

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

CASE NO. 3644

Heard in Montreal Tuesday 12 February 2008

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

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

DISPUTE:

Claim on behalf of senior Track Maintenance Foremen on the London, Toronto and Smiths Falls Seniority Territories.

JOINT STATEMENT OF ISSUE:

On April 14, 1999, the Company issued Award Bulletin 106/99 awarding flagging positions for the Ledcor Fibre Optic Project as Leading Track Maintainer positions with the LTM rate of pay. A grievance was filed on the basis that the positions should have been advertised and awarded as Track Maintenance Foremen positions.

The Union contends that: **1.)** The Ledcor flagging positions should properly have been advertised and awarded as Track Maintenance Foremen positions. **2.)** The duties involved were those properly performed by Track Maintenance Foremen. **3.)** The Company's actions were in violation of the bulletining provisions of the collective agreement in general and section 26.9 thereof in particular.

The Union requests that: **1.)** All affected employees be made whole, on the basis of the TMF rate, for all losses incurred as a result of this matter.

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

FOR THE UNION:

(SGD.) Wm. BREHL
PRESIDENT

FOR THE COMPANY:

(SGD.) M. MORAN
LABOUR RELATIONS OFFICER

There appeared on behalf of the Company:

M. Moran – Labour Relations Officer, Calgary
A. Mielke – Manager, Track Maintainer, Southern Ontario

J-F. Boisvert – Manager, Special Projects, Engineering

And on behalf of the Union:

Wm. J. Brehl – President
D. Brown – Counsel, Ottawa

AWARD OF THE ARBITRATOR

The Union asserts that flagging work in conjunction with the installation of fibre optic cable along the Company's roadway is work which requires the incumbent in the position to hold a track occupancy permit, a function the Union maintains is generally associated with the duties and responsibilities of a track maintenance foreman. In fact, during the Ledcor Project, the Company bulletined the flagging work to leading track maintainers, at the LTM rate of pay. Citing what was formerly section 26.9 of the collective agreement then in effect (section 2.17 of the current collective agreement) the Union notes the language: "... employees temporarily assigned to higher-rated positions shall receive the higher rate ... while occupying such positions ...". On that basis it argues that flagging should have been paid at the wage rate of the track maintenance foreman.

It does not appear disputed that if this matter had arisen after November 30, 2000, the Union's view would have prevailed. That is because the parties executed, on that date, a flagging agreement, paragraph 3 of which expressly provides that any employee filling a flagging position is to be paid at the track maintenance foreman's rate of pay. However, the instant grievance pre-dates that agreement by approximately one year.

The material before the Arbitrator falls well short of confirming that the understanding or practice of the parties, at least up to 1999, was that all flagging was to be paid at the track maintenance foreman's rate of pay. For example, the Company cites another fibre optic project, apparently done in 1994 for Sprint. In that case, a project similar in size and scope to the Ledcor project was implemented on the Company's system, with flagging for the installation of fibre optic being exclusively bulletined and assigned to employees in the leading track maintainer's classification. It appears that there was no grievance against that wage treatment.

The position argued by the Company, unrebutted by any contrary evidence from the Union, is that, depending on the circumstances both track maintenance foreman rates and leading track maintainer rates have been paid to employees performing flagging. In addition to the example of the Sprint project, its representatives draw to the Arbitrator's attention **CROA 2779**, which involved a flagman working under the LTM classification in Southern Ontario.

According to the Company's representations, the foreman's rate of pay is assigned where the duties involve more than merely obtaining a track occupancy permit and exercising primary vigilance over the project with respect to protecting the roadway. Where, for example, the oversight of other employees or the management of movements and activities on a large territory become a factor, the Company has traditionally assigned the flagging duties to a person being paid at the track maintenance foreman's rate of pay. Where, however, no such duties existed, and the function was essentially restricted to obtaining the necessary track occupancy permit, at

least prior to November of 2000, the Company commonly made use of employees paid at the leading track maintainer's rate to perform the flagging function. It is precisely that practice, its representatives note, which was brought to an end by the flagging agreement negotiated by the Union.

On the whole, the Arbitrator must sustain the position advanced by the Company. It is far from clear to the Arbitrator that prior to November of 2000 the practice or understanding was that all flagging assignments must necessarily be compensated at the track maintenance foreman's rate of pay. The relatively substantial Sprint project of 1994 stands as an obvious example of a contrary practice, which apparently went without objection from the Union. On the whole, therefore, the Arbitrator cannot find that the Union has discharged its onus of establishing that the collective agreement, whether expressly or implicitly, contemplated the payment of the wages of persons assigned to flagman's duties to be paid at the foreman's rate of pay.

In the result, no violation of the collective agreement is disclosed and the grievance must be dismissed.

February 18, 2008

(signed) MICHEL G. PICHER
ARBITRATOR