CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY AWARD TO

CASE NO. 3207

conference call held on Wednesday, 9 January 2002

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS

(UNITED TRANSPORTATION UNION)

SUPPLEMENTARY AWARD OF THE ARBITRATOR

The award herein, dated October 12, 2001, dismissed the grievance. Part of the Arbitrator's reasoning is reflected in the following passage:

> 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.

By letter dated October 31, 2001, counsel for the Council advised the Arbitrator that the article cited in the above passage is in fact the version of the article which existed in the prior collective agreement, and not in the current collective agreement which governs the instant dispute. Under the current agreement the sentence which is highlighted in the passage reproduced above has been removed from sub-paragraph 9A (3) (b). Counsel for the Council notes, in his letter of October 31, 2001, that the text of article 9A (3) referred to in the award is not found in the collective agreement. Stating, in part, "This sentence was deleted from the collective agreement by the parties …", counsel requests the Arbitrator to reconvene the hearing for the purposes of hearing further argument in this matter, based on the changes made to the collective agreement.

Counsel for the Company makes a three-fold submission. Firstly he stresses that the Company is not prepared to agree to a re-opening of this case to hear again the arguments of the parties based on the current configuration of the collective agreement. Secondly, counsel stresses that the *ratio* of the Arbitrator's decision remains unaffected by the sentence which was erroneously included in the text of article 9A (3) (b). He stresses that the basis of the award is that the posting obligation relates to assigned service, and not to the treatment of spareboard positions. The Company submits that it follows that if the matter were heard anew there would be no difference in the conclusion to be drawn. Thirdly, in any event, Counsel for the Company takes the position that this is not a circumstance in which the Arbitrator can use the implicit retainer of jurisdiction noted in the **Supplementary Award to CROA 1861** to in any way amend or alter the original award. He submits, in other words, that the Arbitrator is *functus officio* in this matter.

Having considered the written submissions of the parties, and their verbal submissions made in a conference call on January 9, 2002, the Arbitrator turns to deal with the merits of the Council's request. Firstly, assuming, without finding, that it would be proper to reschedule this matter for hearing, it is not altogether clear that the substance of the dispute, and the substantive provisions of the collective agreement to be considered, would be any different. While it is true, as counsel for the Council notes, that the last sentence of article 9A (3) (b) as reproduced in the original award no longer appears within that paragraph in the provisions of the current collective agreement, it is not accurate to say that the sentence in question "… was deleted from the collective agreement by the parties, and was no longer part of the collective agreement at the material times relevant to the grievance …", as counsel for the Council submits. A review of the "Change Document Concerning Final Contract Language Regarding Method of Pay Agreement", which incorporates the changes to the various articles, including article 9A, confirms that, in fact, in the current version of the collective agreement the sentence in question still appears, albeit at a different location.

Under the current version article 9A (3) (b) 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 or yard 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.

In addition, a newly added paragraph, in the form of article 9A (3) (v), reads as follows:

> **(v)** Adjustments to pools or spareboards will continue to be handled as at present.

As is evident from the above, while the parties have reconfigured the form of this part of the collective agreement, they have not changed its substance. It appears to the Arbitrator that on the basis of the current

configuration of the language, there is no reason to doubt that the parties did intend to maintain the existing system of making adjustments to spareboards and that the obligation to bulletin positions was intended to apply to assigned service. It is, to say the least, arguable that the transfer of the last sentence from sub-paragraph (b) to sub-paragraph (v) of article 9A (3) has not changed the substantive meaning of the collective agreement with respect to the issue in dispute, and that while there may have been an error in form by the mistaken quoting by the Arbitrator of the prior collective agreement, there would appear to be no error in substance.

On the foregoing basis, assuming, without finding, that I would have jurisdiction to re-schedule this matter for further hearing, I cannot find in the submissions of counsel for the Council evidence of a substantive error or any other prejudicial factor which would justify acceding to the Council's request.

More fundamentally, as the primary basis for this supplementary award, I must agree with counsel for the Company that the Arbitrator is *functus officio* in this matter. While this Office does maintain an implicit retainer of jurisdiction, without attaching to each and every award a statement with respect to remaining seized of a dispute, (supplementary award to **CROA 1861**), the retainer of jurisdiction can only be exercised to explain or complete an award, not to reconsider it on its merits or alter any substantive aspect of its conclusions. Boards of arbitration, including this Office, do not have an inherent jurisdiction to reconsider their awards. That jurisdictional reality is essential to the interests of clarity and finality in the disposition of disputes and the final and binding determination of the rights and obligations of parties under collective agreements governed by the **Canada Labour Code**. The retainer of jurisdiction is, of course, available for such purposes as dealing with aspects of the dispute which have not been fully resolved in the original award, and perhaps not addressed in evidence, such as the calculation of compensation or other consequences secondary to the principal conclusion of the award. Considerations of that kind do not arise in the case at hand.

For all of the foregoing reasons the Arbitrator is compelled to deny the request of the Council for a reopening of this grievance.

January 16, 2002

(signed) MICHEL G. PICHER
ARBITRATOR