CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2826

Heard in Montreal, Wednesday, 12 February 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

EX PARTE

DISPUTE:

Various time claims submitted on behalf of Windsor Locomotive Engineers J.J. Deck, D.J. Jewell and R.L. Ellison, in accordance with the provisions of Appendix C of Agreement 1.1.

EX PARTE STATEMENT OF ISSUE:

In November 1994 the Company made the decision to cut the shop staff in Windsor Terminal, without reviewing this matter with the General Chairman in violation of the intent of Appendix C, Section A of Agreement 1.1.

As a result of shop staff reduction, there was a noticeable decline in cab conditions, causing cabs being improperly cleaned and serviced. After many failed attempts in having this matter addressed by the Company, various locomotive engineers submitted time claims – 15 minutes for supplying drinking water and cleaning units under Section A and C of Appendix C.

The Company allowed the claims in part, compensating claimants 5 minutes for supplying drinking water on engines, however declined to pay the portion of claim for cleaning units.

The Brotherhood appealed the declined portion of the claims under Appendix C of Agreement 1.1. The Brotherhood also contends that the Company violated the intent of Section C, Section A of Agreement 1.1.

FOR THE BROTHERHOOD:

(SGD.) C. HAMILTON
GENERAL CHAIRMAN

There appeared on behalf of the Company:

J. Coleman	– Counsel, Montreal
M. Becker	– Manager, Labour Relations, Montreal
J. Krawec	– System Transportation Officer, Montreal
D. A. Watson	– Labour Relations Consultant, Montreal
G. Search	– Assistant Manager, Labour Relations, Toronto

And on behalf of the Council:

M. A. Church	– Counsel, Toronto
C. Hamilton	– General Chairman, Toronto

PRELIMINARY AWARD OF THE ARBITRATOR

The sole issue to be resolved at this point in the proceedings is whether the grievance is arbitrable. The history of the matter can be briefly stated. This dispute concerns time claims filed by three locomotive engineers at Windsor, relating to work performed in respect of supplying drinking water and cleaning locomotive units. The amount of the claims are for an approximate total amount of some $207.00. This matter was initially scheduled for hearing on December 10, 1996. On December 9, this Office received a letter from the Company's Director, Labour Relations stating in part: "Please be advised that the Company has placed the claims in line for payment, without prejudice or precedent, and considers the case as settled." The Council's representative, however, came to the hearing expecting the matter to proceed. He then took the position, as the Council does today, that the Council did not agree to a settlement of the matter, and that there is an arbitrable issue still to be resolved. As the Company was not present at the time, this matter was remitted for further argument and submissions by the parties on the issue of arbitrability.

The facts disclose that the grievances originated as time claims filed by the three locomotive engineers in question. It does not appear that the parties had any joint agreement with respect to the settlement of the grievances, so that they would not proceed to arbitration. Rather, in keeping with what appears to have been general practice concerning the settlement of contested time claims, the Company simply decided, on the eve of the arbitration, to pay the time claims to the grievors on a without prejudice basis. In the result, payment was made to them sometime in pay periods following the date scheduled for the original arbitration. It appears that the amounts in question were blended into the employees' pay cheques, with due notation on their pay slips as to the payment of the claims. There is, however, no evidence that the employees or their Council representative ever indicated to the Company that they would accept the payment in full satisfaction of the issues being progressed to arbitration. More specifically, it appears, as reflected in representations made by the Council's representative, Mr. Hamilton, that he specifically indicated to Company officials prior to the original arbitration date that he was not agreeable to accepting any payment, on a without prejudice basis, as a settlement of the grievance.

The Company now submits that these claims are not arbitrable. Its counsel submits that the issue is moot, given that they have been fully paid by the Company, albeit on a without prejudice basis. In support of that position he refers the Arbitrator to a prior award of this Office in **CROA 843**. In that case Arbitrator Weatherill disallowed the arbitration of claims which had, in fact, been paid. In that case he commented, in part, as follows:

> At the third stage, the Company allowed the grievances, in that it undertook to pay the claims. It did not, however, admit that there had been any violation of Article 29. The Company did state that it had erred in not rebulletining the positions in question pursuant to Article 33.31. The claims have, it appears, been paid and payment accepted.
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> The claims in question were for particular amounts and such claims have, it appears, been paid. Acceptance of payment in these circumstances constitutes settlement of the grievances, in my view. No question arises as to the Union's right of representation of employees, which is not in doubt, but which does not constitute a right to arbitrate academic questions of interpretation in the absence of some concrete grievance. Whether or not Article 29, or Article 33 or any other Article of the Collective Agreement applies in circumstances such as those which gave rise to these grievances is a question which may arise whenever such circumstances occur and give rise to claims. Where particular claims have been fully satisfied, there is no longer an arbitrable question.
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> For the foregoing reasons it is my conclusion that the grievances are not arbitrable. These proceedings are accordingly terminated.

This Arbitrator agrees that the foregoing passage is a correct statement of the operative principles. When a union makes a claim on behalf of a grieving employee, and an offer to pay the claim on a without prejudice basis is made by the employer, and that offer is accepted by the union, there can be no doubt that the grievance must be treated as settled. That, it seems to me, is reflected in the above noted passage by Mr. Weatherill: "Acceptance of payment in these circumstances constitutes settlement of the grievances in my view." As appears from the record in that case, the union and employees concerned consciously made an acceptance of the company's offer of settlement.

The instant case is different, however. There is, very simply, no evidence before the Arbitrator that at any point in time the Company and the Council were in agreement as to the tendering and acceptance of a without prejudice payment in full settlement of the grievances arising from the claims which are before me. On the contrary, neither the

employees nor their Council representative were directly approached on the matter, and payment was simply processed on a unilateral basis within the Company's payroll system, without any consultation. I cannot find in these circumstances settlement of the kind contemplated within CROA 843. Plainly, both the Council and the employees had the right to consider whether they would accept payment, coupled with a without prejudice condition, as part of the settlement and final resolution of their grievances. Absent the opportunity of any such agreement, however, I cannot come to the conclusion that the matter can be said to be mutually settled, even bearing in mind that the Company's unilateral action appears to have satisfied the claim for payment which was originally made.

It should be stressed that this is not an academic or frivolous dispute. There seems to be little doubt that the issue of payment for work performed by locomotive engineers in respect of supplying and cleaning locomotive cabs, work previously performed by employees from another bargaining unit, is an ongoing point of contention and disagreement between the Company and the Council. In that circumstance it is not without merit for the Council to seek arbitral guidance on the basis of precedential awards, even if they should relate to certain fact specific cases. There is, in other words, something in the nature of a systemic labour relations problem underlying these individual claims which would, in my view, justify the Council's wish to obtain an adjudication of precedential value which might have some bearing in either justifying or quieting other similar claims which, it seems, are fairly numerous. Further, it appears well settled that a unilateral offer of payment does not, of itself, render an issue inarbitrable, particularly where the offer of payment is on a without prejudice basis. (*See* **Re International Nickel Co. of Canada Ltd. and United Steelworkers, Local 6500** *(1975) 9 L.A.C. (2d) 83 (Simmons) and* **Re Imperial Tobacco Products and Tobacco Workers' Union, Local 323** *(1975) 8 L.A.C. (2d) 388 (Weatherill) and see also* **Re Windsor Roman Catholic Separate School Board and Service Employees' International Union, Local 210** *(1994) 45 L.A.C. (4th) 149 (Jolifffe) and* **Re Canada Post Corp. and Canadian Union of Postal Workers** (1989) *8 L.A.C. (4th) 201 (Thistle).*)

If, in the instant case, it could be shown that the Council and the grievors knowingly accepted the money offered by the Company in settlement of the grievance, the Employer's argument as to arbitrability would obviously succeed. That, however, is not the case before me. The payments made to the employees concerned were blended with their paycheques, in circumstances where they appear to have had little option in respect of receiving the monies and where, indeed, they may well have received the money in question, whether by cheque or direct deposit, without realizing that the settlement monies were included. That would be especially so in the case of two of the grievors, for whom the amounts in question were little more than three dollars.

In the result, the Arbitrator must conclude that the grievances remain arbitrable, conditional upon the return of the settlement monies tendered by the Company. Should any of the grievors elect to retain the payment made, any claim by that employee must be considered fully settled. Subject to proof of repayment back, therefore, these matters shall be rescheduled for hearing on their merits.

February 14, 1997 **(signed) MICHEL G. PICHER**
ARBITRATOR

The matter was ultimately resolved between the parties had no further award issued.