CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2941

Heard in Montreal, Tuesday, 14 April 1998

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim for all wages at punitive and pro-rata time for either R.S. Dawson, K.J. Genaille, J.S. Allan, J.B. Duduych or J. Molnar.

JOINT STATEMENT OF ISSUE:

On March 17, 1995, a request for applications was posted on the bulletin board at the Work Equipment Shop, Transcona, Winnipeg, requesting interested parties to apply for positions to work as Operator/Maintainer on Can-Ac's P811 project in New York, U.S.A. These positions were to run from April 3 to July 1, 1995, and could be extended if other contracts were obtained. The successful applicants were L. Dudar, N. Wilson, G. Colli, K. Wasylenchuk, K. Bator and G. Zanewich.

After the first contract expired, a second contract was signed to do work for Canadian Pacific Railway in British Columbia. The original applicants were sent to this new job. However, one of the original applicants was unable to go and a replacement was sent in his place, Mr. H. Friesen, a junior employee.

The Union contends that: **(1.)** The Company is in violation of article 18.6 in that the senior applicant was unjustly dealt with by not being allowed to assume the position assigned to Mr. Friesen. **(2.)** The Company is in violation of article 3.2 of Supplemental Agreement 10.3. **(3.)** Other employees were senior and qualified and available to work the position or positions required that Mr. Friesen, a junior employee, was assigned to. **(4.)** That the Company cease and desist from violating the collective agreement.

The Union requests that: the senior grievor be made whole and compensated for all wages at the rate of pay Mr. Friesen, the junior employee, received on the Canadian Pacific Railway contract worked in British Columbia.

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

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) R. F. LIBERTY	(SGD.) S. BLACKMORE
SYSTEM FEDERATION GENERAL CHAIRMAN	FOR: SENIOR VICE-PRESIDENT, WESTERN CANADA

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:

R. F. Liberty	– System Federation General Chairman, Winnipeg
R. A. Bowden	– System Federation General Chairman, Ottawa
D. W. Brown	– Sr. Counsel, Ottawa

AWARD OF THE ARBITRATOR

The first issue to be dealt with is the claim of the Brotherhood that the senior applicant was "unjustly dealt with" contrary to article 18.6 of the collective agreement. The Company submits that that claim is not arbitrable. The Arbitrator must sustain the position of the Company.

The provisions of article 18.6 and 19.1 of the instant collective agreement are identical to those in the collective agreement between CP Rail and the Brotherhood, and read as follows:

> **18.6** **A grievance** concerning the interpretation, or alleged violation of this Agreement, **or an appeal by an employee who believes he has been unjustly dealt with** shall be handled in the following manner.
>
> **19.1** **A grievance** which is not settled at the last step of the grievance procedure may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work.
>
> (emphasis added)

The language of these provisions was exhaustively considered in a recent award of this Office in **CROA 2939**. For the reasons related in that award, I am satisfied that the intention of the parties to the instant collective agreement was to provide a mechanism whereby appeals by employees who believe they have been unjustly dealt with can be heard through the first three steps of the internal grievance procedure. Such complaints, however, which may well fall outside the terms of the collective agreement, cannot be progressed to arbitration. Under the provisions of article 19.1 of the collective agreement it is only a "grievance" which may proceed to arbitration and, as reflected in article 18.6, a grievance is a dispute concerning the interpretation or alleged violation of the collective agreement. Article 18.6 does not itself grant substantive rights, but is, rather, a procedural provision intended to provide an avenue for venting and possibly resolving complaints unrelated to any substantive provision of the collective agreement. The Arbitrator must therefore sustain the position of the Company that the Brotherhood's first contention that the senior applicant was unjustly dealt with is not arbitrable.

The next question to be addressed is whether the work which is the subject of this dispute is properly work within the bargaining unit, which is covered by the collective agreement. The position of the Company is that it is not. The evidence before the Arbitrator reflects, without substantial dispute, that the P811 assignments were not bulletined pursuant to the provisions of the collective agreement. Rather, the Company posted requests for applications on the bulletin board at the work equipment shop at Transcona on March 17, 1995. The successful applicants were advised that they would be paid on the basis of a weekly salary, at a rate well in excess of the wages which they would receive under the collective agreement, apparently based on salaries paid to supervisors. Their expenses were paid by CANAC, with the exception of meals, which were covered on the basis on a *per diem* rate.

The Company submits that the facts disclose that the work which is the subject of this dispute is not bargaining unit work, and that the employees who were selected to perform it did so on a basis entirely outside the collective agreement. It stresses that the Brotherhood did not grieve the manner in which the original applicants were selected and assigned, nor the method or amount of payment which they received. Essentially the position of the Company is that the work in question was in fact assigned to the individuals selected as non-scheduled employees, and does not fall within any of the terms or provisions of the collective agreement.

The Brotherhood alleges a violation of what was then article 3.2 of collective agreement 10.3 which reads as follows:

> **3.2** Temporary vacancies of less than 30 days required by the Company to be filled may be filled temporarily by the senior qualified employee immediately available. An employee who does not exercise his seniority to such a temporary vacancy of 30 days or less will not forfeit any seniority. Junior qualified employees immediately available must protect assignments in all instances.

The Brotherhood's representative submits that the facts do not support the conclusion that the employees in question worked outside the bargaining unit. He stresses that CANAC is a wholly owned subsidiary of the Company, and that the work performed both in the United States and for the Canadian Pacific Railway in British Columbia is not unlike other work performed by bargaining unit employees who, for example, have been called upon to perform

work for VIA Rail, the Ontario Northland Railway and GO Transit in Ontario. He further draws to the Arbitrator's attention the fact that the collective agreement does contain provisions governing the assignment and payment of work on P811 equipment. The Brotherhood submits that the eighteen day P811 project at Golden, B.C., performed for Canadian Pacific Railway, must be viewed as a temporary vacancy of thirty days or less within the contemplation of article 3.2 of the collective agreement, and that the failure to bulletin the position and make it available to the senior qualified employee constitutes a violation of that provision.

Upon a careful review of the facts of the case at hand, the Arbitrator has difficulty sustaining the position of the Brotherhood. At the outset it would appear arguable that the Brotherhood could have grieved against the Company independently negotiating wages and salary with bargaining unit employees, without the concurrence or involvement of the Brotherhood in the negotiation of such factors as wage rates, travelling expenses and expenses in relation to meals and accommodation. For reasons which it best appreciates, however, which may well be justified from the practical standpoint of its own interests and those of the employees, the Brotherhood chose not to grieve the setting up of the salaried positions to which the employees were assigned. In that circumstance the Arbitrator finds it difficult to see upon what basis the Brotherhood can now grieve the selection process for employees so assigned. It has, for practical purposes, acquiesced in the practice of the Company, said to have been in place for some time, of separately negotiating with employees terms and conditions of temporary employment outside the bargaining unit, on a salaried basis. It would seem to the Arbitrator that the Brotherhood cannot have it both ways, on the one hand claiming for its members the advantage of privately negotiated non-bargaining unit work and, on the other hand, insisting on the application of the collective agreement for the purposes of selecting employees to be assigned.

Great care must be taken in approaching a grievance of this kind. The Arbitrator makes no comment as to the status of work or assignments which may have been performed for other railways or companies on a similar or comparable basis. Needless to say, each case must be determined on its own specific facts. In the case at hand it is apparent that the Brotherhood was aware that the Company was treating the employees in question as falling outside the collective agreement, and chose not to grieve the assignments, or the terms and conditions under which they worked. When it could have done so in a timely way, it did not claim that such work must be treated as bargaining unit work, within the terms of the collective agreement. Having done so, it cannot now successfully claim that in fact the provisions of the collective agreement govern the employees in respect of that work, whether in the selection process or otherwise.

The Brotherhood's willingness to allow the Company to make such arrangements is understandable. It does not appear disputed that the employees selected for the P811 assignments can earn up to twice their regular wages, in addition to guaranteed overtime, thereby making these assignments extremely attractive. However, if it is the Brotherhood's wish to compel such work to be done within the terms of the collective agreement, it must do so clearly, by negotiating provisions within the collective agreement to deal expressly with it. Alternatively, it can grieve that such assignments are contrary to the collective agreement in all respects, a matter upon whose merits the Arbitrator makes no comment.

For all of the foregoing reasons the grievance must be dismissed.

April 17, 1998

(signed) MICHEL G. PICHER
ARBITRATOR