CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3104

Heard in Montreal, Wednesday, 11 April 2000

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE – BROTHERHOOD:

Claim on behalf of Mr. B. Metcalfe.

BROTHERHOOD'S STATEMENT OF ISSUE:

The grievor claimed mileage expenses at the rate of 28 cents per kilometre for the months of June and July, 1998. This claim was rejected by the Company who directed the grievor to re-submit his expense claim at the rate of 13 cents per kilometre. The grievor grieved the difference.

The Union contends that: **(1.)** By letter dated May 3, 1996, the Company gave its clear undertaking that employees in the grievor's situation would receive 28 cents per kilometre for claimed mileage expenses; **(2.)** The May 3, 1996 letter formed part of the settlement to a grievance concerning the same issue submitted by the Brotherhood on April 12, 1996 and therefore binds the parties. **(3.)** During the 1997 work season employees on the St. Lawrence & Hudson continued to receive a mileage allowance in the amount of 28 cents per kilometre. **(4.)** The Company is estopped from unilaterally changing the amount of the mileage allowance.

The Union requests that the grievor and all other affected employees be made whole for all losses incurred as a result of this matter.

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

DISPUTE – COMPANY:

In June of 1998, Mr. B. Metcalfe a seasonal track program employee, submitted a mileage claim of 28 cents/km daily, to and from the work location, from his home. The Company returned the expense claim asking that it be resubmitted under the auspices of appendix B-1 of wage agreement 41 & 42 (weekend travel). Subsequently, Mr. B. Metcalfe initiated a grievance contesting the Company's decision to decline his personal mileage claim.

COMPANY'S STATEMENT OF ISSUE:

In June of 1998, Mr. B. Metcalfe a seasonal track program employee, submitted a mileage claim of 28 cents/km daily, to and from the work location, from his home. The Company returned the expense claim asking that it be resubmitted under the auspices of appendix B-1 of wage agreement 41 & 42 (weekend travel). Subsequently, Mr. B. Metcalfe initiated a grievance contesting the Company's decision to decline his personal mileage claim.

The Company resolved a grievance with the BMWE in May 1996, which had contested the travel expense portion of the "1996 seasonal work gang" bulletin. The resolve was to apply to the 1996 work season only but was gratuitously carried over to the 1997 season.

In April 1998, with the issuance of the seasonal bulletin and subsequent start-up meetings, all parties were made aware that the Company was reverting to the clear language of Appendix B1 and removing the 1996 mileage arrangement.

The Company believes that employees should be compensated for reasonable expenses "incurred" and further believe that removing the "28 cents/km within 35 miles" practice, is not acting in a manner which is arbitrary, discriminatory or in bad faith.

The Company contends : **(1.)** the Brotherhood has improperly submitted their step 2 grievance, by significantly expanding the scope of the grievance to include "all affected employees" and in so doing, have skipped step 1 of the grievance procedure completely. **(2.)** The Brotherhood have improperly added the "estoppel" argument to their *ex parte*, without raising this contention as part of their grievance submission. **(3.)** The Brotherhood have broken clearly established time limits, as the Step 2 grievance was submitted in July and all parties were advised of the reversion, back to the B1 application, in April of 1998. **(4.)** The Company and the Brotherhood entered into an agreement for the single work season and as such, the Company is not subject to the Brotherhood's estoppel argument. **(5.)** The Brotherhood cannot meet the requirements to successfully argue estoppel. **(6.)** B-1 of wage agreement 41/42 is the only reference to weekend travel allowance and this is the only language which binds the parties.

The Company requests that the scope of the grievance be properly narrowed to include Mr. Metcalfe's claim only and that the grievance be dismissed in its entirety.

FOR THE BROTHERHOOD:	**FOR THE COMPANY:**
(SGD.) J. J. KRUK	**D. E. FREEBORN**
SYSTEM FEDERATION GENERAL CHAIRMAN	**FOR: MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

E. J. MacIsaac	– Labour Relations Officer, Calgary
R. M. Andrews	– Manager, Labour Relations, Calgary
R. Brosseau	– Danella Rental Systems Canada Ltd.
S. Rowe	– Manager, Track Programs & Equipment, STLH

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. McCracken	– Federation General Chairman, Ottawa
M. Couture	– General Chairman, Montreal
D. W. Brown	– General Counsel, Ottawa

AWARD OF THE ARBITRATOR

As a preliminary matter the Company raises a number of procedural objections to the arbitrability of this matter. Firstly it submits that the Brotherhood has improperly expanded the scope of the grievance by indicating that it applies to "all affected employees" in the drafting of its position at step 2 of the grievance procedure. The Company maintains that the conversion of what was originally an individual grievance by Mr. Metcalfe into a general or policy grievance is not appropriate, and that this Office is without jurisdiction to deal with that aspect of the matter.

Secondly, the Company maintains that the Brotherhood cannot argue estoppel as a basis for its claim, because that matter was not raised during the course of the grievance procedure, arising first in the drafting of Brotherhood's *ex parte* statement of issue.

Thirdly the Company maintains that the aspect of the grievance which relates to "all affected employees", being raised at step 2 of the grievance in July of 1998 is untimely, being more than 28 days beyond what the Company says was the notice given to the Brotherhood in April of 1998 with respect to its change of policy.

On a review of the facts the Arbitrator cannot sustain any of the jurisdictional objections raised by the Company. Firstly, there was no affirmative obligation upon the Brotherhood to grieve in April of 1998. It does not appear disputed that on or about April 6, 1998, during camp start-up safety meetings, the gang which employed Mr. Metcalfe held a meeting, also attended by General Chairman Marc Couture. The Company announced its policy to no longer pay mileage claims at the rate of 28 cents per kilometre to employees who live within thirty-five miles of their work location. The Company advised that thenceforth such employees would only be entitled to allowances, including weekend travel allowance, payable at a lower rate of 13 cents per kilometre, where appropriate, as found

within appendix B-1 of the collective agreement. The grievor, Mr. B. Metcalfe, filed his individual grievance at step 1 on or about July 9, 1998, apparently on the first occasion when his claim for the 28 cents per kilometre mileage allowance to and from his home was disallowed. This would appear to be the first recorded instance of any employee being denied the allowance and making a claim and grievance in relation to it. In the Arbitrator's view it is fair to conclude that the facts then crystallized for the purposes of the Brotherhood's obligation to grieve on behalf of Mr. Metcalfe. Indeed, the Company does not appear to dispute the timeliness of the individual grievance of Mr. Metcalfe.

It is only after the Company's response, sent by Manager, Track Programs & Equipment R.J. Brosseau on August 4, 1998, declining Mr. Metcalfe's grievance at step 1, that the Brotherhood became formally aware was in fact implementing the new policy in relation to the payment of mileage allowance to employees who live within thirty-five miles, or fifty-six kilometres, of their workplace. In that context, on September 14, 1998, as part of the step 2 process General Chairman Couture advised the Company that in light of its position the grievance was now being forwarded on behalf of Mr. Metcalfe "and any other affected employees working on Eastern Region District No. 1."

The Arbitrator cannot agree that that submission was in fact untimely. Assuming a reasonable time for the Brotherhood to receive the letter addressed to Mr. Metcalfe, to examine and consider its contents, with a view to determining whether the Company's response at step 1 to Mr. Metcalfe's grievance represented a shift in practice which would justify a more general grievance, I am satisfied that that point of determination would not have been reached, given a reasonable period for proper analysis, much before mid August of 1998. In my view the filing of the policy grievance on September 14, 1998, as part of the step 2 reply was therefore not untimely. It is well settled that a union need not grieve general declarations of intention made by an employer, and can fairly await the point in time at which a grievance has crystallized, that is to say where an employee or group of employees has in fact been denied a wage, benefit or other right which is claimed. (See, e.g., **CROA 2263, Re Canadian Broadcasting Corporation and Canadian Union of Public Employees** (1985), 21 L.A.C. 3(d) 389 (M.G. Picher).)

On the issue of timeliness, if it were necessary to do so, I would also conclude that following the step 1 reply to Mr. Metcalfe's grievance the Company's position became an ongoing violation of the collective agreement which the Brotherhood was entitled to grieve on behalf of all affected members as of September 14, 1998.

Nor would I conclude that the adding of the policy dimension to deal with the rights of all employees improperly broadens the scope of the grievance. The scope of the grievance, insofar as its merits are concerned, is in no way changed by the fact that a larger number of employees may be impacted by the result. This is not a circumstance in which different facts, incidents or circumstances are introduced at a late stage of the grievance procedure, or where there is an attempt to make a separate and different claim. The claim made for the larger group of employees is identical to that made on behalf of Mr. Metcalfe. For the reasons touched upon above, I am satisfied that it was made in a timely fashion, and I am also satisfied that it did not involve the expansion of the grievance in the sense of introducing new or different issues, or claims fundamentally unrelated to the original grievance.

Nor can the Arbitrator accept the Company's submission that the Brotherhood is prevented from arguing estoppel. There is nothing within the collective agreement, nor the rules governing this Office, which requires that a party provide to the other all or part of the legal arguments which will form the basis of its fundamental claim that there has been a violation of the collective agreement. Article 18.7 of the collective agreement, which deals with the filing of grievances, reads as follows:

> **18.7** A grievance under Clause 18.6 shall include a written statement of the grievance and where it concerns the interpretation or alleged violation of the collective agreement, the statement shall identify the section and paragraph of the section involved.

As is evident from the foregoing, the Company is clearly entitled to know the article or provisions of the collective agreement which the Brotherhood alleges were violated. There is no suggestion that in the instant case there was any doubt about that aspect, as the Brotherhood relied explicitly on a letter of understanding signed between the parties on May 3, 1996. The Brotherhood has clearly complied with the requirements of the collective agreement concerning the specificity of its claim. Nor is the jurisdiction of this Office ousted with respect to dealing with the issue of estoppel. That issue is plainly expressed within the *ex parte* statement of issue filed by the Brotherhood, and to that extent it is properly before the Arbitrator. The Company has had reasonable notice of the issue of estoppel, and cannot be said to be prejudiced in its ability to deal with it in these proceedings.

I turn to consider the merits of the grievance. In doing so it is important to outline certain facts by way of background. For many years the Company provided boarding car accommodations in the field for its employees involved in track repair and maintenance. The boarding cars were eventually eliminated, with meals and accommodation nevertheless still being provided in hotel or motel facilities. It is not disputed that such facilities were made available to all employees, including employees who might in fact live relatively close to the work location.

It appears that in or about 1996 the Company became concerned about the costs associated with maintaining motel accommodations for employees who lived near the workplace. Although they might claim a motel room, in fact they would often return to their own homes overnight during the course of their work week. Based on that concern the Company unilaterally instituted a new policy in early 1996 whereby allowances for overnight hotel accommodation and meals would not be provided to employees residing within thirty-five miles or fifty-six kilometres of the designated starting location. That change of policy prompted a grievance in the seniority district overseen by the Eastern Region General Chairman, Mr. Couture. The objection taken by Mr. Couture to the Company's change of policy prompted negotiations which resulted in a letter of understanding dated May 3, 1996 whereby the Company undertook to pay to employees residing within thirty-five miles daily travel allowance at the rate of 28 cents per kilometre, both ways. The letter of understanding reads, in part, as follows:

> Further to award Bulletin No. 96-02 dated April 1, 1996 stating employees residing within 35 miles (56 kilometres) from the designated starting location are not entitled to hotel and meal allowance.
>
> It has been decided that the St. Lawrence & Hudson Railway will give these employees that reside within 35 miles (56 kilometres) from the designated starting location 28 cents a kilometre daily, both ways for the actual mileage up to 35 miles. No meals or hotel rooms will be allowed at that time.
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> It is also agreed that the grievance dated April 12, 1996 initiated by the General Chairman Marc Couture on behalf of the employees concerning the compensation for all boarding and lodging expenses for employees residing within 35 miles from the designated starting location will be rescinded.

It is common ground that the letter was applied without exception or incident through the working season of 1996. Its terms with respect to the payment of the travel allowance at 28 cents per kilometre were repeated in the general job bulletin in the spring of 1997, and the allowance was in fact paid for that further working season. As noted above, however, in April of 1998 the Company first indicated to employees that the 28 cent per kilometre allowance would no longer be payable to employees residing within thirty-five miles of the workplace, and no such offer or payment was included in the general job bulletin for the 1998 season.

The first issue is whether the letter of May 3, 1996 does, as the Brotherhood asserts, represent an agreement between the parties to provide the 28 cents per kilometre daily allowance to employees who qualify for it for an indefinite period, or at least for the duration of the collective agreement, absent the negotiation of any contrary arrangement. Upon a careful examination of the document, and the surrounding facts, the Arbitrator is compelled to the conclusion that the Brotherhood's interpretation is correct. There is nothing on the face of the document itself to suggest that it is time limited, save the general notation "further to award Bulletin No. 96-02 dated April 1, 1996". In my view that notation is intended to give precision as to the nature of the understanding between the parties, as is evident from the balance of the first paragraph of the letter. It identifies the bulletin as the source of the assertion that employees residing within thirty-five miles of a starting location are no longer entitled to hotel and meal allowance. In my view it cannot be fairly interpreted as meaning that the understanding reached between the parties is time limited, or intended only to apply to jobs falling under the 1996 award bulletin. What the letter appears to achieve, on its face and in its obvious intention, is to reflect an agreement between the parties that in exchange for the withdrawal of the Brotherhood's grievance the Company agrees to pay employees who reside within thirty-five miles of the work location a travel allowance of 28 cents per kilometre daily. The document does not indicate that it is a "without prejudice" settlement related solely to the circumstances of one grievance. Nor does it, on its face, indicate any time limitation in relation of its own application. In the circumstances, the Arbitrator is satisfied that the Brotherhood's view that the settlement reached with the Company was intended to provide an arrangement which would continue for the duration of the collective agreement, or until some other arrangement might be negotiated, is correct. It appears noteworthy that similar arrangements were apparently negotiated in the Pacific Region, as well as in the Quebec and Eastern Regions of the Company's operations.

The Arbitrator finds further evidence to support the foregoing conclusion in the fact that the Company did apply the terms of the letter of May 3, 1996 to the award bulletin which it issued in the working season of 1997. While the employer seeks to characterize that bulletin as reflecting a gratuity extended toward the employees, it would appear to the Arbitrator, on the balance of probabilities, that it more properly reflects the understanding reached between the parties in May of 1996, namely that the mileage allowance would remain payable for those employees who would qualify to receive it.

The Arbitrator is also satisfied that a purposive and practical examination of the circumstances supports the Brotherhood's interpretation of the intent of the letter of May 3, 1996. It is not disputed before me that for many years the Company did provide boarding car and hotel accommodation and meals to employees who resided near the workplace, but chose to avail themselves of the facilities provided by the employer. Over time that became a condition of employment of some importance to the employees concerned. When the Company unilaterally discontinued the practice of providing hotel and meal allowance to employees who lived within thirty-five miles of the designated starting location, the Brotherhood immediately grieved on April 12, 1996. That grievance would have resolved the question of whether the employees had a collective bargaining right to the continuation of the hotel and meal allowance. By agreeing to the letter of understanding of May 3, 1996 the Brotherhood agreed to abandon its grievance in that regard, in exchange for the payment of the allowance which is now the subject of this grievance.

If the Company's interpretation is accepted, the Brotherhood would have given away its right to grieve the elimination of a long-standing working condition in exchange for the payment of a mileage allowance for the duration of only a single working season. The Arbitrator has difficulty with the plausibility of that theory of the bargain reached between the parties. In my view the more compelling conclusion is that the Brotherhood was willing to give up its grievance over the elimination of hotel and meal allowances only in exchange for an undertaking that its members would have the benefit of an equivalent right in the form of the mileage allowance, at least for the duration of the collective agreement, or until some other arrangement might be negotiated. Whatever the chances the Brotherhood's grievance might have had of succeeding, the surrendering of its ability to grieve the Company's change of practice must be viewed as a significant concession, a concession which is difficult to square with a short term gain for only one working season. And, as noted above, the fact that the Company continued the practice in the following year would suggest that it shared the Brotherhood's view as to the ongoing nature of the obligation undertaken in the letter of understanding of May 3, 1996.

For all of the foregoing reasons the grievance must be allowed. The Arbitrator finds and declares that the grievor, Mr. Metcalfe, is entitled to the payment of mileage expenses at the rate of 28 cents per kilometre for the months of June and July of 1998, as claimed. The Company has also violated the letter of understanding to the extent that other employees were similarly treated. The Arbitrator therefore directs that all employees similarly affected be likewise compensated, and further directs that the Company apply the letter of understanding to the employees of the seniority district for the balance of the collective agreement, or until such time a different arrangement is mutually negotiated.

April 14, 2000

(signed) MICHEL G. PICHER
ARBITRATOR