CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2880

Heard in Montreal, Tuesday, 9 September 1997

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of the Extra Gang Labourers on the Commuter Rail Gang (10-285).

EX PARTE STATEMENT OF ISSUE:

The grievors worked on the Gang from January until November 1995, a period of 11 months. However, the grievor were paid at the Extra Gang Labourers' rate of pay for the entire period.

The Union contends that the grievors worked "practically" all year on the Gang and therefore should have been paid the Trackman's (or Track Maintainer's) rate of pay as provided for in section 26.5 of Agreement No. 41.

The Union requests that the grievors be compensated for all wages lost as a result of this matter.

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

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

S. Moutinho	– Labour Relations Officer, Calgary
R. M. Andrew	– Manager, Labour Relations, Calgary
E. MacIsaac	– Labour Relations Officer, Calgary

And on behalf of the Brotherhood:

D. Brown	– Sr. Counsel, Ottawa
P. Davidson	– Counsel, Ottawa
K. Deptuck	– Vice-President, Ottawa
J. Kruk	– System Federation General Chairman, Ottawa
Wm. Brehl	– General Chairman, Pacific Region, Revelstoke

AWARD OF THE ARBITRATOR

Article 26.5, which is the subject of this grievance, reads as follows:

> **26.5** Labourers in an extra gang engaged practically all year round, shall be paid the same rates as trackmen or, if qualified as such, as track maintainers.

The following provisions were also raised in the arguments of the parties:

> **16.1** Trackmen "A"/track maintainers and trackmen "B" employed in temporary extra gangs to be known as special maintenance gangs, doing section maintenance work, shall be paid the applicable trackman or track maintainer rate.
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> **16.2** Section rates of pay shall not apply on large temporary extra gangs employed in ballasting and lifting track where new material has been distributed continuously along the line, relaying rail out of face, lining and other work incidental to such ballasting and relaying rail, or in other work too heavy for regular section gangs to perform.

The facts pertinent to this grievance are not in dispute. The labourers who are the subject of the instant grievance worked as part of the commuter rail gang, in and around Vancouver. They worked some eleven months in 1995. Following a brief layoff, they are said to have then worked on the same project from February until the 12th of December, 1996. The Brotherhood claims that the grievors, who were compensated at extra gang labourers' rates of pay for the entire period, should properly have been paid in accordance with section 26.5 of collective agreement no. 41, at the trackman's or track maintainer's rate of pay. This, it submits, is so because the work in question qualifies as work in which the employees were "… engaged practically all year round", as contemplated in article 26.5.

The Company's representatives submit that the intention of the article is not what it appears. They submit that historically, it was intended to provide trackmen's or track maintainers' rates of pay to "special maintenance gangs" which are established to perform section work to which laid off sectionmen, such as trackmen or track maintainers, are entitled to claim by priority. In other words, the Company argues that the rates payable under section 26.5 of the collective agreement would attach only in the case of gangs which are engaged to perform sectional work on divisional or special maintenance gangs, generally comprised of laid off sectionmen. It is submitted that the history of the article, traced as far back as 1938, supports that interpretation.

The jurisprudence in this area establishes certain principles. In **CROA 90** the Brotherhood claimed that trackmen employed in temporary extra gangs were entitled to sectionmen's wages. Under the language of wage agreement no. 14, as it then stood, Arbitrator Hanrahan concluded that the claim could not succeed unless it could be shown that the employees were performing the work of sectionmen. He concluded, to the contrary, that the laid off sectionmen were in fact working under collective agreement no. 13, as extra gang labourers, and were properly paid in the circumstances. There is nothing in the award, however, which considers the circumstance of extra gang labourers who are engaged in projects that extend "practically all year round".

In **CROA 671** Arbitrator Weatherill dealt with a claim of the Brotherhood that members of the Alberta Tie Gang No. 1 should be paid at sectionmen's rates, rather than at extra gang labourers' rates. That claim was denied, with the arbitrator reasoning as follows:

> The employees covered by this grievance do not work (or at least did not work at the material times) as members of regular section crews. There are a great many such crews established, and their members are engaged in a variety of tasks relating to track maintenance. Some years ago the Company reorganized its track operations, reducing the number of regular sectionmen and increasing the use of extra gangs. These extra gangs are used on a seasonal basis usually, it would seem, to perform some particular type of work along a distance of track where they may, in some cases, work with a series of section crews in succession. Thus, there are ballast, rail, tie and surfacing gangs among others. These gangs use various sorts of equipment not previously used by section crews for the same work. Thus, the mechanized tie gang performs in a specialized way a type of work which was only one of a number of tasks done by section crews.
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> The work of a section crew has included and may still include tie renewal work. Regardless of the tasks they perform, section crew members are entitled to section rates of pay in accordance with

> the applicable provisions of the collective agreement. The mere fact of being engaged in tie renewal work, however, is not sufficient to establish that one is a sectionman. In the instant case the employees concerned work as labourers (the gangs include other classifications not in issue here) on "large temporary extra gangs" of the sort described above. Such employees are not covered by the collective agreement, as is clear from Article 1.2:
>
> > **1.2** Labourers in extra gangs, unless those engaged practically all year round, shall not be considered as coming under this agreement.
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> The employees concerned were hired as and worked as labourers. The sort of work they did was, as has been noted, related to some of the work which might be done by sectionmen. It remained nevertheless labourers' work, and it was done on extra gangs. These gangs were not, from the material before me, "engaged practically all year round". Thus, whether or not the employees concerned had worked a probationary period, they were not entitled to section rates. They were not trackman "A"/track maintainers nor were they trackmen "B". Their work was that of extra gang labourers.
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> Accordingly the grievance must be dismissed.

As appears from the foregoing analysis, implicit in the comments of Mr. Weatherill is the suggestion that a different outcome might have obtained if it could have been shown that the gangs were "engaged practically all year round". The award, however, rests on the proposition that as a general rule doing "section work" as part of an extra gang does not entitle the labourer to sectionmen's rates.

On a review of these materials, including the history of the collective agreements, the Arbitrator has substantial difficulty with the position advanced by the Company. If, as its representative submits, the intention of the parties was to provide ongoing trackmen or track maintainer rates of pay for laid off trackmen reduced to labourers on special maintenance gangs, there would be no reason for article 26.5, as the matter is fully dealt with under article 16.1. Nor can I conclude that the language of article 26.5 reflects either a patent or latent ambiguity. On its face it appears clear, and intends that labourers in extra gangs whose projects will see them "engaged practically all year round" are to be paid at premium rates, in that special circumstance. In contrast to article 16.1, there is no qualification as to the kind of work to be performed, save for its extended duration.

The Arbitrator cannot, however, fully accept all of the arguments advanced by the Brotherhood. Needless to say, each case must be determined on its own facts. The instant case does not involve a work project which was not, from the outset, contemplated to last "practically all year round". Whether article 26.5 would extend to a shorter term project which, for whatever reason, is unforeseeably extended to last for practically a full year is a matter which is not before me, and upon which I make no comment. Significantly, however, it does not appear disputed that the Vancouver commuter rail project, which involved setting up a commuter rail system between Vancouver and Mission, British Columbia was known, well in advance, to be a project which would occupy the commuter rail gang on a basis that can be described as "practically all year round". Whatever precise definition might ultimately be given to that phrase, I am satisfied that the assignment, on a consecutive basis, over an eleven month period in 1995, the period which is the subject of this grievance, would qualify for the purposes of the article.

The grievance is therefore allowed. The Arbitrator directs that the grievors be compensated for all wages and benefits lost by reason of the violation of article 26.5 in the manner utilized to calculate their compensation.

September 15, 1997

(signed) MICHEL G. PICHER
ARBITRATOR