CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3101

Heard in Montreal, Tuesday, 11 April 2000

concerning

ONTARIO NORTHLAND RAILWAY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE – COMPANY:

Determination of what the terms were that the parties agreed to in the Memorandum of Settlement dated June 10, 1999 where it concerns the incorporation of the allowances in articles 1.14(a), 1.14(b), 2.10(a) and 2.10(b) of Agreement No. 8.

COMPANY'S STATEMENT OF ISSUE:

On June 10, 1999, the parties signed a Memorandum of Settlement which contained the following clauses:

ARTICLE 1.14(a)	Incorporate current allowance into base rate.
ARTICLE 1.14(b)	Incorporate current allowance into base rate.
ARTICLE 2.10(a)	Incorporate allowance into base rate.
ARTICLE 2.10(b)	Incorporate allowance into base rate.

The Brotherhood had the Memorandum of Settlement ratified by the membership.

On July 6, 1999, the parties signed a Memorandum of Agreement which contained the following clauses:

ARTICLE 1.14(a)	Change the base rate for passenger to $121.13. (110.12 + (10 miles x 1.1012) = 121.132) and delete.
ARTICLE 1.14(b)	Delete
ARTICLE 2.10(a)	Change base rate for freight to $145.52. (137.28 + (6 miles x 145.5168) and delete. (sic)
ARTICLE 2.10(b)	Delete

These clauses were unilaterally drafted by the Brotherhood. The Company believes the Memorandum of Agreement did not reflect the parties' agreement. The Company believed the Brotherhood had reproduced the terms of the Memorandum of Settlement in the Memorandum of Agreement, signed the latter without carefully reviewing it.

The parties agreed in bargaining that the incorporation of these allowances would be done on a zero cost basis. (This would, in effect, require that the actual total cost of the allowances be folded into employees' base rates.) The Brotherhood however added significantly to the base rates (by 10% for passenger trains and 6% for freight trains).

The Brotherhood requested that the Company implement the rates outlined in the Memorandum of Agreement. The Company refused. The Brotherhood filed a policy grievance contending that the Company was in violation of the collective agreement and requested that the Company immediately implement the rates outlined in the Memorandum of Agreement and compensate engineers who have lost compensation from the effective date of the Agreement and further, to apply all general wage increases to the new rates.

The Company contends that the Brotherhood unilaterally changed the wording of the Memorandum of Settlement which resulted in the Company signing a document which did not reflect what was negotiated at collective bargaining. The Company further contends that the above noted increases in the rates for passenger and freight service are null and void as currently written. The Company requests that the arbitrator dismiss this grievance and find that the terms of the collective agreement provide for the incorporation of the allowances in question in a cost neutral manner into the base rates payable to the locomotive engineers.

DISPUTE – BROTHERHOOD:

The Company's failure to implement the increases in the base rates for passenger and freight contained in the Memorandum of Agreement signed July 6, 1999 and delete all references to preparatory and final inspection allowances contained in articles 1.14(a), 1.14(b), 1.13, 1.18, 2.10(a), 2.10(b), 2.9, 2.14 and 5.2 of agreement no. 8.

BROTHERHOOD'S STATEMENT OF ISSUE:

On June 10, 1999, the parties signed a Memorandum of Settlement, which was drafted by the Brotherhood and contained the following clauses:

ARTICLE 1.14(a)	Incorporate current allowance into base rate.
ARTICLE 1.14(b)	Incorporate current allowance into base rate.
ARTICLE 2.10(a)	Incorporate allowance into base rate.
ARTICLE 2.10(b)	Incorporate allowance into base rate.
ARTICLE 5.2	Incorporate allowance into base rate.

The Brotherhood had the Memorandum of Settlement ratified by the membership.

On July 6, 1999, the parties signed the Memorandum of Agreement (by fax) which incorporated the allowances into the base rate and deleted all references to preparatory and final inspection time. This document was also drafted by the Brotherhood.

This was reflected in the Memorandum of Agreement dated July 6, 1999 as follows:

ARTICLE 1.14(a)	Change the base rate for passenger to $121.13. (110.12 + (10 miles x 11012) = 121.132) and delete. (sic)
ARTICLE 1.14(b)	Delete
ARTICLE 1.13	Delete
ARTICLE 1.18	Delete
ARTICLE 2.10(a)	Change base rate for freight to $145.52. (137.28 + (6 miles x 1.3728) = 145.5166) and delete.
ARTICLE 2.10(b)	Delete
ARTICLE 2.9	Delete
ARTICLE 2.14	Delete
ARTICLE 5.2	Delete

This document became effective on the day of signing.

The Manager, Labour Relations faxed the signed agreement to the Brotherhood and requested original copies for legal purposes.

The Brotherhood hand delivered original copies to the Manager, Labour Relations, which the Company again signed and returned to the Brotherhood on or about August 10, 1999.

Subsequent to August 10, 1999 the Brotherhood contacted the Company and made several attempts by e-mail and telephone to have the new rates implemented.

On November 10, 1999, the Company informed the Brotherhood that they never intended to increase the base rate for freight and passenger as reflected in the Memorandum of Agreement and on November 22, 1999 responded at Step 2 declining the Brotherhood's grievance.

The Brotherhood contends that the new incorporated base rates for passenger and freight are clearly defined in the Memorandum of Agreement and its is incumbent on the Company to implement these rates.

The Company declined the Brotherhood's grievance.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) B. E. WOOD	**(SGD.) L. K. MARCELLA**
GENERAL CHAIRMAN	**DIRECTOR, HUMAN RESOURCES**

There appeared on behalf of the Company:

M. Gleason	– Counsel, Montreal
M. J. Restoule	– Manager, Labour Relations, North Bay
J. Thib	– Chief Transportation Officer, North Bay

And on behalf of the Brotherhood:

P. Hunt	– Counsel, Ottawa
B. E. Wood	– General Chairman, New Bedford
S. O'Donnel	– Local Chairman, North Bay
M. Kenney	– Secretary/Treasurer, North Bay

AWARD OF THE ARBITRATOR

It is common ground that the terms of articles 1.14(a) and 2.10(a) as they appear in the memorandum of agreement of July 6, 1999 are different from the language of those same articles as they appeared in the memorandum of settlement made on June 10, 1999. The Company maintains that its officers inadvertently signed the memorandum of agreement of July 6, 1999, a document which was prepared by the Brotherhood to be the formalized collective agreement document, based on the memorandum of settlement reached earlier on June 10, 1999. In essence the Company asserts that the understanding reached in the memorandum of settlement is that the terminal time allowances which were previously a separate payment under the terms of the collective agreement would become incorporated into the base rate for locomotive engineers, without any additional cost to the Company. In other words, in the Company's submission, the parties intended to simply change the mechanics by which terminal time would be paid, by folding the payment in question into the base salary rate.

The formula adopted by the Brotherhood, and incorporated into the memorandum of agreement of July 6, 1999, does not achieve that. In fact, based on the fluctuation of miles which a locomotive engineer might work, the formula advanced by the Brotherhood would result in across the board average wage increases in excess of 6% for all employees. The Company submits that the parties never intended such a sweeping adjustment, the terms of which would be entirely out of keeping with wage increases within the industry in recent years, and that the memorandum of settlement of June 10, 1999 properly reflects the understanding of the parties that there would be no monetary gain achieved by incorporating the current preparatory and inspection time allowances into the base rate.

The Brotherhood raises a preliminary objection to the jurisdiction of the Arbitrator. It protests the advancing of the matter for hearing by the Company on the basis of the Company's own statement of facts and issues filed with this Office on March 6, 2000. The Brotherhood suggests that the Company's filing of the issue, which treats the memorandum of settlement of June 10, 1999 as being the collective agreement, raises issues beyond the jurisdiction of the Arbitrator because, in the Brotherhood's view, the memorandum of agreement of July 6, 1999 represents the collective agreement between the parties, and it is therefore only that document which can come under the jurisdiction of the Arbitrator. So framed, in my view, the preliminary issue is effectively inseparable from the dispute on the merits, namely to determine the intention of the parties with respect to the terms of articles 1.14 and 2.10 of their collective agreement, dealing with the payment of terminal time. In light of the Arbitrator's decision on the merits of the dispute, elaborated below, it is unnecessary to deal with the preliminary objection which, in any event, could not succeed.

The fundamental issue to be determined is whether the language reflected in articles 1.14 and 2.10 of the memorandum of agreement properly express the bargain struck by the parties in settling the terms of their collective agreement or whether, as the Company maintains, the final form of the two articles as they appear in the memorandum of agreement of July 6, 1999 are in fact an erroneous representation of what the parties intended by the initial draft of the articles as it appeared in their memorandum of settlement of June 10, 1999.

From a historical perspective the evidence tends to support the position of the Company. That is reflected in the evolution of the issue on the payment of preparatory and final inspections as it was handled between the parties in bargaining. At the outset, the Brotherhood sought no changes with respect to the terminal time allowances. Initially in bargaining the Company sought changes whereby the allowances paid to locomotive engineers for preparatory and final inspections of their trains would be reduced. While the Brotherhood did not accept the Company's proposal, it appears that on March 11, 1999 it advised the Company that it was willing to consider rolling the allowances into the base rate. On March 17, 1999 the Brotherhood tabled a proposal to that effect, prompting a response from the Company on March 18, 1999 which would incorporate the allowances into the base rate, but subject to the employer's proposed reductions. The parties held to their respective positions through several bargaining sessions until May 20, 1999 when the parties reached an agreement on the allowances, as reflected in the memorandum of settlement of June 10, 1999.

The Company's representatives in bargaining stress that in their view, a view which they believe was communicated to the Brotherhood, the proposal for folding in the terminal time allowances to the base rate was acceptable to the Company only on condition that the change be cost neutral. In the employer's perspective the change would, of course, provide it savings in that the administrative and accounting function related to keeping track of employee claims for terminal time would be eliminated. In the Company's submission it communicated to the Brotherhood's representative that there would need to be an examination of the mechanics of the fold-in and an eventual formula established by the employer's payroll staff for computerizing the change.

Very simply, the position of the Company is that it was understood at the bargaining table that no upward change in the amount of the allowance payable for preparation and inspection time was contemplated, as indeed neither party sought any such increase in advancing their positions. What transpired in bargaining was an initial attempt on the part of the Company to reduce to allowances, an attempt successfully resisted by the Brotherhood. In the Company's submission the agreement to fold the allowances into the employees' base wage rate was never intended as an indirect mechanism to increase their overall wages by an amount averaging in excess of 6%. Counsel for the Company submits that what has occurred is a mutual mistake in the framing of the final collective agreement document, the content of which in fact does not reflect the contractual agreement of the parties as expressed in the memorandum of settlement of June 10, 1999, the document which was in fact ratified by the Brotherhood's membership as constituting the terms of its new collective agreement.

The case law amply confirms that where the parties have committed an error in the preparation of their final collective agreement document, the terms of which do not properly reflect the settlement which they previously made, generally in writing, a board of arbitration may apply principles of rectification, and may properly view the initial settlement document as correctly reflecting the parties' understanding, and therefore the terms of their collective agreement. That general principle is well reflected in the decision of the board of arbitration in **Re Mississauga Hydro Commission and International Brotherhood of Electrical Workers, Local 636** (1984), 17 L.A.C. (3d) 299 (P.C. Picher). In that case the parties executed minutes of settlement which were ratified. Subsequently, in the preparation of the formal collective agreement document, a provision of the minutes of settlement was omitted. The board of arbitration rejected the position of the employer, which was that the memorandum of settlement merged into the formal collective agreement document, and found that the union's claim for the pay-out of accumulated sick day credits was well founded. At pp. 326-27 the majority of the board commented as follows:

> … [W]e conclude in the instant matter that the collective agreement dated April 1, 1981, which came into force upon the ratification of the April 1st memorandum of settlement did not merge with or get swallowed up by the execution of the formal collective agreement document in August. The parties did not agree to eliminate the pay-out agreement from their collective agreement as would be required by s. 52(5) of the *Labour Relations Act* in order to alter the collective agreement between the parties.
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> The importance of this finding to the ongoing labour relations between the parties is well expressed by Arbitrator Arthurs at p. 8 of his decision in *Alcan Canada*:

> A collective agreement is intended to keep the peace within the relationship over a long period of time, to cope with foreseeable and unforeseeable stresses and strains which may originate either within or beyond the bargaining unit. Yet the document which will keep the peace is being collated, transcribed and reproduced at the very moment when the parties are emerging from the crisis and confrontation of negotiations. It is particularly important to assist their transition to a new and lengthy period of cooperation that they be assured that the delicate balance they have just worked so hard to achieve will not be disturbed, or the gain of what was not won in negotiations.
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> Suppose, for example, that accidentally omitted language in this case had involved the provision relating to wages or discharge for just cause. It would be "ridiculous", conceded union counsel, to say that the workers could not claim wages or protection from unjust dismissal. The omission in this case differs only in degree and not in kind from those just mentioned. To give it legal effect would be only marginally less "ridiculous". Nor is there much comfort in the possibility that the agreement itself might be voided if some centrally important clause were accidentally omitted. The Supreme Court of Canada has already held in *McGavin Toastmaster Ltd. v. Ainscough et al.* (1975), 54 D.L.R. (3d) 1, [1976[1 S.C.R. 718, [1975] 5 W.W.R. 444, 4, N.R. 618, that the doctrine of fundamental breach does not apply to collective agreements, which have a statutorily fixed duration. It is unlikely, for the same reason, that the courts would hold that some such doctrine as *non est factum* would apply, so as to vitiate an agreement from which a vital term was omitted. There is a public interest in keeping the peace between the parties for the duration of the agreement. It can only be achieved if the agreement is treated as the living embodiment of genuine labour-management consensus, rather than as a collection of curious hieroglyphs chiselled by an anonymous hand on the tomb of an unknown dynasty.
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> We might also comment that if a party, given to second thoughts about its agreement in the cold light of morning, could successfully alter the negotiated deal as reflected in the memorandum of agreement by simply dropping clauses through "clerical errors" in drafting their formal collective agreement, trust and honesty between the parties would be jeopardized and a mockery would be made of the whole negotiation process.
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> Accordingly, and for the reasons set out above, we conclude that the collective agreement which governs the instant dispute is the collective agreement dated April 1, 1981.

In the cited case of **Re Alcan Canada Products Ltd. and Metal Foil Workers Union, Local 1663** (1982), 5 L.A.C. (3d) 1 (Arthurs), the well recognized principle that errors in the process of transcribing a memorandum of settlement into a formal collective agreement document should not be taken as making a new contract is reflected in the following passage at p. 5:

> … [T]he signatures on the master agreement was not to assent to the creation of a new agreement, but to attest (incorrectly as it happens) to the fidelity with which the new document transcribed and integrated the old. The relative insignificance of the signatures on the master agreement is further underlined by the fact that no discussions between the parties were necessary (and none ensued) following September 20th to alter the language in substance or in detail, or in order to integrate the several documents which comprised the agreement. The signatures obviously were not intended and cannot serve to validate any such alterations since none occurred.

Arbitrators have not strictly applied common law doctrines of mistake, *non est factum* or misrepresentation, to the extent that those doctrines might result in a contract or a contract term being viewed as vitiated. Rather, for collective bargaining purposes where a collective agreement is a statutory document which must remain in effect for a determined period, the focus has been on examining all of the documents which reflect the understanding of the parties to determine the true nature of their mutual intention. (See, generally, **Re Aimco Industries Ltd. and United Steelworkers, Local 7574** (1976), 13 L.A.C. (2d) 338 (Beck) and **Re Puretex Knitting Co. Ltd. and Canadian Textile & Chemical Union, Local 560** (1975), 8 L.A.C. (2d) 371 (Dunn).)

In dealing with issues of this kind it is important to bear in mind the distinctions which can flow from the particular facts of a dispute. Where the parties have not signed a preliminary memorandum of settlement, but rather proceed to fashion a single document for their mutual signature as reflecting the terms of their collective agreement, a board of arbitration may be reluctant to look behind the only signed document, and is far more likely to be satisfied that the collective agreement must be read in the terms of the mutually executed single memorandum of agreement. That was plainly the case in a recent decision of this Office in **CROA 3072**. In that context the failure on the part of one party to fully read or understand the wording of the terms of the document is not a defence to the other party's claim that the document indeed constitutes the collective agreement. In the instant case, however, where two documents are involved, the considerations are different. In the instant context it is open, and indeed arguably obligatory, for a board of arbitration to have regard to both the preliminary memorandum of settlement and the subsequent memorandum of agreement in an effort to fully understand and determine the intention of the parties with respect to the content of their collective agreement.

In addressing the instant dispute it is instructive to ask whether a collective agreement existed upon the ratification of the memorandum of settlement of June 10, 1999. The answer to that question must be in the affirmative. At that point in time, before the preparation of the text of the memorandum of agreement, the parties had fully completed the negotiation and finalizing of the terms of their collective agreement. Anyone seeking to know the terms of their agreement would then have properly been referred to the memorandum of settlement of June 10, 1999. The additional preparation of the memorandum of agreement of July 6, 1999, in keeping with the traditional formalizing of a collective agreement document within normal Canadian collective bargaining practice, could not serve to change the original bargain of the parties, unless of course they expressly and mutually agreed to make such a change. That has plainly not occurred in the instant case, as there was no intention on the part of the Company at any time to depart from the terms of articles 1.14 and 2.10 concerning the terminal preparation and inspection time as reflected in the memorandum of settlement of June 10, 1999.

The classic process, and the critical importance of the initial memorandum of settlement, is reflected in the decision of the board of arbitration in **Re Alcan Canada Foils and Printing Specialties & Paper Products Union, Local 466** (1976), 11 L.A.C. (2d) 352 (Schiff) at pp. 355-356:

> When we study the memorandum of settlement before us, these matters are clear: First of all, it was deliberately drafted as an agreement between the company and the union – and not merely between groups of signatories in their individual capacities – disposing of all previously disputed matters and contemplating no further negotiation of any substantive terms. Secondly, while its language appears to envisage future embodiment of the settlement on some document called "collective agreement", creation of the document was not rendered a condition precedent to the parties' present agreement. Stronger language than we find here would be necessary to permit that conclusion. Moreover, the parties' conduct confirms our interpretation: the union's bargaining committee, believing they had an agreement subject to ratification, submitted the memorandum to a meeting and, upon gaining membership approval, so informed the company; the company then wasted no time calling employees back to work; the next working day all employees in fact returned to work; and thereafter the company implemented the agreed terms. Thirdly, the agreement of the individual signatories to recommend acceptance of the memorandum's provisions to their respective principals created a condition precedent to its legal force. While some decisions of labour relations boards hint that a collective agreement subject to such a condition cannot be operative unless the condition is executed in writing, we see no reason for that requirement. The condition is not a term of the parties' collective agreement within the policy or wording of the statutory definition; the condition is a mere catalyst whose satisfaction breathes life into what is their agreement. Therefore, subject to a reservation, as we read the memorandum of settlement, when the union and the company accepted its contents the provisions came into immediate effect as a collective agreement.

See also **Re Canteen of Canada Ltd. and Retail, Wholesale & Department Store Union, Local 414** (1984), 15 L.A.C. (3d) 305 (Mitchnick).)

What the cases stand for is the common sense proposition that a collective agreement is a document which reflects the agreement and understanding of the parties, and that errors in the preparation of a formal collective agreement document, containing inconsistencies with the original memorandum of settlement, are not to be elevated to the status of negotiated amendments of a collective agreement. Where it is clear that the formal collective

agreement document or memorandum of agreement prepared by one or other of the parties for purposes of convenience does not reflect the understanding reached in the terms of an earlier memorandum of settlement, it is the memorandum of settlement which is to be looked to as the true expression of the parties' agreement.

For all of the foregoing reasons, as a matter of straightforward interpretation, the Arbitrator is satisfied that the position of the Company is to be preferred. I am compelled to find and declare that the memorandum of settlement of June 10, 1999, as interpreted by the Company, properly represents the agreement between the parties for all purposes in relation to articles 1.14 and 2.10 of the collective agreement. Having regard to the history of bargaining, and the initial positions of both parties which would not have involved an increase in wages based on the terminal time allowance, as well as the obvious intention reflected in the phrase "incorporate current allowance into base rate" which would not connote any monetary increase, the Arbitrator is satisfied that the memorandum of settlement of June 10, 1999 does properly reflect the mutual intention of the parties, and that the interpretation of the Company is correct. To the extent that any different conclusion would flow from the formulation of the memorandum of agreement of July 6, 1999, the terms of that document are to be rectified for the purposes of the proper interpretation of the parties' intention.

For these reasons the grievance must be dismissed.

April 20, 2000

(signed) MICHEL G. PICHER
ARBITRATOR