard to the amount of work which continues to be available at the location.

Based on the facts before me, however, I find and declare that the Brotherhood is entitled to the payment of union dues with interest, for the period of time during which members of the IAM have performed or continue to perform the duties of labourers. The Arbitrator further directs that compensation be paid to the former employees displaced by the abolishment of the positions, to the extent that they may have lost wages and benefits, and that such compensation include the payment of interest on any wages lost. With respect to all issues the Arbitrator retains jurisdiction in the event of any dispute between the parties having regard to the interpretation or implementation of this award.

October 15, 1993

(signed) MICHEL G. PICHER
ARBITRATOR