

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2521

Heard in Montreal, Tuesday, 13 September 1994

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of M. Morin, Leading Track Maintainer.

EX PARTE STATEMENT OF ISSUE:

On August 27, 29 and 30, 1990 the grievor was delegated by Track Maintenance Foreman Mr. Mayer to supervise Gang 22B7 while Foreman Mayer oversaw the use of certain work equipment machines. The grievor requested TMF rate of pay for the period of time he carried out the functions of a TMF. The Company declined to pay the grievor this rate.

The Union contends that: 1.) The grievor was completely in charge of Gang 22B7 during the above dates. 2.) The Company has violated the terms of Article 7.1 and 18.9 of Agreement 10.1

The Union requests that: The Company pay the grievor \$36.72 being the difference between what he received and what he was entitled to receive for the work performed on August 27, 29 and 30, 1990.

The Company denies the Union's contentions and declined the Union's request.

FOR THE BROTHERHOOD:

(SGD.) R. A. BOWDEN

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

L. Lagacé	– System Labour Relations Officer, Montreal
N. Dionne	– Manager, System Labour Relations, Montreal
R. Morel	– Supervisor, Structures, Quebec
K. Lavolette	– Project Officer, Montreal

And on behalf of the Brotherhood:

D. Peterson	– Counsel, Ottawa
D. Brown	– Senior Counsel, Ottawa
A. Trudel	– General Chairman, Montreal
R. Phillips	– General Chairman,
M. Lacroix	– Local Chairman, Montreal
M. Morin	– Grievor

AWARD OF THE ARBITRATOR

The evidence before the Arbitrator establishes, beyond controversy, that on August 27, 29 and 30, 1990 the grievor, Mr. M. Morin, was assigned to work with a crew performing track and switch maintenance on the east bank of the Lachine Canal in St-Henri, Montreal. Mr. Morin's evidence is that on each of those days he was assigned by his supervisor, Mr. Geoffroy, to oversee the work being performed by the crew at that location, while his regular foreman, Mr. B. Mayer, was in charge of work elsewhere. On that basis he claims the payment of three days at the foreman's rate under the terms of article 7.1 of the collective agreement, which provides as follows:

7.1 Employees temporarily assigned to higher-rated positions shall receive the higher rates while occupying such positions.

Evidence produced by the Company calls into question the grievor's claim, or certain parts of it. Based on log records kept by Mr. Geoffroy it is suggested that another foreman, Mr. J. Raymond, was working at the same location on the 27th and that on the 30th a relieving foreman, Leading Track Maintainer C. Caronne, worked on the canal bank project with Mr. Morin and was the person properly entitled to the upgrade for that date.

The events in relation to the grievance are some four years distant from the hearing, and recollections are obviously affected by the passage of time. In the result it is for the Arbitrator to determine the facts, on the balance of probabilities, as best can be discerned from the Company's records and the account of events given by Mr. Morin, to some extent corroborated by his fellow crew member Mr. Michel Lacroix.

As regards the 27th of August, I am satisfied that there was no supervisory person working at the east bank of the Lachine Canal, whether in the form of a foreman or a relieving foreman. The entry in the log book upon which the Company relies to suggest that Mr. Raymond was there is far from clear, as some three separate entries appear next to the names of his crew. I am inclined to accept the evidence of Mr. Morin to the effect that Mr. Raymond was, at the time, frequently absent for personal reasons, and that he did not see him on the site. In the circumstances, Mr. Mayer not being present, the assertion of Mr. Morin that he was charged with supervising the work force at that location is made out.

With respect to August 29, the facts appear somewhat different. On that occasion the crew's regular foreman, Mr. Mayer, was working at a crossing at St-Ambroise Street, a relatively short distance from the east bank of the Lachine Canal where Mr. Morin was assigned. While the Company does not suggest that Mr. Mayer in fact attended at the switch location to supervise the work being done by Mr. Morin and the crew working with him, it submits that he was in effect in a lead hand position, with his foreman working nearby. There is some dispute between the parties as to whether a Leading Track Maintainer can normally be assigned lead hand duties, to effectively oversee the work of a segment of employees while the foreman directs his attention to another part of a job. The Brotherhood asserts that, as originally described in the Company's own documents, the Leading Track Maintainer's position was established solely to provide a body of employees qualified to relieve a foreman, but not to assist a foreman who is present on site. The Company suggests that the position of Leading Track Maintainer has evolved into something different.

The Arbitrator is satisfied that that issue need not be resolved for the purposes of this grievance, and indeed, should it be contentious, that it would be best addressed in the context of a grievance which raises that issue squarely. For the purpose of this grievance I am satisfied that on the evidence there cannot be said to have been any effective presence of Mr. Mayer at the site of the switch repair being effected on the east bank of the Lachine Canal on August 29, 1990. A sketch of the location provided by the Company would indicate that there is a significant distance between the St-Ambroise crossing and the place where Mr. Morin was working. The evidence, moreover, appears to confirm that Mr. Mayer was never in direct contact with the crew during the course of the day on the 29th. In the result, the Arbitrator is satisfied that Mr. Morin was, as he relates, assigned by Mr. Geoffroy to supervise the crew working on the Lachine Canal bank on August 29, 1990.

The evidence is not supportive of the Brotherhood's claim, however, as it relates to the date of August 30, 1990. By Mr. Morin's own admission, during the course of cross-examination, Mr. Mayer did attend at the canal bank location during the course of that day. Further, C. Caronne was also working at the same location as a relieving foreman. In the circumstances the Arbitrator cannot find that Mr. Morin was assigned as a relieving foreman, or directed to perform the duties and responsibilities of a foreman on that day.

Although the statement of issue raises an alleged violation of article 18.9 of the collective agreement, that matter was not addressed by the Brotherhood before the Arbitrator, although it was briefly addressed by the Company in its submissions. In the circumstances, as the Union did not plead the application of article 18.9 before me, I deem it inappropriate to make any finding in respect of that issue.

In the result the grievance is allowed, in part. The Arbitrator finds and declares that the grievor was assigned the duties and responsibilities of a Track Maintenance Foreman for the full tours of duty performed by him on August 27 and 29, 1990. The Arbitrator directs that he be compensated for all wages and benefits lost by reason of the failure of the Company to remunerate him at the level of Track Maintenance Foreman, for the days in question, in violation of article 7.1 of the collective agreement.

16 September 1994

(signed) MICHEL G. PICHER
ARBITRATOR