

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2475

Heard in Montreal, Tuesday, 10 May 1994

concerning

CANADIAN PACIFIC LIMITED

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
[UNITED TRANSPORTATION UNION]**

DISPUTE:

The status of Protected Employees under Article 9A of the Collective Agreement and the Company's practice of discontinuance, blanking or abolishment of brakepersons "non-required positions".

JOINT STATEMENT OF ISSUE:

On August 31, 1992 the collective agreement was amended and Article 9A was implemented to allow for a Conductor-Only crew consist subject to certain requirements.

Shortly after certain territories were declared Conductor-Only the Company operated trains with a Conductor only crew consist. This was done when protected employees with a seniority date on or before June 18, 1990 were available on the brakepersons' spareboard.

Protected brakepersons submitted wage claims for not being called for the first brakeperson's positions while available and first out on the spareboard. The Company declined the wage claims submitting that Article 9A, 3(h) gave them the right to reduce the number of positions that existed.

The Union appealed the Company practice of blanking first brakeperson's positions. The Union submits that there is no provision allowing for the discontinuance, blanking or abolishment of first brakepersons' positions when protected brakepersons are available on the spareboard. Furthermore, the Union submits that the Company has applied Article 9A contrary to the intent under which the contract ratified. The reduction of the Crew consist was to be achieved through attrition.

The Union requested that the Company cease the practice of blanking first brakeperson's positions and pay all outstanding wage claims that resulted from this practice.

The Company has declined the Union's request, and asserts that the agreement has been applied as intended and as written, and that protected employees on the spareboard are entitled only to fill vacancies in respect of non-required first brakeperson positions.

FOR THE UNION :

(SGD.) D. A. WARREN
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) M. G. MUDIE
GENERAL MANAGER, OPERATION & MAINTENANCE, IFS

There appeared on behalf of the Company:

- | | |
|--------------|---|
| F. O. Peters | - Director, Labour Relations, R/T Employees |
| R. Colosimo | - Vice-President, Industrial Relations (Ret'd.) |
| R. E. Wilson | - Manager, Labour Relations, IFS, Toronto |
| M. E. Keiran | - Manager, Labour Relations HC, Vancouver |
| G. Chehowy | - Manager, Labour Relations, Montreal |

And on behalf of the Union:

- D. A. Warren – General Chairperson, Toronto
- J. R. Austin – General Chairperson (Ret'd.)
- L. H. Olson – National President, UTU-Canada, Ottawa
- M. J. Hone – Vice-President, UTU-Canada, Ottawa
- T. G. Hucker – International Vice-President, BofLE, Ottawa
- S. Keene – Vice-General Chairperson, London
- L. O. Schillaci – General Chairperson, Calgary
- J. W. Armstrong – General Chairperson, CN Western Lines, Edmonton

AWARD OF THE ARBITRATOR

As reflected in the joint statement of issue, the grievance before the Arbitrator raises a matter of substantial importance to the parties in respect of the operation of their Conductor-Only Agreement of August 31, 1992. At issue is the interpretation and application of article 9A of the collective agreement, which governs conductor-only operations in freight service. The following provisions of article 9A are pertinent to the resolution of this grievance:

1. DEFINITIONS

...

FIRST BRAKEPERSON

The position of first brakeperson is the position of brakeperson when there is one brakeperson on a crew.

PROTECTED EMPLOYEE

A protected employee for purposes of filling a position of first brakeperson is an employee having a seniority date in train or yard service on or before June 18, 1990.

REQUIRED POSITION

A required position shall consist of a conductor; a brakeperson on a road freight crew where determined by the Company that such position is needed; a position on a road, common or yard spareboard; or a position in yard service.

NON-REQUIRED POSITION

A non-required position is a position of brakeperson on a road freight train that has been determined by the Company as not being needed subject to the requirements of Clause 2.

3. On Subdivisions on which the Company has notified the Union that conductor-only operations will be implemented, trains will be operated with a conductor-only train crew at any time thereafter in accordance with the following:

a) Only employees with a seniority date on or before March 7, 1979 will be entitled to fill a non-required second brakeperson's position subject to the provisions of Article 9.

b) All positions, whether required or non-required, will be advertised at the general advertisement of assignments; upon the setting up of new assignments; and/or upon the creation of a permanent vacancy in assigned road or yard service. Only those required positions will be filled unless circumstances are such that the other provisions of this Clause 3 pertaining to the placement of protected employees in non-required positions can be applied. Adjustments to pools or spareboards will continue to be handled as at present subject to the parameters contained in this Clause 3.

c) Such required positions will be awarded to the senior protected employee applying therefor.

...

h) Protected employees who are not awarded or assigned to required positions pursuant to the above, will be permitted to claim, in seniority order, non-required first brakeperson's positions to the extent that such positions are available at the terminal.

...

k) Temporary vacancies of less than six days in road service, or five days in yard service, on required positions, will be filled by the first out available employee on the spareboard.

l) Temporary vacancies of less than six days in non-required road service positions will be filled by the first out available protected employee on the spareboard. This will not constitute a runaround of unprotected employees on the spareboard. If there are no protected employees on the spareboard the vacancy will not be filled.

It is common ground that under the collective agreement, notwithstanding the provisions of article 9A, the Company is compelled to bulletin all positions at a terminal, including pool positions in the classifications of conductor, first and second brakeperson, as specifically contemplated in paragraph 3(b). Where, for example, the Company establishes ten conductor positions at a given terminal, it also bulletins ten first brakeperson positions, even though they may be non-required. That is the practice of the Company in respect of the handling of the first brakeperson's positions which give rise to this grievance.

It is not disputed that upon the bulletining of the positions, including non-required first brakeperson's positions, the Company does not fill the non-required positions. Rather, it blanks or effectively abolishes those positions. Persons who have bid on them, including protected employees, are then forced to the spareboard. As reflected in the material reproduced above, a spareboard position is a "required position" within the meaning of article 9A of the collective agreement.

The Union submits that the intention of the Conductor-Only Agreement is that protected employees retain the right to bid on both required and non-required positions. In its submission, while the Company may be entitled to force an employee holding a non-required position onto a required position, such as the spareboard, doing so creates a temporary vacancy in the non-required position. The Union submits that the Company is then required to fill the temporary vacancy in the non-required position with a protected employee off the spareboard, in accordance with the terms of the collective agreement.

The Union submits that by blanking virtually all of the non-required positions the Company has effectively reduced the number of pool assignments, rendered all first brakeperson's positions "non-required" and forced protected employees to the spareboard in a manner not contemplated by the agreement of the parties governing conductor-only operations. The Union further suggests that in some locations, particularly in the west, the Company has simply declined to allow protected trainpersons to apply for any non-required positions, thereby compelling them to bid onto required positions, foreclosing the opportunity to establish a maintenance of basic rates for those persons. The Union submits that by effectively "wiping out" the first brakepersons' pool and forcing protected employees to the spareboard the Company has rendered the obligation to bulletin all positions, including non-required positions, virtually meaningless. It submits that an overall interpretation of the provisions of article 9A does not sustain the approach taken by the Company.

In the alternative, the Union pleads estoppel in support of its claim. It submits that during the course of negotiations leading up to the Conductor-Only Agreement the Company's officers made representations which led the Union's membership to believe that they would have an undiminished access to all positions, would not risk any reduction in their earnings and that the eventual goal of conductor-only operations would be achieved by attrition. In particular, the Union points to the "presentation package" provided to the Union's membership by officers of the Company at the time of ratification of the Conductor-Only Agreement. This includes, in part, simple one or two sentence statements of the principles underlying the agreement. For example, the following statement appears:

When all required positions are filled and there are protected employees not holding a required position, such employees with a post March 7, 1979 seniority date may claim a non-required first brakeperson position. ... Other temporary vacancies in non-required first brakeperson positions filled by first out available protected employee on spareboard.

The Company asserts a different view. It submits that if the interpretation of the Union is to be accepted, the employer gained virtually nothing from the Conductor-Only Agreement. Firstly, it's representative stresses that the Conductor-Only Agreement resulted in the payment of substantial sums by the Company in relation to voluntary separation packages made available to maximize the attrition opportunities taken up by protected employees. It estimates the cost of retirement and separation incentives in support of conductor-only operations to be in excess of

fifty million dollars. Implicit in that arrangement, according to the Company, is the understanding that the employer would not be put to the obligation of hiring new employees to replace those who had left pursuant to the incentives established. However, the Company notes that if the interpretation of the Union in respect of the operation of article 9A of the collective agreement should obtain, the Company will in fact be compelled to hire new employees. Whenever an employee holding a required position on the spareboard should claim a vacancy in a non-required first brakeperson's position, in accordance with the Union's view of the bulletining procedure, the Company would be compelled to backfill the required positions so vacated, if necessary, by resorting to hiring. In the result, in the Company's view, the Union's interpretation would place large numbers of protected employees into non-required positions, while required positions would become filled by newly hired junior employees. This, it submits, was not intended or contemplated by the Conductor-Only Agreement.

The Company argues that a protected employee holding a required position on the spareboard cannot claim a non-required brakeperson's position unless the non-required position is one which the Company has in fact regularly filled by assigning it to a protected employee, and a temporary vacancy of six days arises by reason of the absence of that employee

The Company vigorously disputes the concept of the temporary vacancy in a non-required brakeperson's position which underlies the Union's argument. Stressing the arbitral jurisprudence which affirms the right of an employer to determine whether a vacancy exists to be filled, it argues that the obligation to bulletin positions does not, of itself, create assignments, positions or vacancies which can be claimed under the terms of the Conductor-Only Agreement. In this regard it cites the following passage from in **Re Oil, Chemical and Atomic Workers and Tidewater Oil Co.** (1963) 14 L.A.C. 233 (Reville):

A provision in a collective agreement requiring a company to post vacancies does not become applicable when there is merely an emptiness or vacant position in the dictionary sense of the term. This requires a vacant position for which there is adequate work in the opinion of the company to justify the filing of that position. In other words, there must be a job of work to be done, and the company is not called upon merely to fill a classification for which no work is available.

In further support the Company also cites the following awards: **Re United Steelworkers and International Nickel Co. of Canada** (1971) 22 L.A.C. 244 (Brown); **Re United Brewery Workers and Loblaw's Groceries** (1967) 18 L.A.C. 420 (Weatherill); **Re Rothman's and Bakery Workers' International Union** (1983) 12 L.A.C. (3d) 329 (M.G. Picher). The Company submits that there is nothing in the Conductor-Only Agreement which departs from the established principle of what constitutes a vacancy. In the Company's view, a vacancy arises in a non-required position only when such a position is occupied by a protected employee who is temporarily absent from it. It submits that, during the bulletining process, when it does not fill non-required first brakeperson's positions, but rather blanks them and forces protected employees to the spareboard, it does so in pursuance of its prerogative to determine that no vacancy in that position in fact exists.

In the Company's view the bulletining process, which includes identifying non-required first brakeperson's positions, is not rendered academic or meaningless by reason of the approach which it takes. It stresses that the Conductor-Only Agreement provides to protected employees the ultimate guarantee that if they should be unable to hold a required position they retain the right to claim an available non-required position, which would include any first brakeperson's position which was previously bulletined and blanked. In other words, the protected employees retain a significant protection against layoff, in that unoccupied non-required first brakeperson's positions must first be made available to them.

In the Arbitrator's view the interpretation advanced by the Company is more compelling than that pleaded by the Union. Firstly, the Arbitrator accepts, as submitted by the Company, that the prerogative to determine whether a job of work exists so as to give rise to a vacancy remains vested in the employer, absent clear and unequivocal language in the collective agreement to the contrary. While in most industrial relations settings the bulletining of a position is *prima facie* evidence of the employer's view that a vacancy exists, that alone is not determinative, and it is generally considered that it remains available to an employer to cancel a bulletin prior to the filling of a vacancy. Most importantly for the purposes of this grievance, the bulletining provisions of the Conductor-Only Agreement found in article 9A have a clear purpose which is unrelated to the identification or filling of a vacancy. As argued by the Company, the requirement to bulletin first brakeperson's positions, and indeed second brakeperson's positions, even though they may not be filled, is significant for the exercise of the residual right of a protected employee to claim a

non-required position in the event that he or she is not successful in holding a required position. Other rights under the agreement, including the right to take layoff and have the benefit of Supplementary Unemployment Insurance benefits, may flow from the manner in which the non-required positions become filled.

In the Arbitrator's view the language of article 9A of the collective agreement lends substantial support to the interpretation of the Company. As the second sentence of paragraph 3(b) of article 9A clearly reflects, the parties agreed that following the bulletining of positions only required positions are to be filled, "... unless circumstances are such that the other provisions of this Clause 3 pertaining to the placement of protected employees in non-required positions can be applied."

In my view the foregoing provision has reference to the operation of paragraph 3(h) of article 9A, whereby protected employees unable to hold required positions are permitted to claim non-required first brakeperson's positions to the extent that they are available. In this context it is not disputed by the Company that availability refers to first brakeperson's positions which were bulletined at a terminal and which have not been filled. The hurdle which the Union's position cannot overcome is the language of the second sentence of paragraph 3(b) of article 9A. It provides that, in the normal course, following the bulletining process, only required positions are to be filled. The Union's submission, however, rests on the premise that all bulletined positions, including non-required first brakeperson's positions, are to be considered filled, even if the incumbents in such positions are thereafter forced to the spareboard. In my view that position flies in the face of the language of paragraph 3(b). If the parties had intended that all bulletined positions, including non-required positions were to be filled, they could plainly have said so. They did not, however. In the result, I am satisfied that the employer's course of blanking non-required first brakeperson's positions, and forcing protected employees to take required positions on the spareboard is in keeping with the contemplation of article 9A of the collective agreement. I do not see how the interpretation of the Union can be accepted without doing violence to the language of paragraph 3(b) which expressly stipulates that only required positions are to be filled unless conditions require the placement of protected employees in non-required positions. Moreover, if a choice must be made between two arguable interpretations, the general purpose of the Conductor-Only Agreement is achieved through the interpretation advanced by the Company and is substantially frustrated, if not defeated, by the interpretation of the Union.

Neither can the Arbitrator accept that the Company is estopped from relying upon the interpretation of article 9A of the collective agreement which the Arbitrator has found to be correct. The record of negotiations discloses that at all times, up to and including the adoption of the final language of the agreement, the Company insisted upon the use of the word "available" in relation to non-required first brakeperson's positions which could be filled by protected employees. There was, in other words, a consistency in the position of the employer that it should retain discretion in determining when non-required first brakeperson's positions were to be considered vacant, in the sense that they were to be filled, other than in accordance with the terms of paragraph 3(b). Nor is there anything contrary to that in the written statements issued in the context of the "presentation package" of the Company during the ratification process. The Arbitrator sees nothing inconsistent with the interpretation of the Company of article 9A and the statement made to employees that protected employees may claim a non-required first brakeperson position when all required positions are filled or that temporary vacancies in non-required first brakeperson positions are to be filled by the first out available protected employee on the spareboard. The written materials issued by the Company are little more than a restatement of the operation of the collective agreement's provisions. They are far short of an express or implied undertaking on the part of the employer to the effect that non-required first brakeperson's positions would be either filled or treated as vacant and subject to being claimed at any time by protected employees. For the reasons discussed above, such an undertaking would be in obvious contrast to the overall purpose and scheme of the Conductor-Only Agreement. It would, in my view, require a clear and unequivocal statement on the part of the employer to sustain the Union's assertion that an estoppel is made out. No such statement is evident in the material before me.

Lastly, it is far from clear to the Arbitrator that the approach adopted by the Company is necessarily prejudicial to the Union or its members. Notwithstanding the merits of this grievance and its disposition by the Arbitrator, there is nothing in the Conductor-Only Agreement which curtails such rights as the Union may have with respect to protecting the job security of its members by the proper regulation and administration of spareboards.

For the foregoing reasons the grievance must be dismissed.

25 May 1994

(sgd) MICHEL G. PICHER
ARBITRATOR