CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3100

Heard in Montreal, Thursday, March 16, 2000

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS

EX PARTE

DISPUTE:

The Company's refusal to include CN NQISL employees in CN's 1998 Productivity Sharing Program.

JOINT STATEMENT OF ISSUE:

On or about February 22, 1998, grievances pertaining to the Company's refusal to include all CN employees in its new 1998 Productivity Sharing Program were filed by various members of the Canadian Council of Railway Operating Unions (UTU – BLE).

On April 8, 1999, the Company advised the grievors that the grievances would be treated as one grievance submitted at Step III of the grievance procedure and would be sent to the Advisory Council for a ruling on the matter.

On January 6, 2000, the Company advised the Canadian Council of Railway Operating Unions (UTU–BLE) of the denial of its grievance relative to CN's 1998 Productivity Sharing Program.

The Canadian Council of Railway Operating Unions (UTU–BLE) does not agree with the decision of the Company to reject the claim filed at Step III.

FOR THE COUNCIL:

(SGD.) R. LEBEL
GENERAL CHAIRPERSON, UTU

(SGD.) B. E. WOOD
GENERAL CHAIRMAN, BLE

There appeared on behalf of the Company:

D. Laurendeau	– Labour Relations Associate, Montreal
J. Coleman	– Counsel, Montreal
J-M Montigny	– Superintendent
J. Brayley	– Manager – Corporate Development
K. Knox	– Manager – Labour Relations (ret.)

And on behalf of the Council:

R. LeBel	– General Chairperson, UTU, Quebec City
R. Leclerc	– Local Representative, BLE

ARBITRATION AWARD

The facts pertinent to this grievance are not in dispute. The rationalization of CN's lines at the end of the '80s resulted in a decision concerning the management of a number of subdivisions located in northern Quebec. Following negotiations with certain of its unions, CN made the decision to establish a short line railway made up, in part, of the Lac St-Jean, Roberval, Cran, Chapais, Matagami, Val d'Or, Taschereau, St-Maurice and La Tuque Subdivisions. The railway thus established, the Northern Quebec Internal Short Line (NQISL), operated for all practical purposes as an independent employer. To facilitate the operation of the short line railway, CN negotiated with several unions collective agreements that allowed the employer a greater flexibility in the distribution of duties, as well as other administrative and economic advantages such as those as agreed to in the collective agreement, which applies in this case, dated March 10, 1995.

In order to promote the profitability of the company, in 1995 the parties agreed to establish a system that allowed NQISL employees to receive a monetary reward based on the performance of NQISL, as determined by a Joint Advisory Council. This arrangement, which is forms part of the collective agreement, is in the form of several letters dated February 17, 1995. Letter 5 of which reads as follows:

> This is in reference to our agreement for the operation of the Northern Quebec Internal Short Line. The following is an outline of the incentive plan that was agreed upon during our discussions.
>
> 1. All "qualified" employees will participate.
> 2. Each employee will receive an equal share based on length of "qualified" length of service.
> 3. 10% of net improvement over the 1994 Base Year.
> 4. The incentive will be paid quarterly, spread over 2 years.
> 5. Net losses to be offset against net gains.
> 6. Maximum incentive payment not to exceed 25% of the Internal Short Line's annual wage.
> 7. Incentive plan payments and any changes thereto will be approved by the Advisory Council.
> 8. A mechanism will be developed to allow the voluntary payment of incentive directly into a RRSP for each employees, if legally possible. (sic)

It is agreed that this profit sharing system has been successful. In each year since 1995 NQISL employees have received considerable supplementary earnings. For example, in 1998 each eligible employee received a bonus of $3,275. It is to be noted that this system of supplementary compensation is called "… the profit sharing plan," as it appears in Appendix 4 of the Collective Agreement established by the Advisory Council.

In 1998, CN decided to implement a profit sharing plan for its own operations, that is to say in its national railway. As the Council had already refused to the introduction of this concept in its collective agreement with CN, the plan came into effect via a unilateral declaration by the Company, as communicated to the Council's representatives in a letter from CN Assistant Vice-President Richard J. Dixon, dated February 13, 1998. That letter, written in English, referred to the project as a: "*productivity sharing program*." It was agreed that even if the Council did not concur in the establishment of this system, it did not object to the payments received by its members in the application of the plan.

It should also be noted that the reward program established at CN differed from that already in place at the NQISL, as concerned the calculation formula and controlling factors. The NQISL plan is based on the net gains over the 1994 base year and net losses are to be offset by net gains. The CN plan takes into consideration other factors, such as the rate of reportable accident, the rate of lost-time injuries, on-time train performance and fuel savings, among other things.

The matter at dispute is whether or not NQISL employees have the right to receive reward payments from the CN productivity sharing program, in addition to the rewards already received under the NQISL profit sharing plan. The Council's representative draws to the Arbitrator's attention the fact that a letter sent to CN employees concerning the CN productivity sharing program was also sent to NQISL employees. The Council maintains that NQISL employees have the right to participate in the CN reward program. Its representative bases its argument, in part, on the provisions of Article 26 of the Memorandum signed on March 10, 1995, which reads as follows:

26 OPERATING EMPLOYEE BENEFITS

26.1 All running trades employees will receive the same benefits as those which are currently provided to all CN operating employees.

The Council's representative maintains that equity requires that NQISL employees receive their share of the rewards which flow from the CN productivity sharing program, in as much as NQISL operations contribute to the success of CN operations, "by ricochet," in the Champlain District. He also emphasizes the obvious links between the management of the two companies, noting that the NQISL Superintendent for the Northern Quebec Region reports directly to CN's Champlain District Manager.

The Arbitrator cannot allow the grievance. In the first place, it is important to note that the Council is not signatory to a collective agreement or any other contractual instrument which deals with the content or scope of CN's productivity sharing program. In fact, the Council refused to include, in its collective agreement with CN, the terms of the reward program which it now seeks to claim through this grievance. It is appropriate at this time to remember that the jurisdiction of the Arbitrator applies only to the interpretation and application of the provisions of a collective agreement. It is not disputed that the rights of NQISL employees to receive payments from the NQISL profit sharing program flow explicitly from the wording of the collective agreement. Nevertheless, the Council is not signatory to a collective agreement with CN which deals with the parent company's productivity sharing program. I have difficulty seeing how the Council can now claim through arbitration a request for a payment which does not appear in any provision of a collective agreement. The Arbitrator can understand that the Council chooses to tolerate the unilateral payment of certain rewards related to productivity to its members at CN. But this tolerance does not create in itself, the equivalent of a contractual right the administration of which is reviewable at arbitration. Furthermore, the fact that NQISL employees received a letter addressed to all CN employees regarding the new productivity sharing program is insufficient, in the absence of clear provisions in a collective agreement, which would establish the existence of a contractual obligation concerning the NQISL employees.

If the Council wishes to plead the right of NQISL employees to participate in the CN plan, it must be through the interpretation of Article 26 of the Memorandum. However, the Arbitrator is not persuaded that the article in question can be read in such as fashion as to support the claim of the Council. First of all, Article 26 deals with "benefits" accorded to employees. By the word "benefits" it seems to the Arbitrator that the parties intended to deal with the matter of fringe benefits concerning the welfare of the employees. In the jargon of collective agreements the expression "benefits" or "fringe benefits" normally speaks to the protections relative to such things as health insurance, life insurance, dental plans, pension rights, etc. The issue of salary, in whatever form, is not normally considered to be part of the "benefits".

Secondly, even if the scope of Article 26 could arguably include a system of productivity bonuses, a hypothesis which the Arbitrator rejects, the wording of the article leaves no doubt that the productivity sharing program established by CN in 1998 is not included. Article 26 of the Memorandum, dated March 10, 1995, explicitly provides NQISL employees with the benefits "currently" granted to CN employees. The use of the word "currently" must, in my opinion, be interpreted as setting a time reference to the date of the document in question. The Council's interpretation wanted the Article to connote the expression "currently granted and granted thereafter." I believe to make such an interpretation would have the effect of adding to the collective agreement, or of amending its provisions, something which is forbidden to the Arbitrator.

In sum, the Arbitrator must conclude that the Council's position is not convincing. Furthermore, the fact that data related to NQISL performance are excluded from CN's productivity formula further supports the logic of the employer's position. I find doubtful that the parties would have intended to double the bonus payable to NQISL employees for CN's productivity, given the clear division separating the operations of these two companies. There is nothing in the NQISL employees' collective agreement that would grant them the right to receive a share of CN's productivity gains.

For these reasons, the grievance must be declined.

March 17, 2000

(sgd.) MICHEL G. PICHER
Arbitrator