

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3207

Heard in Montreal, Wednesday, 10 October 2001

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

EX PARTE

DISPUTE:

The interpretation and application of Article 9A, clause (3), (b), (c) & (d) of the MOP change document and related provisions of the collective agreement as they relate to the forced relocation which occurred on March 11th, 2001 involving Messrs. Lariviere, Kinney and Lee.

COUNCIL'S STATEMENT OF ISSUE:

On September 19th, 2000 the Company issued a letter disqualifying MacTier protected employees from relocation benefits under article 9A. On March 11th, 2001 the Company forced three employees, mainly, John Lariviere, Bob Kinney and Mike Lee from a spareboard position at MacTier to a spareboard position in Sudbury. Lariviere, Kinney and Lee are protected employed as defined in article 9A. Following their relocation the furlough board at MacTier was reduced by three positions. Correspondingly, three positions were created on the common spare board at Sudbury.

The Union asserts the Company failed to meet its obligation to bulletin and advertise vacancies is restated in Art 9A,(8),(a). The Union insists employees, forced from MacTier to permanent required positions in Sudbury, are entitled to all the relocation benefits contained in Article. 9A. In view of the foregoing, the Union requests the Company allow Messrs. Lariviere, Kinney and Lee to immediately return to MacTier. Additionally, the Union is seeking damages for lost earnings and compensation for any expenses arising from their forced relocation.

The Company has declined the Union's request.

FOR THE COUNCIL:

(SGD.) D. A. WARREN
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

D. E. Freeborn	– Labour Relations Officer, Calgary
E. J. MacIsaac	– Manager, Labour Relations, Calgary
F. Peters	– Service Area Manager, Toronto

And on behalf of the Council:

D. A. Warren	– General Chairperson, Toronto
--------------	--------------------------------

R. S. McKenna	– General Chairman, BLE, Calgary
D. G. Colasimone	– Vice-General Chairperson
N. E. Morden	– Local Chairperson

AWARD OF THE ARBITRATOR

The facts in respect of this grievance are not in dispute. In October of 1996 the parties executed a material change document respecting the closure of the Company's operations in the Ottawa Valley, and the assignment of the line in question to a short line operator. That agreement, generally referred to as the "TOR Material Change Agreement" involved, among other things, the closure of the Company's terminal at North Bay. Previous to that time Sudbury had been an outpost terminal to North Bay. Part of the TOR agreement contained provisions whereby Sudbury would thenceforth become an outpost terminal to MacTier. That is reflected in article 10 of the TOR Material Change Agreement which provides as follows:

10.1 It is agreed that North Bay will no longer be a home terminal and will be removed from subsequent collective agreements. Should work be re-established at North Bay the Company reserves the right to again establish North Bay as a home terminal.

10.2 Sudbury will be an outpost terminal to MacTier which will be included in the next printing of the CCROU(UTU) collective agreement.

10.3 Existing rules or practices contained within the collective agreement which are in conflict herewith shall have no application, subject to the letter of understanding attached herewith.

The instant dispute arises because on March 11, 2001 the Company forced three employees holding required assignments at MacTier to required assignments on the expanded spareboard at Sudbury. The Council maintains that in that circumstance the Company proceeded incorrectly. It argues that it was under an obligation to post the additional positions on the Sudbury spareboard in accordance with article 9A of the collective agreement, which governs the filling of positions in conductor-only operations. In the circumstances, in a subsidiary argument, the Council also submits that the Company was obligated to provide to the three employees so affected relocation allowances within the contemplation of article 9A(8)(f) which provides as follows:

8. RELOCATION

...

(f) A protected employee required to relocate his home from one Main Home Terminal to another to fill a required permanent position will be entitled to claim the relocation benefits contained in Section 2(c) of the Material Change in Working Condition Article or, in lieu thereof may elect to receive a lump sum payment of \$15,000.00 if vacating rented accommodation or \$45,000.00 if the employee sells a home which he owned and occupied.

The Company maintains that it was entitled to proceed as it did by reason of the provisions of article 37-A(d)(5), which read as follows:

(5) When there are no applicants for a Conductor's temporary vacancy of six days or more or for a permanent vacancy or new assignment in either assigned or unassigned service, the junior qualified Conductor on the master seniority list is the Sub-Zone not holding a regular Conductor's position will be required to fill it. If no qualified Conductor is working as a Brakeman in that Sub-Zone, then the junior qualified Conductor not holding a regular Conductor's position in the Zone where the vacancy exists, will be required to take the position. If no qualified Conductor is working as a Brakeman in that Zone, then the junior qualified Conductor not holding a regular Conductor's position on the Superintendent's Division where the vacancy exists, will be required to take the position. If no such qualified Conductor is available on the Superintendent's Division, then the junior qualified Conductor on the Seniority District will be required to take the position. **Where common spare boards are maintained when there is no applicant for a Brakeman's temporary vacancy of six days or more or for a permanent vacancy or new assignment in assigned or unassigned road service, it will be awarded to the junior spare man on the common spare board in that Sub-Zone.** At Montreal and Toronto, where separate spare boards are maintained, when there is no applicant for such vacancies or new assignments in assigned or

unassigned road service, it will be awarded to the junior spare man on the road spare board in that Sub-Zone. If no applicant and no man is available in that Sub-Zone, then the junior man in the Zone where the vacancy exists will be required to take the position. If no man is available in that Zone, then the junior man on the Superintendent's Division where the vacancy exists will be required to take the position. If no man is available on the Superintendent's Division, then the junior man on the Seniority District will be required to take the position.

(emphasis added)

The Council submits that the foregoing provision has no bearing, to the extent that the facts of the instant case arise in conductor-only territory. It argues that article 9A was intended as a full code with respect to the filling of positions in that circumstance, and that article 37A(d)(5) would therefore have no application. That article, it submits, might still be relevant to the filling of positions in non-conductor-only territory.

Upon a full review of the submissions made the Arbitrator has some difficulty with the position advanced by the Council in this grievance. Firstly, it cannot be disputed that at all material times Sudbury was agreed to be, for all purposes of the collective agreement, an outpost terminal to the home terminal of MacTier. It does not appear disputed that, subject to what the Council characterizes as the overriding effect of article 9A, it would otherwise be appropriate for the Company to force employees from MacTier to fill vacancies at the outpost terminal of Sudbury, in accordance with the provisions of article 37A(d)(5).

The issue then becomes whether in the circumstances of this case article 9A can be said to in fact override. In that regard the Council refers the Arbitrator to clause 10 of article 9A which reads as follows:

(10) On territories on which Conductor-Only train operation has been implemented pursuant to Article 9A, Clause 9, existing rules or practices which are in conflict herewith shall have no application.

In the Arbitrator's view the instant grievance is best resolved by a close analysis of article 9A(3), which is the basis of the Council's claim. Sub-paragraph (b) of that article reads as follows:

(b) All positions whether required or non-required will be advertised at the general advertisement of assignments; upon the setting up of new assignments; and/or upon the creation of a permanent vacancy in assigned road service. Only those required positions will 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. **Adjustments to pools or spareboards will continue to be handled as at present subject to the parameters contained in this Clause 3.**

(emphasis added)

In the Arbitrator's view the last sentence speaks directly to the circumstance at hand. We are not here concerned with the general advertisement of assignments, nor are we dealing with the setting up of new assignments in the sense contemplated within sub-paragraph (b). What is involved in the instant case is non-assigned service through the adjustment of spareboards. As is evident from the final sentence of sub-paragraph (b) the parties contemplated that there would be no change to the rules governing the adjustment of spareboards, "subject to the parameters contained in this Clause 3". When regard is had to those parameters it is not clear to the Arbitrator that there is anything within clause 3 which would contemplate a limitation on the right of the Company to force employees from the spareboard of the main terminal to the spareboard of an outpost terminal. There are, it may be noted, arguable limitations on the movement of employees in that kind of circumstance. For example, the note to sub-paragraph (d) of article 9A(3) provides that a protected employee with seniority prior to March 7, 1979 cannot be forced to any position outside of the home terminal where they are employed, or if they are employed at an outpost terminal, cannot be forced back to the main home terminal. It appears to be common ground that the employees who are the subject of this grievance are not within that protected category of employees and so do not fall within that "parameter" of clause 3.

On the whole, I am compelled to the conclusion that in the fashioning of the conductor-only rules the parties did intend to preserve the general thrust of the rules governing the filling of spareboards as between home terminal and terminals which are outposts to a given home terminal. The movement of employees in that circumstance does not fall within the contemplation of article 9A(3), and more specifically the bulletining requirements contained therein which relate to the general advertisement of assignments, the setting up of new assignments and vacancies in assigned road or yard service.

In effect, through this grievance the Council argues that the parties have effectively agreed to a full-blown bulletining process, and the application of the various steps of article 9A(3) for filling positions added to a spareboard, in circumstances which would generally be viewed as normal spareboard adjustments. Given the language of the final sentence of sub-paragraph (b) of article 9A(3), I am satisfied that the parties did not intend to do away with the normal processes, rights and obligations which attach to the adjustment of spareboards within home terminals and their outpost terminals. Had the parties intended to make such a radical change they would, I think, have done so through clear and unequivocal language. Such language as is found within article 9A(3)(b) is to the contrary.

In the result, the Arbitrator is not persuaded that there was any violation of the collective agreement by the Company when it relied upon the provisions of article 37-A(d)(5). That article provides, in part:

(5) ... Where common spare boards are maintained when there is no applicant for a Brakeman's temporary vacancy of six days or more or for a permanent vacancy or new assignment in assigned or unassigned road service, it will be awarded to the junior spare man on the common spare board in that Sub-Zone. ...

In the Arbitrator's view the Company was correct in its interpretation and application of these provisions in the circumstances disclosed. For these reasons the grievance must be dismissed.

October 12, 2001

(signed) MICHEL G. PICHER
ARBITRATOR