CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2652

Heard in Montreal, Tuesday, 12 September 1995

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

DISPUTE:

CN Intermodal's intention to eliminate all positions of Tractor Trailer Operator (TTO) working in P&D service at Montreal.

JOINT STATEMENT OF ISSUE:

On June 5, 1995, the Company offered a number of lump sum payments (buyouts) to employees at certain intermodal terminals including MonTerm (Montreal Intermodal Terminal). On July 18, 1995, buyouts were awarded to 47 employees at MonTerm. These employees will either retire or resign effective September 30, 1995.

It is the Company's intention to reduce one position of tractor trailer operator working in P&D service for each buyout awarded and to replace each such position with an owner-operator represented by the Union. Since MonTerm's fleet consists of 42 tractor trailer operators, this action will effectively eliminate the fleet of tractor trailer operators.

It is the Union's position that the Company's intended action is in violation of: **(1)** Paragraphs 11 and 16 of the Memorandum of Agreement referred to as the Initial Transfer Agreement; **(2)** Letter 7 which was signed by the parties at the time of signing of the supplemental collective agreement governing employees of CN Intermodal. Furthermore, the numerous references to the position of tractor trailer operator in the supplemental collective agreement constitutes a requirement to retain the position in compliance with the terms of Letter 7. The Company, therefore, is constrained from eliminating the positions of tractor trailer operator at MonTerm.

The Company disagrees.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) A. S. WEPRUK	**(SGD.) J. B. BART**
NATIONAL COORDINATOR	**MANAGER, LABOUR RELATIONS – MARKETING**

There appeared on behalf of the Company:

J. B. Bart	– Manager, Labour Relations - Marketing, Montreal
R. Faucher	– Labour Relations Officer, Marketing, Montreal
D. Baril	– System Labour Relations Officer,
L. Steeves	– Senior Consultant, CN Intermodal, Mississauga
M. Brault	– Terminal Manager, MonTerm, Montreal

And on behalf of the Union:

D. Boiteau	– Vice-President - Labour, Local 4334, Montreal
G. Verdi	– Vice-President - Information, Local 4334, Montreal
A. S. Wepruk	– National Coordinator, Montreal

J. Savard – President, Local 4334, Montreal

AWARD OF THE ARBITRATOR

The record discloses that on May 31, 1994 the parties signed a new supplemental collective agreement designed to deal with the terms and conditions of employment of the employees of CN Intermodal. Parallel to the new collective agreement was a separate agreement whereby the Company extended voluntary recognition to the Union as bargaining agent for all owner-operators to be engaged by CN Intermodal, in respect of whom a separate collective agreement was also signed on May 31, 1994. The supplemental agreement was to come into effect in stages, over time, on a region by region basis. The agreement is now scheduled to commence to apply in the St. Lawrence Region, including Montreal, On October 1, 1995.

Understandably, the introduction of owner-operators into the collective agreements caused concern among the Union's members that a conversion to owner-operators not result in a loss of employment to employee tractor trailer operators. To that end, the Company produced for the Union a series of undertakings in the form of "Letter 7", which were accepted by the bargaining agent. That document reads, in part, as follows:

> During negotiations on the supplemental agreement that will govern employees working in CN Intermodal, the Union expressed some concern about the status and continued viability of Tractor Trailer Operators under the supplemental collective agreement
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> The supplemental collective agreement requires that a minimum of 60% of the loads for which CN Intermodal provides pickup and/or delivery service, either extended or local, be handled by CBRT&GW represented drivers. By Union-represented drivers, we mean either owner-operators or tractor trailer operators or a combination of both.
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> This provision has prompted a question about the Company's intentions with respect to the retention of a complement of tractor trailer operators.
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> There are, of course, many factors which will have to be considered in arriving at any determination as to the "best mix" of tractor trailer operators and owner-operators. For this reason, we cannot give any firm indication as to what proportion of traffic will be handled by tractor trailer operators as opposed to CBRT&GW-represented owner-operators. It would, furthermore, be imprudent to offer any opinion in this respect until we have had some experience with both the utilization of owner-operators on a system-wide basis and the new system of payment for tractor trailer operators (i.e. mileage and zone rates).
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> However, the Company understands the Union's concern. We therefore reiterate that it is not the Company's intention to expand the utilization of owner-operators in a manner that will cause an immediate reduction in our tractor trailer operator complement and, consequently, result in an overall loss of jobs. If there is to be an overall reduction in the number of tractor trailer operators - and this is by no means clear at this time - it is agreed that this will be accomplished through the attrition or absorption of tractor trailer operators into the terminal workforce or by conversion to owner-operator or by a combination of such means.

It is common ground that following the execution of the above documents the Company made extensive examination of the feasibility of implementing zone rates for tractor trailer operators. According to its representative, this was a complex and onerous task which, ultimately, indicated to the employer that the payment of tractor trailer operators on the basis of a combination of mileage and zone rates could not effectively compete with the lower cost of utilizing owner-operators. This judgment seems, in part, to have been influenced by the Company's prior experience with zone rates for owner-operators, apparently in Atlantic Canada. Ultimately, therefore, the Company decided to convert virtually all tractor trailer operations, with the exception of three positions in Toronto, from employee tractor trailer operators to owner-operators.

The evidence establishes that the Company felt constrained by the terms of Letter 7 as to the steps it must follow to achieve a conversion to an owner-operator system, and that it must follow the principles of attrition, conversion and absorption. To accelerate attrition it established a plan of incentive severance payments to employees willing to resign or retire early. Further, it undertook to absorb all other tractor trailer operators into the terminal workforce, in

keeping with Letter 7, or to arrange for their conversion to the status of owner-operators. To this end, on June 5, 1995 the Company posted a bulletin at six of the nine terminals in Canada, including the Montreal Terminal, advising of a lump sum severance opportunity with payments in the range of $65,000 to $75,000, depending on length of service, for persons willing to resign or opt for early retirement. At Montreal, where there are forty-two employees in the classification of tractor trailer operator, some forty-eight employees overall opted for the severance package. Ten of those were tractor trailer operators who elected to leave the Company's service while another ten have elected to convert to the status of owner-operator. It is not disputed that the attrition of other non-driver employees under the incentive program will open positions which will become available within the terminal for the remainder of the tractor trailer operators. In the result it appears, beyond controversy, that the elimination of the forty-two tractor trailer operator positions at Montreal will be accomplished by attrition, absorption into the terminal workforce and by conversion of some persons to owner-operators. There will be no loss of employment to anyone. Moreover, as the Company's representative submits, under the terms of the arrangements between the parties, including Letter 7, all the employees in question, including employees who are not tractor trailer operators, who may be affected indirectly in job displacements, shall have the protection of maintenance of earnings for a period of three years and, in the case of persons whose continued employment would be jeopardized without training, such training is to be provided.

The position of the Union's representative is that the Company was not entitled to eliminate all of the tractor trailer operator positions at Montreal. Its representatives argue that the Company's actions violate paragraphs 11 and 16 of the Initial Transfer Agreement as well as Letter 7. They also argue that the extensive references to the position of tractor trailer operator found within the supplemental collective agreement are an implicit recognition on the part of the Company that such positions are to be maintained.

The Initial Transfer Agreement is an instrument established by the parties to oversee the bridging of the collective bargaining rights of the employees working in CN Intermodal from the previous agreement which governed them, collective agreement 5.1, to the terms of the new supplemental agreement governing Intermodal operations. Paragraphs 11 and 16 of that agreement are as follows:

> **11.** All existing positions in Intermodal terminals (including cargo-flo terminals operated by the Company) will be abolished effective 2359 on the day prior to the effective date of the supplemental agreement. It is understood that the abolition of positions in accordance herewith shall not be a reason to effect a reduction in staff nor shall it be construed as a technological, operational or organizational change.
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> ...
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> **16.** The provisions of this Memorandum of Agreement shall prevail notwithstanding any provisions of Agreement 5.1 which may be in conflict or restrict the full application hereof.

It does not appear, on the evidence before the Arbitrator, that there has been any reduction in staff in violation of article 11 as a result of the implementation of the Initial Transfer Agreement. The unchallenged representation of the Company's spokesperson at the arbitration hearing would suggest that the complement of employees at the Montreal Intermodal Terminal will, in fact, increase. Most importantly, the Arbitrator is compelled to accept the position of the Company that the reduction of staff by attrition, prompted by the Company's offer of an early retirement severance package, is not, of itself, a reduction in staff attributable to the abolition of positions, contrary to the requirements of article 11 of the Initial Transfer Agreement. On that basis I cannot see how the position of the Union alleging a violation of article 11 of the Initial Transfer Agreement can be sustained. That position might be more persuasive if it could be shown that tractor trailer operators, or others in the Montreal terminal, are forced into unemployment by the Company's action. That is plainly not so. Nor can I find that there has been any violation of the terms of paragraph 16 of the Initial Transfer Agreement, a provision which merely reflects the primacy of the new arrangements over the terms of collective agreement 5.1.

In my view the more significant argument made by the Union relates to the spirit of Letter 7. Its representative submits that the understanding which underlies that letter is that the Company is to make a reasonable attempt at the implementation of zone rates for tractor trailer operators before converting in any substantial way to owner-operator operations. Implicit in the Union's submissions is the view that the parties contemplated a mixed force of tractor trailer operators and owner-operators, at least for the immediate future, and that the Company's decision to effectively eliminate all tractor trailer operator positions is in breach of that understanding.

While the Arbitrator can appreciate the Union's perception, a close examination of the terms of Letter 7 leaves substantial doubt as to its validity. If there is any conclusion to be drawn from the letter, it is that the Company is careful not to limit its options with respect to conversion from tractor trailer operators to owner-operators. The fourth paragraph of the Letter, reproduced above, plainly declines to give any firm assurances with respect to the rate, timing or degree of conversion. Significantly, in the fifth paragraph of Letter 7, reproduced above, the Company does speak to the possibility of an overall reduction in the number of tractor trailer operators, subject to the assurance that such a reduction shall be accomplished by attrition, absorption or conversion.

In the Arbitrator's view, if any conclusion is to be drawn from the above language, it is that the Union was well aware that the conversion to owner-operators was an option open to the Company and one which it might well decide to implement overall. Against that possibility, however, the Company gave written assurances that, although tractor trailer operator jobs might be eliminated, the persons in question would be offered protection in the form of absorption into other jobs or conversion to the status of owner-operator. In these circumstances I find it difficult to avoid the conclusion that, if the parties had mutually intended that the Company be required to maintain a given number of tractor trailer operators at any terminal, they would have said so clearly and explicitly within the terms of their agreement. The Union is not unsophisticated in the ways of collective bargaining, and must be taken to have known that the language of Letter 7 could not reasonably be construed as restricting the ability of the Company to eliminate tractor trailer operator positions in favour of the use of owner-operators. On the contrary, the thrust of the document is to allow just that. Additionally, the material before the Arbitrator indicates that the Company did make a close examination of the option of paying tractor trailer operators on a combination of mileage and zone rates, drawing in part on its own experience in the Atlantic Region, and came to the business decision that that was not a viable alternative as compared to the use of owner-operators. Again, if the Union had intended that the Company be prevented from making such a decision, and that it be compelled to maintain a given number of tractor trailer operator positions, it could have negotiated language to that effect. It did not do so, however, and in the circumstances the Arbitrator is compelled to conclude that the parties had a different understanding.

Lastly, it must be remembered that the supplemental agreement is national in scope. It is true that its provisions make extensive reference to the position and remuneration of tractor trailer operators. However, while that position is to be eliminated at Montreal, it does continue to exist elsewhere, notably at Toronto. Moreover, in locations where the Company has converted to the exclusive use of owner-operators, the presence of language in the supplemental collective agreement governing the use of tractor trailer operators may nevertheless be of importance to both parties in the event that the Company should decide to return to that option. In the circumstances, the mere presence within the collective agreement of language governing tractor trailer operators does not, of itself, support the inference that the Company surrendered its ability to abolish such positions. On the contrary, as reflected in the language of Letter 7, such abolishments were clearly envisioned, subject only to the rules of attrition, absorption and conversion.

For all of the foregoing reasons the Arbitrator cannot sustain the position of the Union to the effect that the Company is constrained from eliminating the positions of tractor trailer operator at the Montreal Terminal. For these reasons the grievance must be dismissed.

September 15, 1995

(signed) MICHEL G. PICHER
ARBITRATOR