CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3206

Heard in Montreal, Wednesday, 10 October 2001

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Failure of the Company to bulletin and award positions of Extra Gang Foreman on certain Surfacing Gangs and instead have local BTMF Foremen being assigned to them.

BROTHERHOOD'S EX PARTE STATEMENT OF ISSUE:

The Company issued bulletins advertising positions on various surfacing gangs. No Extra Gang Foreman positions were bulletined on these gangs. The bulletins indicate that the crews "will be required to work in conjunction with the local BTMF Foreman and may be required to obtain their own track protection". In addition, the bulletins indicated that the "Special Group Operator will be required to certify in RTSR". The Brotherhood grieved.

The Union contends that: **(1.)** Historically, surfacing gangs have each had their own Extra Gang Foreman. Because of this, the Brotherhood contends that the Company is now estopped from implementing this new policy. **(2.)** The Company is in violation of Sections 32.3 and 16 and Appendix B-9 of Agreement No. 41. **(3.)** The Company is acting unfairly, arbitrarily and in bad faith.

The Union requests that **(1.)** the bulletins in questions be rescinded; **(2.)** that bulletins be issued that include the position of Extra Gang Foreman on each surfacing gang; **(3.)** that until such time as the positions are advertised and awarded, that section 14.4(a) of Agreement No. 41 be utilized to fill the Extra Gang Foreman positions; and **(4.)** that all affected employees be compensated for any and all losses (including wages, expenses and seniority) incurred as a result of this matter.

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

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. E. Freeborn	– Labour Relations Officer, Calgary
E. J. MacIsaac	– Manager, Labour Relations, Calgary
J. C. Presley	– General Manager, Operations

And on behalf of the Brotherhood:

D. Peterson	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. W. Brown	– General Counsel, Ottawa

C. Saith – Extra Gang Foreman (witness)
J. Rivers – M/O Special Group (witness)

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in substantial dispute. In February of 2000 the Company bulletined work for a surfacing gang to be assigned primarily to the Toronto Yard, Belleville and North Toronto and Havelock subdivisions. The gang was described as consisting of one Special Group Tamper Operator and one Group One Ballast Regulator Operator. The bulletin did not call for the gang to include an Extra Gang Foreman, and indicated that the employees would "… work in conjunction with the local BTMF foreman and will be required to obtain their own track protection." A similar bulletin was issued for a surfacing gang in the Algoma District of Northern Ontario, also during the month of February of 2000. The Brotherhood grieves, on what appears to be a national basis, that the Company has failed to properly fill vacancies in the position of Extra Gang Foreman. It seeks a finding that the collective agreement has been violated, and a direction to the Company to bulletin and fill extra gang foreman positions on all two-man surfacing gangs, with compensation for employees adversely affected.

Among the Brotherhood's contentions is that the Company is estopped from not filling or establishing the extra gang foreman positions as its change in practice occurred at a time which does not allow the Brotherhood to bargain in respect of that issue. It further submits that BTMF foremen, that is to say the foremen of section crews, are spending virtually their entire day working with the surfacing crew in some situations. That, the Brotherhood submits, is evidence that a job of work exists which amounts to a vacancy in the position of extra gang foreman. According to its submission Appendix B-9 of the collective agreement requires that such vacancies be filled by extra gang foremen. Additionally, the Brotherhood submits that the Company is in violation of article 32.3 of the collective agreement because, it submits, the use of section foremen to work with the surfacing gangs involves the prohibited crossing of divisions contemplated within that article.

The Arbitrator can understand the motives which underlie this grievance. The evidence advanced by the Brotherhood confirms that on a day-to-day basis the absence of an extra gang foreman can bring an additional degree of stress to bear on the two machine operators of the surfacing gang. Maintaining and administering their own track protection, making their own decisions with respect to measurements and the repair of curves, sometimes without the benefit of manuals, and working at times with a succession of different section foremen, as their work progresses through different territories, can no doubt make their daily work more burdensome. Concern was also raised with respect to the overall safety of operations in some circumstances, although that did not constitute the major thrust of the Brotherhood's case before me. There can be little doubt but that the change visited upon the surfacing crews in Ontario may have had a meaningful impact on the ease and efficiency with which they perform their work. However, those factors, standing alone, do not confer remedial jurisdiction upon this Arbitrator. What is more narrowly at issue is whether the Company violated the collective agreement by deciding not to post and fill positions of extra gang foreman in the circumstances described.

In considering that question, the Arbitrator must first conclude that the Brotherhood cannot rely on the application of the doctrine of estoppel in this case. With respect to the issue of estoppel the evidence discloses two significant facts. Firstly, the instant grievance was in fact filed at a time when the parties were still in the process of bargaining the renewal of their collective agreement. This is not, therefore, a circumstance in which it can be said that an agreement was concluded and only afterwards did the Company make an adjustment in its practice in a way which could arguably be surprising and prejudicial to the Brotherhood. On that basis alone the doctrine of estoppel would not apply.

Secondly, bearing in mind that the grievance is national in its scope, the evidence adduced by the Company confirms that at many locations, system wide, it has for a number of years not filled positions of extra gang foreman for all of its extra gangs, including surfacing gangs. While the Company's representatives indicate their belief that the practice of not assigning an extra gang foreman to two-person surfacing gangs may be one of very long standing, they tabled in evidence such research as they were able to do with respect of job bulletins system-wide dating back to 1990. The Arbitrator allowed the Brotherhood to make written submissions on the data tabled in evidence by the Company, with an opportunity for the Company to reply to those submissions. There remains some disagreement between the parties as to the precise occasions and locations where extra gang foremen were not assigned to surfacing gangs. I do not consider it necessary to resolve that dispute in detail, as I am satisfied that overall the evidence does reflect a substantial number of occasions where extra gang foremen's positions were not bulletined in relation to surfacing gangs. I am satisfied, on the balance of probabilities, that on a relatively frequent and widespread basis, over a span of some ten years, the Company has not utilized extra gang foremen in circumstances similar to those which give rise to this grievance.

The Brotherhood's representatives counter that the practice so described did become the subject of grievances commencing in or about 1998, many of which are still outstanding. It would also appear that in some instances the Brotherhood's grievances resulted in an agreed settlement which involved the addition of an extra gang foreman to surfacing crews. The foregoing record of events further confirms that the practice of the Company, which is the subject of this grievance, was not a new departure, at least on a system basis, when it was first instituted in Ontario. In the circumstances this is not an issue which the Brotherhood can say has occasioned surprise after the closing of any period of negotiation respecting the renewal of their collective agreement. On the contrary, it appears that the practice has gone on over several agreement renewals, for at least as long as ten years. For these reasons the argument with respect to the application of the doctrine of estoppel cannot succeed.

Has there been a violation of article 32.3 of the collective agreement? It provides as follows:

> **32.3** Except in cases of emergency or temporary urgency, employees outside of the maintenance of way service shall not be assigned to do work which properly belongs to maintenance of way department, nor will maintenance of way employees be required to do any work except such as pertains to his division or department of maintenance of way service.

In the instant case the Brotherhood argues that section foremen are not within the division of extra gangs, and that the use of section foremen to oversee the work of the surfacing gangs constitutes a violation of article 32.3 of the collective agreement. The Company responds that the line of promotion established for extra gang foremen relates directly to the position of track maintenance foreman, and that in the absence of any contrary definition of the word "division" to be found within the collective agreement, the better view is that section crews and extra gang crews do work within the same division, involved as they are in the hands-on repair of track and road bed.

The collective agreement does speak relatively clearly to the concept of departments. Article 13 makes reference to the Track Department and to the Bridge and Building Department, as two examples. It would appear clear that section foremen and extra gang foremen are part of the same department, the Track Department. In that regard article 13.13(a) provides as follows:

> **13.13(a)** The line of promotion for employees in the Track Department shall be as follows:
>
> Trackman "B"
> Trackman "A"/Track Maintainer
> Leading Track Maintainer
> Asst. Track Maintenance Foreman
> Track Maintenance Foreman
> Asst. Extra Gang Foreman
> Extra Gang Foreman

There can be little doubt but that the extra gang foreman and track maintenance foreman work within the same department, namely the Track Department. The more difficult issue, for the purposes of this case, is whether they can be said to be within the same "division" within the meaning of article 32.2. Where that issue is concerned the Arbitrator has greater difficulty with the position advanced by the Brotherhood.

The collective agreement makes clear distinctions between certain categories of employees. For example, the rates of pay and rules governing extra gang labourers are separately provided under a specific addendum to Wage Agreement No. 42. Similarly, under Wage Agreement No. 41 a separate green coloured section of the collective agreement governs the rates and pay and rules governing working conditions of operators, assistant operators and helpers of power machines in maintenance of way service. Significantly, article 13 of the collective agreement provides for distinctive seniority lists to be maintained. Machine operators, like extra gang labourers, have their own separate seniority lists. It is also agreed that extra gang foremen hold a separate form of seniority within that classification.

There is, however, a significant degree of interchangeability reflected in the collective agreement, as between the functions of extra gangs and of employees assigned to section crews. For example, section 16 of the collective agreement contemplates the establishment of special maintenance and extra gangs, whereby trackmen "A"/ track maintainers and trackmen "B" may be employed in temporary extra gangs referred to as Special Maintenance Gangs, doing section maintenance work. When they do so they are paid at the applicable trackman or track maintainer rate. Article 16.2 stipulates that section rates of pay are not applicable, however, where the work involved is on a large scale or too heavy for regular section gangs to perform. Article 16.3 stipulates that extra gangs are not to be used to take the place of regular section gangs. Additionally, Understanding No. 12 of Appendix C of the collective agreement confirms that a probationary section gang employee working in a special maintenance gang can apply such work to the accumulation of seniority for the purposes of article 13.1(a) of the collective agreement.

When all of these provisions are read together, and with particular regard to the fact that the extra gang foreman is within the same line of promotion as the track maintenance foreman, as reflected in article 13.13(a), the Arbitrator has some difficulty in accepting the submission of the Brotherhood to the effect that the extra gang foreman and the track maintenance foreman must be viewed working within separate "divisions" of the maintenance of way service. Not only do they work within the Track Department, but they work in circumstances which contemplate a degree of interchangeability of employees as between section crews and extra gangs. That is not to say, however, that section crews and extra gangs are to be deemed in the same division for all purposes. Each case must turn on its own facts. For the purpose of the instant case I am satisfied that the section foreman and extra gang foreman, who work on track repair within the same line of promotion, do work within the same division for the purposes of article 32.3 of the collective agreement. On the whole, therefore, the Arbitrator is compelled to conclude that the Brotherhood has not established that the Company has violated article 32.3 of the collective agreement by assigning supervisory duties in respect of the machine operators to section foremen. Nor can I find in the Company's initiative anything which can be fairly characterized as a violation of the provisions of article 16, reviewed above. Nor is there any violation of Appendix B-9 disclosed, as that part of the collective agreement essentially deals with the process by which extra gang foremen positions are to be bulletined where they are established. It does not speak to the threshold question of which circumstances require the establishment of such a position.

It is, as stressed by the Company's representatives, well established within Canadian arbitral jurisprudence that the discretion to determine whether a vacancy exists rests with management, absent collective agreement language to the contrary. In that regard this Office made the following comment in **CROA 2274**:

> … It is well established within Canadian arbitral jurisprudence that, absent contrary language in a collective agreement, in any particular case it is the prerogative of the company to determine whether a vacancy exists and is to be filled. In a number of awards this Office has sustained that approach, and has held that it is for the Company to determine whether it is necessary to fill a position which is temporarily unoccupied. (*See **CROA 233, 570, 1287, 1336***) In a case not unlike the case at hand, in **CROA 2166**, this Office concluded that the Company was under no obligation to assign replacing yardmasters in the Saint-Luc Yard, at Montreal, when the regular yardmaster was not present. …

See also **CROA 2006** and **2166**.

It is also true that, absent collective agreement language to the contrary, it is generally open to an employer to redistribute work so as to achieve the greatest efficiencies, and that it may do across job classifications (**Re Gates Canada Inc. and URW Local 733** (1999), 6 L.A.C. (4th) 435 (I. A. Hunter).

As noted above, the instant collective agreement does prevent the cross-classification assignment of work when it involves the work being transferred from one division of the maintenance of way service to another. That, for the reasons discussed above, has not occurred in the case at hand. Therefore, even if it can be said that a job of work does exist, so as to justify the existence of a vacancy to be filled, the filling of that vacancy by the cross assignment of a section foreman, as has occurred in some of the circumstances described, would not constitute a violation of the collective agreement. Nor would the failure to assign a section foreman, or anyone else, to directly supervise the two operator surfacing crew of itself be a violation of the agreement if, as I am satisfied, the Company has made a judgement in good faith and for valid business purposes that such a supervisory assignment is not justified.

In the result, no violation of the provisions of the collective agreement is disclosed, nor can I conclude that the Company has proceeded in bad faith, arbitrarily or unfairly as alleged by the Brotherhood. The grievance must therefore be dismissed.

November 8, 2001

(signed) MICHEL G. PICHER
ARBITRATOR