

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2873

Heard in Montreal, Wednesday, 9 July 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS
[RAIL CANADA TRAFFIC CONTROLLERS]**

DISPUTE:

Claim of Rail Traffic Controller Level 4, V.L. Archibald, concerning lost wages account not called for work 31 times from February 7, 1993 to January 28, 1994.

JOINT STATEMENT OF ISSUE:

The Brotherhood contends that the Company has violated articles 5.11 and 21.8 of Agreement 7.1.

The Brotherhood contends that RTC Level 4 V.L. Archibald should have been called for 31 shifts during the period of February 7, 1993 until January 28, 1994 and requests compensation for those shifts.

The Company has denied the Brotherhood's contention and declined their request.

FOR THE BROTHERHOOD:

(SGD.) A. OWENS
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. TORCHIA
FOR: VICE-PRESIDENT, CN WEST

There appeared on behalf of the Company:

S. Blackmore – Labour Relations Officer, Edmonton
J. Torchia – Manager, Labour Relations, Edmonton

And on behalf of the Brotherhood:

A. Owens – General Chairman, Winnipeg
J. Ruddick – General Chairman Elect, Burlington
P. Wojtowicz – CN System General Chairman,

AWARD OF THE ARBITRATOR

The facts pertinent to this grievance are not in dispute. The grievor entered Company service as an operator, a position which now corresponds to RTC level 4, at Saskatoon in March of 1988. She ultimately obtained a permanent level 4 position in 1995. For a number of years, however, Ms. Archibald performed work under article 21.8, which corresponds to article 19.8 in the current collective agreement. That provision provides as follows:

19.8 RTC level 4's Spare or Pool Lists will be maintained on each Manager – RTCC's Territory and RTC level 4s, while assigned to such lists, will be considered as in the service of the Company. A sufficient number of RTCs level 4 will be assigned to the RTC level 4 Spare or Pool Lists to take care of the normal requirements of the service, with a minimum of fifteen percent of the number of permanently assigned positions on the Manager – RTCC's Territory.

It is the position of the Brotherhood that as a spare RTC level 4, in conformity with article 19.8, the grievor was entitled to be called to fill vacancies, including vacancies of ten days or less, in RTC level 4 positions. The grievance arises because for a period of time, estimated by the Brotherhood to be roughly from February 7, 1993 to January 28, 1994, Ms. Archibald was not called to work to cover a number of vacancies which arose.

The Company's position is that the vacancies which were not filled by the grievor were properly filled in accordance with the terms of a memorandum of agreement made between the Company and the Brotherhood, dated December 16, 1992. That agreement established a spareboard of unassigned Rail Traffic Controllers levels 1 to 3. Under the terms of that agreement, referred to as the PUB Agreement, relief RTCs in levels 1 to 3 have the advantage of being given a permanent position, with a forty hour guarantee. The grievance arises because the Company assigned RTC level 4 vacancies of ten days or less to employees on the newly established spareboard, to the exclusion of the grievor. The position of the Company is that it was entitled to assign the work as it did, as the memorandum of agreement specifically overrides any contrary provisions of the collective agreement. The Brotherhood counters that while the memorandum of agreement does contemplate eventual attrition and the ultimate elimination of the Operator or RTC level 4 position, it does not, either expressly or implicitly, intend to override the Company's obligations in respect of the treatment of spare RTC level 4 employees, such as the grievor, as contemplated under article 19.8 of the collective agreement. It further submits that the Company is in error in taking the position that the grievor was entitled only to vacancies of ten days or more, in accordance with what is now article 36.1 of the collective agreement, which provides as follows:

36.1 A temporary position or temporary vacancy of less than sixty (60) days will be filled without bulletin. RTCs will be permitted to exercise their seniority in filling temporary positions or temporary vacancies of ten (10) working days and less than sixty (60) days in their respective offices regardless of rates of pay. Otherwise such temporary positions or temporary vacancies may be filled, where practicable, by the senior qualified unassigned RTC who is available. The principles of this Article 36.1 will also apply to RTCs level 4.

The Brotherhood's representative submits that the above provision merely establishes the requirement to post temporary vacancies in excess of ten working days, to be filled in accordance with the bulletining and seniority provisions of the collective agreement. It does not, he submits, derogate from the entitlement to spare work contemplated for RTC level 4s under article 19.8 of the collective agreement.

The following provisions of the memorandum of agreement of December 16, 1992 are pertinent to this dispute:

- 1.** The Company will establish and maintain an unassigned Rail Traffic Controllers board in each Rail Traffic Control Centre for the purpose of providing relief. All positions on this board will be permanent positions. Employees will be utilized in accordance with the daily requirements of each office to provide relief such as vacation or sickness relief, assist in emergency situations, relieve or assist busier desks, perform clerical duties, relieve for meals, and any other duties within the scope of Agreement 7.1 as determined by the Manager – Rail Traffic Control Centre.
- 2.** Effective upon establishment of these boards, all present employees who are qualified, or are currently being qualified, as Rail Traffic Controller level 1 to 3 but do not hold a permanent position as a Rail Traffic Controller level 1 to 3 will be assigned to the board.

3. Thereafter any new positions on the unassigned board will be established as required by the Manager – Rail Traffic Control Centre and any employees who become qualified as Rail Traffic Controllers level 1 to 3, will be assigned to the board.

4. Rail Traffic Controllers on the unassigned board may be directed by the Manager – Rail Traffic Control Centre to perform relief work on Rail Traffic Controller level 1 to 4 positions or vacancies.

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12. When Rail Traffic Controller level 4 positions become vacant, they may be filled by a Rail Traffic Controller on the unassigned board, pending occupancy by the successful applicant to the bulletin.

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14. Rail Traffic Controllers on the board not required at their home terminal may be required to protect Rail Traffic Controller level 4 shortages on the Manager – Rail Traffic Control Centre’s Territory for periods of up to three months. Shortage assignments will be offered on a voluntary basis on the Manager – Rail Traffic Control Centre’s Territory. If no applications are received, the junior unassigned Rail Traffic Controller on the Manager – Rail Traffic Control Centre’s Territory will be assigned. Employees who fail to protect these shortages will not be entitled to a wage guarantee for the length of time which they would have been required for the shortage. Employees protecting these shortages will be entitled to expenses in accordance with the provisions of articles 20.12, 20.14 and 21.2 of Agreement 7.1.

...

17. The provisions of this Memorandum of Agreement will override any other provisions in Agreement 7.1 to the contrary.

While the Arbitrator can appreciate the sentiment which motivates this grievance, the language of the provisions which are in issue does not tend to support the Brotherhood’s claim. Firstly, it may be noted that article 19.8 does not make any specific provision for the manner in which RTC level 4s who are on the spare or pool lists are to be assigned to relief positions or temporary vacancies. More fundamentally, the Arbitrator cannot escape the conclusion that there appears to be a categorical contradiction between the obligation placed upon the Company under article 19.8, namely to maintain a list of spare RTC level 4s sufficient for the “normal requirements of the service” and the provisions of the memorandum of agreement which categorically vest in the Company’s manager the discretion to assign PUB agreement spareboard employees to relief work on all Rail Traffic Controller positions, including level 4 positions or vacancies. Significantly, article 12 of the memorandum of agreement appears to contemplate that temporary vacancies in RTC level 4 positions are to be filled from the PUB spareboard.

How can these provisions logically be reconciled? If, on the one hand, the Company is obliged to maintain a spareboard of RTC level 4s to cover the normal requirements of the service, there would be little or no necessity to establish terms within the memorandum of agreement of December 16, 1992 whereby Rail Traffic Controllers on the PUB agreement spareboard can be assigned by the manager to level 4 positions or vacancies. As can be seen from the provisions reproduced above, paragraphs 4, 12 and 14 specifically contemplate circumstances in which level 4 shortages or temporary vacancies can be covered by a Rail Traffic Controller on the PUB unassigned board. The interpretation advanced by the Brotherhood is not, obviously, one which cannot be made on the language of these two agreements. It is conceivable that the parties could have intended that the Company continue under an obligation to maintain fully filled spare lists of RTC level 4s to take care of the normal requirements of the service, and that resort could be had to the PUB spareboard to fill RTC level 4 positions when the RTC level 4 lists are depleted. However, a close examination of the memorandum of agreement suggests that the parties intended otherwise. As is evident from paragraph 1, employees on the PUB spareboard are to be utilized “in accordance with the daily requirements of each office to provide relief ... and any other duties within the scope of Agreement 7.1 as determined by the Manager – Rail Traffic Control Centre.” There are, very simply, no qualifications on the ambit of relief to be assigned to the employees on the board. More specifically, paragraphs 4, 12 and 14 directly contemplate employees on the PUB spareboard being assigned to level 4 positions or vacancies.

Can it logically be concluded that the parties agreed and intended that the Company would incur the obligation of paying a guarantee to the PUB spareboard employees while, at the same time, retaining the obligation to fill spare

lists of RTC level 4s to cover relief work at the lowest level of the job hierarchy? It would seem to the Arbitrator that when the collective agreement and the memorandum of agreement of December 16, 1992 are read together, it is highly doubtful that the parties intended such a result. There is nothing in the language of the memorandum of agreement to suggest a curb or restriction on the discretion of the Manager – Rail Traffic Control Centre to assign PUB spareboard employees to level 4 positions or vacancies. Moreover, the specific provisions of paragraph 17 appear to recognize that the arrangements provided for within the memorandum of agreement might conflict with more general provisions of the collective agreement, and that in the event that they do the memorandum of agreement is to override. In interpreting provisions such as these a board of arbitration must take a reasonably purposive approach in determining the intention of the parties. When such an approach is taken in the case at hand, the Arbitrator is compelled to conclude that the more specific and direct language of the memorandum of agreement, as regards the ability of management to make assignments to relief work, are to override the more general obligation found within article 19.8, an obligation which, it may be noted, does not speak to the mechanics of assignment of RTC level 4s on the spare or pool lists.

In the result, the Arbitrator is satisfied that the interpretation of the Company is correct. At the times material to this grievance, the Manager – Rail Traffic Control Centre was entitled, in accordance with the discretion vested by the memorandum of agreement, to assign the relief RTC level 4 work in priority to employees on the PUB spareboard. For these reasons the grievance must be dismissed.

July 16, 1997

(signed) MICHEL G. PICHER
ARBITRATOR