

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3457

Heard in Calgary, Thursday, 11 November 2004

concerning

CANADIAN PACIFIC RAILWAY

and

**TEAMSTERS CANADA RAIL CONFERENCE
(MAINTENANCE OF WAY EMPLOYEES DIVISION)**

DISPUTE:

Claim on behalf of Track Maintainer/Truck Driver D. Olsen.

JOINT STATEMENT OF ISSUE:

On December 5 and 6, 1998, the Track Maintainer/Truck Driver of the Lake Louise Night Crew worked sixteen hours of POT using the BTMF Truck that was regularly assigned to the grievor during the day. A grievance was filed.

The Union contends that: **(1.)** the grievor should have been assigned the work in question; **(2.)** the Company's actions violated Article 2(f) of Appendix "A" and Article 9.1 of Agreement No. 41.

The Company contends that: **(1.)** the Night Crew at Lake Louise was an additional crew that was established by bulletin; **(2.)** the responsibility of operating the BTMF truck on the Lake Louise Night Crew was properly assigned to the Track Maintainer/Truck Driver; **(3.)** there were no provisions within the agreement preventing the Company from assigning the BTMF truck from one crew to another.

The Union requests that the grievor be paid sixteen hours of overtime at the TM/TD rate.

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

FOR THE UNION:

(SGD.) Wm. BREHL
NATIONAL COORDINATOR

FOR THE COMPANY:

(SGD.) E. J. MacISAAC
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

- | | |
|----------------|--------------------------------------|
| M. Moran | – Labour Relations Officer, Calgary |
| E. J. MacIsaac | – Manager, Labour Relations, Calgary |
| T. Yamashita | – Manager, Track Maintenance |
| J. Worrall | – Labour Relations Officer, Calgary |

And on behalf of the Union:

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|-----------------|--|
| P. Davidson | – Legal Counsel, Ottawa |
| Wm. Brehl | – National Representative, Ottawa |
| H. Helfenbein | – Director, Pacific Region, Medicine Hat |
| S. Delongchamps | – Director, Montreal, Montreal |
| G. Doherty | – Witness |
| A. Dellaporta | – Witness |
| C. Watkinson | – Witness |
| D. Olson | – Grievor |

AWARD OF THE ARBITRATOR

The grievor was working on the Lake Louise section crew as a Track Maintainer/Truck Driver (TM/TD) in December 1998. After being awarded the TM/TD position through bid, the grievor was designated as the driver of the Basic Track Maintenance Force (BTMF) truck. The grievor's crew worked regular hours from Monday through Friday and performed standard track maintenance work. Given the winter conditions, a second Lake Louise weekend night crew was also in operation. This three person crew was a temporary winter work force whose primary function was to be available to clear snow from switches when required. This night crew worked on a Thursday to Monday winter schedule. On the weekend of December 5 and 6, 1998 (Saturday and Sunday) the night crew performed a total of sixteen hours of overtime. It

is agreed that throughout that weekend a TM/TD operator on the night crew used the same BTMF truck assigned to the grievor for his use as part of the Lake Louise day crew.

The Union's position is based on two provisions of the collective agreement as outlined in its brief:

Section 2 of Appendix "A" deals with the position of Track Maintainer/Section Truck Driver. Article 2(f) states:

2 (f) The Track Maintainer/Section Truck Driver will have the primary responsibility for the operation of the BTMF Section Vehicle. This operation will consist of the regular driving and daily inspection of the Section Vehicle. The principal duties of the Track Maintainer/Section Truck Driver shall be that of a Track Maintainer.

Section 9 is entitled "Work on Rest Days". Article 9.1 states, in part, as follows:

9.1 For overtime work, the senior employee regularly performing the work will be called.

The Union submits that by virtue of his "primary responsibility for the operation" as set out in article 2(f), the grievor acquired an interest in all forms of company work involving the BTMF truck assigned to him. In this case, the Union states that the grievor essentially has a right of first refusal on any form of work that takes place with his BTMF truck outside of his regular company hours. The Union also submits that the rights established under the collective agreement are reinforced by the past practice with respect to the operation of most forms of railway maintenance equipment, including the BTMF truck. In that regard, three maintenance operators, including the grievor, all with lengthy experience, testified that they were invariably given priority status to operate

their assigned machinery whenever that machinery was required outside of their regular shift. The Union further submits that this practice is also codified in section 9.1 as follows:

9.1 For overtime work, the senior employee regularly performing the work will be called.

From the Union's perspective, the grievor's in this case is inextricably linked to the presence and use of his assigned BTMF truck for the duration of his bulletined position. The Union also added that no formal reassignment of the grievor's BTMF truck ever took place which alters his fundamental right to operate his BTMF truck when asked to do so outside his regular shift. The Union concedes that the Company has the right to re-distribute vehicles and equipment as it sees fit but it must do so in accordance with the provisions of the collective agreement. That has not occurred in this case. In essence, the Union states that the machine operators have the right to "follow their machines".

The Company submits that the grievor was not the person regularly performing the work on the nights in question. The Company established the night crew as an extra crew to work on the same section as the grievor's regular crew. Mr. Culig was the assigned TM/TD night crew operator and he performed that work in accordance with section 2(f) of Appendix "A".

The Company further submits that it has not given up its management right to assign vehicles from one section crew to another. In support, the Company cited several decisions where the Company has been allowed to reassign vehicles as it has done in this case. The Company also notes that the Union has a number of outstanding grievances in this area which indicates that this situation has arisen in other circumstances where the driver has not necessarily followed his equipment. Although section 2(f) of Appendix "A" sets out that the TM/TD has responsibility for the operation – which includes regular driving and daily inspection – of the BTMF section vehicle, it is quite clear in the last sentence of the article that the "principal duties" of a TM/TD is that of a "Track Maintainer". In other words the focus and expectation of the TM/TD driver is to ensure the proper maintenance of the track. This issue was addressed in **CROA 932** by Arbitrator Weatherill:

The grievor is an Assistant Foreman. As such, he is required to be able to operate the crew cab truck, and in fact he is the one principally responsible for its operation on his section, although from time to time other qualified employees, including the Foreman, may operate it. The fact that ability to operate [the] truck is a required qualification for an Assistant Foreman does not, however, require the conclusion that operation of the truck is the exclusive right of the Assistant Foreman. If the only work in question were that of operating the truck, then it may be that the grievor would be considered "the regular employee", and he entitled to the work. **In this case, however, the operation of the truck was only incidental to the main task, which was that of directing the payloader work.** For such work, the Foreman's claim was at least as good as, and probably better than that of the grievor, although it would appear that the grievor was qualified to perform it.

(emphasis added)

The Arbitrator notes that there is no dispute that the employer can assign equipment as it sees fit. That right in my view is not circumscribed by article 2(f) above. As noted in the above decision, the grievor's principal duties are to maintain the track.

Incidental, and only incidental, to that main assignment is the TM/TD's responsibility under article 2(f) to both operate and maintain the BTMF vehicle. To put it another way, the operation and maintenance of that vehicle for which the grievor is assigned "primary responsibility" by article 2(f), is only the means by which the grievor performs his main work obligation which, to reiterate, is to maintain the track. Although the Company periodically may call on its equipment operators to work outside their area with their assigned equipment, it is not a practice which leads to the conclusion that equipment operators, like the grievor, have a *prima facie* right to the actual work to be performed just because they have the "primary responsibility" to operate and maintain their assigned piece of equipment. Stronger language would be required in order for me to conclude that the BTMF truck driver, for example, has the exclusive right of first refusal over work to be performed outside his area on his BTMF truck. To put it succinctly, the machine and driver do not necessarily follow the work under this collective agreement.

The Arbitrator agrees with the Company's position that there has been no violation of article 9.1. The overtime "work" being performed was the night work and the employer had established a night crew to do that work. Article 9.1 might apply, for example, if an employee junior to the grievor was called in to do his work in circumstances where there was no special night crew in place.

The grievance is dismissed.

November 16, 2004

(signed) J. M. MOREAU, Q.C.
ARBITRATOR