

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 2815

Heard in Montreal, Wednesday, 15 January 1997

concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**EX PARTE**

### **DISPUTE:**

Failure to recall Mr. G. Boily to fill position of Extra Gang Labourer.

### **EX PARTE STATEMENT OF ISSUE:**

In the spring of 1992 the Company recalled and hired personnel to staff fully its work gangs. The grievor, who was then laid off, was not contacted by the Company, and thus was not able to work during the summer of 1992.

The Union contends that: 1.) The Company failed to contact him for the purposes of having him return to work as an Extra Gang Labourer for the spring and summer of 1992. 2.) Through its failure to contact the grievor the Company violated article 5.4 of Agreement 10.13 and any other applicable provision of the collective agreement.

The Union requests that the grievor be compensated for all lost wages and expenses as a result of the Company's actions.

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:

D. A. Watson	– Labour Relations Consultant, Montreal
J. C. McDonnell	– Counsel, Toronto
D. Laurendeau	– Assistant Manager, Labour Relations, Montreal
G. Search	– Assistant Manger, Labour Relations, Toronto
M. Legros	– Engineering Clerk, Montreal

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
A. Trudel	– General Chairman, Montreal
D. Brown	– Sr. Counsel, Ottawa

### **AWARD OF THE ARBITRATOR**

The Company does not deny that in the circumstances of the recall conducted in the spring of 1992 the grievor was entitled to be recalled. It submits that he was not entitled to be recalled as a member of the seniority list of extra gang labourers on the St. Lawrence Region, as he had forfeited that seniority previously. Rather, it says that he was entitled to be recalled when the Company reverted to calling employees on other seniority lists, including employees under other supplemental agreements, including trackmen. It is on that basis that the Company submits that the

grievor was in fact placed on the list of names of employees to be called. The Brotherhood submits that the grievor was entitled to be called in priority as an extra gang labourer on the seniority list for the Quebec City area or district. There is, therefore, no dispute that the grievor was entitled to be recalled.

The issue then becomes whether the Company took the appropriate steps to contact the grievor. Article 5.4 of Supplemental Agreement 10.13 provides for the recall of extra gang labourers and reads as follows:

**5 STAFF REDUCTION AND RECALL TO SERVICE:**

...

**5.4** Laid-off employees shall be recalled to service by registered mail, in order of seniority when staff is increased or when vacancies occur.

Article 4 of Supplemental Agreement 10.13 further addresses the seniority of extra gang labourers, and acknowledges that they may be listed both by Region and by Area. It provides, in part, as follows:

**4.1** The seniority of an Extra Gang Labourer shall be confined to the Region or Area and shall commence from the date of entry into the service as an Extra Gang Labourer covered by this Agreement. ...

...

**4.3** Seniority lists of all Extra Gang Labourers covered by this Agreement on each of the seniority territories defined by the Company Area and/or Region, showing name, date of entry into the service and seniority standing, shall be prepared and posted in accordance with article 16.3 of Agreement 10.1.

It is common ground that the grievor did not receive a recall to service by registered mail. The Arbitrator is satisfied that the position of the Brotherhood, to the effect of article 5.4 of Supplemental Agreement 10.13 applied to Mr. Boily, must be accepted. There is nothing within the language or scheme of the agreement to suggest that an employee whose name appears on a District or Area seniority list, as distinguished from a Region seniority list, is not covered by the recall requirements of article 5.4. On that basis the Arbitrator is compelled to conclude that the Company did not properly recall the grievor.

Alternatively, the Company submits that by past practice the procedure for recalling extra gang labourers by registered mail has been effectively abandoned in favour of recall by telephone. On that basis, it submits that efforts to call Mr. Boily at his home would have been in compliance with the recall requirements of the collective agreement. For the purposes of this award the Arbitrator need not determine whether the parties have, by the development of past practice, waived the requirement for notification by registered mail. On the material before me, in fact, there is simply no documentary evidence, nor any direct evidence of any substantial value, to demonstrate that in fact there was a call, or a number of calls, ever made to Mr. Boily. The Company concedes that the records kept at the time of the calls have gone missing. While the individual who made the calls, Engineering Clerk M. Legros, was present at the hearing to testify at to the general process which was followed, he is simply not in a position to speak to any direct recollection of having called Mr. Boily. In the result, in the absence of any notes or documentation, the Arbitrator cannot find that the Company has adduced evidence to establish, on the balance of probabilities, that efforts were made to call Mr. Boily. When that is coupled with the fact of the grievor's own testimony, to the effect that his telephone was operational at the time, that his answering machine was also working, and that he received no call or message from the Company, the Arbitrator is compelled to conclude that the Company did not make reasonable efforts to recall the grievor to work on the regional extra gang in the spring of 1992.

For the foregoing reasons the grievance must be allowed. The Arbitrator finds that the Company violated the recall provisions of Supplemental Agreement 10.13 by failing to take all reasonable steps to recall Extra Gang Labourer Boily to regional service in the spring of 1992. The Company is therefore directed to compensate the grievor for all wages and benefits lost.

January 20, 1997

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