# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 2604

Heard in Montreal, Wednesday, 12 April 1995

concerning

## CANADIAN NATIONAL RAILWAY COMPANY

and

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

## EX PARTE

**DISPUTE:**

Claim by the Union for reimbursement by the Company of wrongfully seized money held in trust for the BMWE.

**BROTHERHOOD'S STATEMENT OF ISSUE:**

From May 1989 to March 1991 various employees of the International Association of Machinists and Aerospace Workers (IAM) worked on rail removal gangs throughout Newfoundland. Their union dues were collected and remitted to the BMWE. On March 5, 1991 the Company informed the BMWE that it would be restoring to the IAM the dues paid to the BMWE during the above mentioned work period. In April of 1991 the Company deducted $8,795.70 from the BMWE payroll and redirected this amount to the IAM.

The Union contends that: **(1.)** The Company's actions are in violation of article 38 and Appendix VIII of agreement 10.61. **(2.)** That there is no basis in law or in equity for the Company's actions. By acting as it did, the Company wrongfully, and without appropriate justification or permission, seized monies that it held in trust for the BMWE. **(3.)** The BMWE invested time and effort in representing the interests of those members during the time dues were collected from them. It would be unfair for the dues paid by these employees to be retroactively assigned to an organization that did nothing to represent them during the time frame indicated above.

The Union requests that: The Company reimburse the BMWE for all money that it wrongfully seized as a result of this matter.

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

**FOR THE BROTHERHOOD:**

**(SGD.) R. A. BOWDEN**
**SYSTEM FEDERATION GENERAL CHAIRMAN**

There appeared on behalf of the Company:

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| J. C. McDonnell | – Counsel, Toronto |
| N. Dionne | – Manager, System Labour Relations, Montreal |
| K. McAuley | – System Payroll Accountant, Winnipeg |

And on behalf of the Brotherhood:

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| P. Davidson | – Counsel, Ottawa |
| R. Philips | – General Chairman, Toronto |
| A. Trudel | – General Chairman, Montreal |

## AWARD OF THE ARBITRATOR

The instant case turns on the application of articles 9 and 10 of Appendix VIII of collective agreement 10.1 which provide as follows:

> **9** The amounts of dues so deducted from wages accompanied by a statement of deductions from individuals shall be remitted by the Railways to the officer or officers of the Organization concerned, as may be mutually agreed by the Railways and the applicable Organization, not later than forty days following the pay period in which the deductions are made.
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> **10** The Railways shall not be responsible financially or otherwise, either to the Organization or to any employee, for any failure to make deductions or for making improper or inaccurate deductions or remittances. However, in any instance in which an error occurs in the amount of any deduction of dues from an employee's wages, the Railway shall adjust it directly with the employee. In the event of any mistake by the Railway in the amount of its remittance to the Organization, the Railway shall adjust the amount in a subsequent remittance. The Railway's liability for any and all amounts deducted pursuant to the provisions of this article shall terminate at the time it remits the amounts payable to the designated officer or officers of the Organization

The facts are not in dispute. For varying periods of time in 1989, 1990 and 1991 some fifteen members of the International Association of Machinists and Aerospace Workers (IAM) on employment security status were assigned occasional work duties which would normally have fallen within the scope of the collective agreement of the BMWE. The Company deducted union dues from the employees and remitted them to the BMWE. The IAM grieved that action, claiming that it was entitled to the payments of dues for the employees in question. The decision of the arbitrator in **SHP-333** found that the employees in question remained under the collective agreement of the IAM and that the Company was obligated to pay the dues in question to the IAM, and not to the BMWE. The reasoning of the decision, dated December 10, 1990, is reflected as follows at pp 6-7:

> ... While article 11.2 of the Special Agreement provides that it is to have precedence over the collective agreements or the ESIMA, that provision could only have application where there is some clear conflict or inconsistency between or among those various agreements. The arbitrator can see nothing in the terms of the Special Agreement to suggest that the parties intended to suspend the protections of employees with employment security against the adverse effects of a layoff. In the arbitrator's view the intention of article 7.5 is to allow the Company to utilize machinists who have the benefit of employment security to perform work "in any capacity within the Company" and to force them to do so by inverse order of seniority. There is nothing in the language of the article, or of the agreement as a whole, however, which suggests that employees so treated are to forfeit the general wage and benefit standards of their own collective agreement, or that they cease to be represented by their union while they are assigned to such work, particularly as it might relate to work which does not involve an unfilled permanent vacancy within the meaning of article 7 of the ESIMA In order words, as a matter of principle, while the Company retains the flexibility to require employees to accept work in any capacity within the Company, in inverse order of seniority, the employees retain the full benefit of the rights which they enjoy by virtue of their employment security. The instant grievance does not concern the status of employees who fill permanent vacancies in bulletined positions, and no comment in respect of that circumstance need be made. There is no basis upon which to conclude that machinists on employment security who are given temporary or seasonal work assignments necessarily forfeit the wage and benefit protections of their own collective agreement, or are removed from their bargaining unit. I can find nothing in the language of the Special Agreement to support such a conclusion.
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> For the foregoing reasons the grievance must be allowed. The Arbitrator finds and declares that the machinists assigned to the track removal gangs were at all material times under the scope of the IAM collective agreement insofar as their wages and benefits are concerned, including travel allowances, overtime payments and the like. They were, moreover, to be treated as employees remaining within the machinists bargaining unit for the purposes of dues deduction. I so declare,

> and remain seized of this matter in the event of any dispute between the parties with respect to the interpretation or implementation of this award as it may affect particular employees.

Following the arbitration award the Company paid to the IAM the union dues owing in respect of the employees concerned, as required under its collective agreement. In April of 1991 it proceeded to deduct the dues previously remitted to the BMWE, in the amount of $8,795.70. The Brotherhood alleges that the Company's actions violate article 38 and the provisions of Appendix VIII of collective agreement 10.1. Article 38.1 of the agreement provides as follows:

> **38.1** The Agreement signed at Montreal, Quebec on February 7, 1953 by and between the Railways and the respective labour organizations providing in Article 3 for the deduction of dues is made a part hereto, as Appendix VIII, as are subsequent amendments thereto, and employees hereby will be subject to these provisions.

The position advanced by the Brotherhood is that the Company remained obligated to deduct dues for its members, and to remit those dues to it for the relevant pay periods in April of 1991. It argues that there is no provision within the collective agreement to effectively absolve the Company of that duty. Its Counsel submits that if there is any issue of unjust enrichment, it is beyond the jurisdiction of the Arbitrator to consider, although it might be raised in some other forum. The Brotherhood further submits that the language of article 10 of Appendix VIII is of no assistance to the Company. It argues that the saving provisions of that article are intended to allow the Company to make adjustments in union dues where it has made some error of fact in the calculation of the remittance. It does not, Counsel submits, contemplate adjustments in remittances where, as he would characterize it, there has been an error of law in determining the union which is to receive the dues, rather than an error of fact in the calculation of the amount of the remittance.

The Company submits that the circumstances fall squarely within the contemplation of article 10 of Appendix VIII of the collective agreement. Its Counsel stresses that the language of paragraph 10 is broad in providing protection against liability to the Railways for "improper or inaccurate deductions or remittances." He further submits that the language of paragraph 10 specifically contemplates adjustments being made at the level of the individual employee, as was done in the case at hand, with respect to the IAM employees concerned. Finally, he argues that the article provides that the railway retains the right to adjust the amounts of subsequent remittances where a mistake is made in its remittances to a trade union, regardless of the nature of the mistake.

I turn to consider the merits of the dispute. In doing so it is important, I think, to bear in mind the general legal framework within which articles 9 and 10 of Appendix VIII of the collective agreement operate or, to put it differently, the legal context within which they were negotiated and intended to apply. Firstly, any company would be in a dubious position under Canadian law if it sought to recover the overpayment of dues from a trade union by way of a civil action in the courts. Statutes such as the **Rights of Labour Act**, R.S.O. 1990, c R.33 in Ontario, for example, prohibit a civil action in any court in respect of the enforcement of a collective bargaining agreement, subject to certain narrow exceptions. More fundamentally, the courts have generally adopted the position that their jurisdiction is ousted in respect of matters relating to the interpretation, application or administration of a collective agreement where a statute such as the **Canada Labour Code** expressly provides that arbitration should be the forum for the resolution of such disputes. As the matter is stated by Brown and Beatty, **Canadian Labour Arbitration**, 3rd edition, at 1:4200, "... Against these legislative provisions, the courts have generally adopted the view that if the question involves an interpretation of the collective agreement, then their primary jurisdiction is ousted." See **Hamilton Street Ry Co. v. Northcott** (1966), 58 D.L.R. (2d) 708, 66, C.L.L.C. 14,157 (S.C.C.); **St. Anne-Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219** (1982), 142 D.L.R. (3d) 678, 82 C.L.L.C. 14,216 (N.B.C.A.), affd [1986] 1 S.C.R. 704, 28 D.L.R. (4th) 1 (S.C.C.). As can be seen from the positions of the parties, the instant case reflects a difference between them in the interpretation and application of articles 9 and 10 of the collective agreement. In that circumstance it is far from clear that the civil courts would provide a forum for redress.

If the position advanced by the Brotherhood is correct, that only mistakes of facts are contemplated for the purposes of recovering monies under section 10 of Appendix VIII of the collective agreement, and that the saving provisions of that article do not apply to protect the Company in the case of an error of law, as for example in this case, where it makes an erroneous determination as to the collective agreement which applies, the Company might well be without any access to a remedy to redress the overpayment made. When the general language of section 10

of Appendix VIII is examined, it does not support such a narrow view. The language of the article is extremely broad, particularly as it appears in the first sentence. It states, in relatively categorical language, that the Company bears no responsibility to the Brotherhood for making improper remittances. That is clearly what happened in the instant case, as the Company erroneously remitted to the BMWE dues in respect of work which the Arbitrator ruled was effectively under the collective agreement of the IAM.

Secondly, the article speaks directly to the recovery of an erroneous remittance to the Brotherhood in the sentence which reads: “In the event of any mistake by the Railway in the amount of its remittance to the Organization, the Railway shall adjust the amount in a subsequent remittance.” In the instant case, insofar as the IAM employees are concerned, the error made in respect of the amount of the remittance to the BMWE was for 100% of the amount of the remittance. Viewed differently, the error of the employer in respect of the total amount which it was required to remit to the trade union for the pay period in which the deductions were made is the total amount of the remittances which relate to the fifteen employees in question. On either view, the mistake by the Company can be said to be a mistake in the amount of the remittance made to the Brotherhood, as contemplated within the general intention of section 10 of Appendix VIII.

To conclude otherwise would, in my view, place an unduly technical gloss upon the language of the article, and would tend to ignore the legal and practical reality within which it was originally intended to operate. An employer in the position of the Company, dealing with a substantial number of trade unions in many locations, can make many kinds of errors in the disbursement and remittance of dues to trade unions, some of which may be strictly characterized as “legal errors” rather than errors of fact. There is nothing, however, within the language of article 10 of Appendix VIII, nor in my view to be implied from its language, to suggest that the parties intended a distinction between errors of fact and errors of law. The thrust of the article is to deal with errors, such as they may be, resulting in either the underpayment or overpayment of a dues remittance by the Railway to the Trade Union. In the result, the Arbitrator is satisfied that the actions of the Company are entirely within the contemplation of article 10 of the Appendix VIII of the collective agreement, and that no violation of the terms of the collective agreement are disclosed on the evidence presented.

For the foregoing reasons the grievance must be dismissed.

April 20, 1995

**(signed) MICHEL G. PICHER**
**ARBITRATOR**