CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2961

Heard in Montreal, Thursday, 11 June 1998

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

DISPUTE:

A grievance with respect to the advertising and awarding of trainperson positions at Sutherland and Wilkie terminals at the Fall advertisement of assignments effective October 29, 1995, and the subsequent loss of income protection for the affected employees.

JOINT STATEMENT OF ISSUE:

The Council contends that in October 1995, General Advertisement of Assignments for the Sutherland and Wilkie Terminals, the Company did not properly advertise positions as outlined in Article 9A(3)(b). Trainperson positions were not properly awarded, subsequent vacancies were not indicated as per Article 37, and entitlements to Maintenance of Basic Rates under Article 9A(6) were not established for protected trainpersons who, as a result of Conductor-Only operations were required to fill a required position.

The Company denies the Council's contentions and has declined the grievance.

FOR THE COUNCIL:	FOR THE COMPANY
(SGD.) L. O. SCHILLACI	(SGD.) K. E. WEBB
GENERAL CHAIRPERSON	FOR: B.C. DISTRICT GENERAL MANAGER

There appeared on behalf of the Company:

M. E. Keiran	– Director, Labour Relations, Calgary
J. J. Cook	– Labour Relations Officer, Calgary
B. P. Scott	– Consultant, Special Projects, Toronto

And on behalf of the Council:

D. H. Finnson	– Secretary/Treasurer, Saskatoon
L. O. Schillaci	– General Chairperson, Calgary

AWARD OF THE ARBITRATOR

By this grievance the Council contests the practice of the Company to not bulletin non-required trainpersons' positions at the change of card. It submits that the Company's practice in that regard is a violation of the provisions of article 9A, the section of the collective agreement dealing with conductor-only operations. The Company submits that its actions are not in violation of the collective agreement, and that article 9A provides protection to employees with the requisite seniority, ensuring that they are entitled to claim non-required brakepersons' positions should they be unable, by the exercise of their seniority, to hold a required position. Additionally, the Company submits that an employee forced from a non-required position to a required position is entitled to maintenance of basic rates protection. It further submits that the issue in the instant case is no different from that which was decided by this Office in **CROA 2475**.

The Arbitrator must agree entirely with the position of the Company. The matter in dispute concerns the ability of the Company to blank unrequired trainperson positions at the general advertisement of assignment, or change of card. That issue is indistinguishable from the issue before the Arbitrator in **CROA 2475**. In that case the submission of the Council, the position of the Company and the decision of the Arbitrator read as follows:

> The Union submits that by blanking virtually all of the non-required positions the Company has effectively reduced the number of pool assignments, rendered all first brakeperson's positions "non-required" and forced protected employees to the spareboard in a manner not contemplated by the agreement of the parties governing conductor-only operations. The Union further suggests that in some locations, particularly in the west, the Company has simply declined to allow protected trainpersons to apply for any non-required positions, thereby compelling them to bid onto required positions, foreclosing the opportunity to establish a maintenance of basic rates for those persons. The Union submits that by effectively "wiping out" the first brakepersons' pool and forcing protected employees to the spareboard the Company has rendered the obligation to bulletin all positions, including non-required positions, virtually meaningless. It submits that an overall interpretation of the provisions of article 9A does not sustain the approach taken by the Company.
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> The Company asserts a different view. It submits that if the interpretation of the Union is to be accepted, the employer gained virtually nothing from the Conductor-Only Agreement. Firstly, it's representative stresses that the Conductor-Only Agreement resulted in the payment of substantial sums by the Company in relation to voluntary separation packages made available to maximize the attrition opportunities taken up by protected employees. It estimates the cost of retirement and separation incentives in support of conductor-only operations to be in excess of fifty million dollars. Implicit in that arrangement, according to the Company, is the understanding that the employer would not be put to the obligation of hiring new employees to replace those who had left pursuant to the incentives established. However, the Company notes that if the interpretation of the Union in respect of the operation of article 9A of the collective agreement should obtain, the Company will in fact be compelled to hire new employees. Whenever an employee holding a required position on the spareboard should claim a vacancy in a non-required first brakeperson's position, in accordance with the Union's view of the bulletining procedure, the Company would be compelled to backfill the required positions so vacated, if necessary, by resorting to hiring. In the result, in the Company's view, the Union's interpretation would place large numbers of protected employees into non-required positions, while required positions would become filled by newly hired junior employees. This, it submits, was not intended or contemplated by the Conductor-Only Agreement.
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> The Company argues that a protected employee holding a required position on the spareboard cannot claim a non-required brakeperson's position unless the non-required position is one which the Company has in fact regularly filled by assigning it to a protected employee, and a temporary vacancy of six days arises by reason of the absence of that employee.
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In the Company's view the bulletining process, which includes identifying non-required first brakeperson's positions, is not rendered academic or meaningless by reason of the approach which it takes. It stresses that the Conductor-Only Agreement provides to protected employees the ultimate guarantee that if they should be unable to hold a required position they retain the right to claim an available non-required position, which would include any first brakeperson's position which was previously bulletined and blanked. In other words, the protected employees retain a significant protection against layoff, in that unoccupied non-required first brakeperson's positions must first be made available to them.

In the Arbitrator's view the interpretation advanced by the Company is more compelling than that pleaded by the Union. Firstly, the Arbitrator accepts, as submitted by the Company, that the prerogative to determine whether a job of work exists so as to give rise to a vacancy remains vested in the employer, absent clear and unequivocal language in the collective agreement to the contrary. While in most industrial relations settings the bulletining of a position is *prima facie* evidence of the employer's view that a vacancy exists, that alone is not determinative, and it is generally considered that it remains available to an employer to cancel a bulletin prior to the filling of a vacancy. Most importantly for the purposes of this grievance, the bulletining provisions of the Conductor-Only Agreement found in article 9A have a clear purpose which is unrelated to the identification or filling of a vacancy. As argued by the Company, the requirement to bulletin first brakeperson's positions, and indeed second brakeperson's positions, even though they may not be filled, is significant for the exercise of the residual right of a protected employee to claim a non-required position in the event that he or she is not successful in holding a required position. Other rights under the agreement, including the right to take layoff and have the benefit of Supplementary Unemployment Insurance benefits, may flow from the manner in which the non-required positions become filled.

In the Arbitrator's view the language of article 9A of the collective agreement lends substantial support to the interpretation of the Company. As the second sentence of paragraph 3(b) of article 9A clearly reflects, the parties agreed that following the bulletining of positions only required positions are to be filled, "... unless circumstances are such that the other provisions of this Clause 3 pertaining to the placement of protected employees in non-required positions can be applied."

In my view the foregoing provision has reference to the operation of paragraph 3(h) of article 9A, whereby protected employees unable to hold required positions are permitted to claim non-required first brakeperson's positions to the extent that they are available. In this context it is not disputed by the Company that availability refers to first brakeperson's positions which were bulletined at a terminal and which have not been filled. The hurdle which the Union's position cannot overcome is the language of the second sentence of paragraph 3(b) of article 9A. It provides that, in the normal course, following the bulletining process, only required positions are to filled. The Union's submission, however, rests on the premise that all bulletined positions, including non-required first brakeperson's positions, are to be considered filled, even if the incumbents in such positions are thereafter forced to the spareboard. In my view that position flies in the face of the language of paragraph 3(b). If the parties had intended that all bulletined positions, including non-required positions were to be filled, they could plainly have said so. They did not, however. In the result, I am satisfied that the employer's course of blanking non-required first brakeperson's positions, and forcing protected employees to take required positions on the spareboard is in keeping with the contemplation of article 9A of the collective agreement. I do not see how the interpretation of the Union can be accepted without doing violence to the language of paragraph 3(b) which expressly stipulates that only required positions are to be filled unless conditions require the placement of protected employees in non-required positions. Moreover, if a choice must be made between two arguable interpretations, the general purpose of the Conductor-Only Agreement is achieved through the interpretation advanced by the Company and is substantially frustrated, if not defeated, by the interpretation of the Union.

What is different in respect of the instant case? The Council's representative submits that the argument put forth on behalf of the Council in **CROA 2475** was not adequate to the task, and failed to draw to the Arbitrator's attention certain Company practices and internal memoranda with respect to the bulletining process to be followed under the Conductor-Only Agreement.

Unfortunately, the representative of the Council who has brought this matter forward to this Office appears to overlook a fundamental principle of the arbitration process. Under the provisions of the **Canada Labour Code** arbitration is contemplated as a final and binding process, to give clarity and finality in respect of disputes between the parties to a collective agreement. When an award has been rendered in respect of a given issue between two identical parties, it is not open to either party to seek to re-litigate the matter by way of a subsequent grievance, even if it could be shown that the matter might have been argued better or differently at the hearing of the original grievance. The common sense underlying that principle is, I think, self-evident. Absent such a rule there could be no certainty or finality in the determination of disputed collective bargaining rights, a goal which is plainly at odds with the very purpose of a rational system of industrial relations dispute settlement.

The general principle is well expressed in the following terms in Brown & Beatty, **Canadian Labour Arbitration** at 2:3220 and in an article by J.F.W. Weatherill, "The Binding Force of Arbitration Awards" (1958), 8 L.A.C. 323. The authors of Brown & Beatty comment as follows:

> The authorities are legion that a board of arbitration has no jurisdiction to consider or, alternatively, that the grievor and his or her union representatives are barred and estopped from processing a grievance which is identical to a former grievance filed by the grievor and either withdrawn, abandoned or settled, or determined by a board of arbitration. Some of these cases proceed on the basis of estoppel and others on the principle of *res judicata*, but regardless of the approach taken, the authorities are overwhelming that a board of arbitration has no jurisdiction to entertain such a second grievance … There is also substantial authority to support the proposition that an arbitration board has no jurisdiction to determine a grievance which, though not identical in wording and form to a former grievance is identical in substance. …

Upon an examination of the Council's position in the case at hand the Arbitrator is satisfied that what arises in this case is in essence no different than the grievance heard and disposed of in **CROA 2475**, namely the ability of the Company to blank non-required brakepersons' positions during the bulletining process under the Conductor-Only Agreement. Nor is the issue of estoppel, which also failed in **CROA 2475**, any different for the purposes of the instant case. What the evidence discloses, at most, is a certain degree of confusion and inconsistency in the initial application of the provisions of article 9A from location to location in Canada. There is, even if this matter were fresh for consideration, nothing in the facts disclosed which would sustain the application of the doctrine of estoppel.

For all of the foregoing reasons the grievance is dismissed.

June 12, 1998

(SIGNED) MICHEL G. PICHER
ARBITRATOR