

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3234

Heard in Montreal, Thursday, 13 December, 2001

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Interpretation and application of Item 8(d) – the Ad Hoc Allowance – of the November 30, 2000 memorandum of settlement in connection with, but not limited to, employees employed on B&B road gangs (File #15-55).

BROTHERHOOD'S STATEMENT OF ISSUE:

In March 2001, Brotherhood officials learned that the Company was advising B&B road gang members that they were not entitled to the *per diem* allowance of \$81.80 (in lieu of direct billed accommodation and meal allowance) as provided for in item 8(d) of the above memorandum of settlement. The Company took the position that item 8(d) does not apply to B&B employees. The Brotherhood took the position that item 8(d) applies to *all* employees that normally received Company direct billed accommodation and meal allowance (and who are not covered by any other accommodation and meal provision contained in the memorandum of settlement).

The Union contends that: (1.) Item 8(d) provides that it “applies when employees are required to stay away from their headquarters or boarding cars overnight”. Nowhere are B&B employees excluded from this application; (2.) The Company’s position is in violation of item 8(d) of the November 30, 2000, memorandum of understanding.

The Union requests that it be declared that the Brotherhood’s interpretation is correct and that all employees who have been wrongfully denied the allowance be compensated for same in the appropriate amount.

The Company denies the Brotherhood’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:

E. J. MacIsaac	– Manager, Labour Relations, Calgary
M. G. DeGirolamo	– Assistant Vice-President, Industrial Relations, Calgary
D. E. Freeborn	– Labour Relations Officer, Calgary

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
D. W. Brown	– General Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
G. D. Housch	– Vice-President, Ottawa

AWARD OF THE ARBITRATOR

At issue is the interpretation and application of the provisions respecting the *per diem* allowance newly negotiated as part of the memorandum of settlement between the Company and the Brotherhood on November 30, 2000. Article 8 of that memorandum reads, in part, as follows:

8.b) Direct Billed accommodation or a Per Diem in lieu:

- Applies to Production Gang employees
- Will be used at the Company's discretion and when used, will apply to the entire production gang.
- Employees will be advised on the status of per diems, when their crew is initially bulletined.
- When direct billed accommodation is supplied, the meal allowance will apply.
- Employees will be provided with a meal and lodging per diem as contained in Appendix "B".
- Employees on a per diem must secure suitable accommodation to ensure proper rest.
- Employees will be responsible for their own travel to and from their place of accommodation and the designated assembly location.
- Assembly locations will be established by mutual agreement between the appropriate representative of the union and the Company.
- Time will be paid for travel to and from the work site and the designated assembly location, if applicable, regardless of where employees elect to take lodging.

...

8.d) Ad Hoc Allowance:

- Applies when employees are required to stay away from their headquarters or boarding cars overnight.
- Employees will receive a meal allowance when accommodation is direct billed or claimed against the Company.
- **In lieu of the above and at the employee's discretion, employees will be provided with a meal and lodging per diem allowance as contained in Appendix "B".**
- Employees on a per diem must secure suitable accommodation to ensure proper rest.

(emphasis added)

Appendix B to the memorandum establishes, among other things, the *ad hoc per diem* allowances for the term of the agreement, to apply under article 8(d). It reads as follows:

d) Ad hoc Allowance (per diem OR meal allowance when accommodation is provided):

Per Diem:	January 1, 2001	\$81.80
	January 1, 2002	\$84.25
	January 1, 2003	\$86.75

The Brotherhood submits that employees, other than production gang employees, would be entitled to opt for the ad hoc allowance whenever the conditions described in paragraph 8.d) arise. In other words, it argues that B&B employees compelled to be away from their headquarters or from boarding car accommodation are entitled to opt for the per diem allowance as provided in Appendix B. The Company's position is that employees in that circumstance who are in fact working away from home, and are housed on a long-term basis in hotel accommodations by the Company, are only entitled to the per diem option if they are sent from that hotel accommodation to work for a temporary period at another location, where they might be housed in a second hotel.

The Arbitrator must confess to some difficulty with the interpretation of the Company. It is, quite clearly, not consistent with the plain language of the provision I am called upon to interpret. In that regard I must agree with the submissions of the Brotherhood that there is no ambiguity on the face of the articles in question, nor am I persuaded

that the evidence before me has disclosed some patent ambiguity. Even if I should accept the Company's suggestion that the term "boarding cars" is inherently ambiguous, as boarding cars are no longer utilized as a general rule and employees are usually housed in hotel accommodation, there is further evidence that calls into question the persuasiveness of the Company's position. It does not appear disputed that as part of the memorandum of settlement the parties agreed upon a set of questions and answers for the assistance of employees in understanding their entitlement under the provisions of the new memorandum. With respect to the ad hoc allowance the following question and answer entry appears:

D) Questions and Answers Ad Hoc Allowance

Q1. Who is entitled to this allowance?

A1. This applies to an employee who as a result of it being too far for him to return to his Principle [sic] Place of Residence stays out overnight.

It does not appear disputed that the parties have agreed that "Principal Place of Residence" for the purposes of the memorandum is to have the same meaning as under the regulations and requirements of Revenue Canada, meaning a person's permanent private home, in a self-contained living accommodation. That, I am satisfied, more persuasively supports the interpretation advanced by the Brotherhood, which I also consider to be more consistent with the plain language of article 8.d) of the memorandum of settlement. Moreover, the separate treatment of production gangs is evidence that the parties were obviously able to address their minds to possible exceptions from the provisions of sub-paragraph (d), applying to employees generally. No exceptions of the kind argued by the employer are evident in the language before me.

For the foregoing reasons the grievance must be allowed. The Arbitrator declares that the Brotherhood's interpretation is correct and directs that employees who have been deprived of the per diem allowance be compensated appropriately. Should there be any dispute with respect to the application of the remedy the matter may be spoken to.

December 19, 2001

(signed) MICHEL G. PICHER
ARBITRATOR