

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

CASE NO. 4133

Heard in Montreal, Thursday 12 July 2012

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Supervisors providing track protection (flagging) for contractors on the Prairie Region during the 2011 work season.

JOINT STATEMENT OF ISSUE:

During the summer of 2011, the Union learned that the Company had assigned three supervisors to provide track protection (flagging) for contractors who were installing cross ties and new and relay rail within Prairie Region District 2.

The Union contends that **1.)** The Company's actions were in violation of section 13.1 and Appendix C (the Flagging Agreement) of Wage Agreement No. 41. **2.)** The Company's actions were also in violation of the well-established past practice between the parties.

The Union requests that the Company compensate the three senior employees in the TMF classification on the Saskatoon Division at the overtime rate for **(1)** all hours worked by the supervisors that exceeded 8 hours on a regular 5/2 work cycle and **(2)** all hours worked by the supervisors on regular assigned rest days of Saturday and Sunday.

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

FOR THE UNION:
(SGD.) WM. BREHL
PRESIDENT

FOR THE COMPANY:
(SGD.) M. MORAN
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

W. Scheuerman	– Labour Relations Officer, Calgary
M. Moran	– Manager, Labour Relations, Calgary
M. Chernenkoff	– Labour Relations Officer, Calgary

D. Cote	– Labour Relations Officer, Calgary
R. Hope	– Superintendent, TR&E, Moose Jaw
T. Hatfield	– Track Renewal Supervisor,

There appeared on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. W. Brown	– Counsel, Ottawa
A. R. Terry	– Vice-President, Ottawa

AWARD OF THE ARBITRATOR

The material establishes, beyond controversy, that in the summer of 2011 the Company engaged a contractor to do substantial installation projects on a number of subdivisions in Prairie Region District 2. The work is said to have included the installation of crossing ties as well as the installation of new and relay rail. It appears that at the outset the Company advertised two extra gang foreman flagging positions to work with the contractor. Those positions were awarded to employees Jason Lavallee and Kelvin Loscombe. While those individuals commenced flagging with the contractor in May of 2011, they were laid off by written notice which took effect on June 20, 2011 for Mr. Loscombe and June 27, 2011 for Mr. Lavallee. After their layoff supervisors assigned to work with the contractor took over the track protection and flagging duties previously performed by the employees.

The Union alleges that the Company's action violate Appendix C, known as "the Flagging Agreement", and section 13.1 of the collective agreement.

The Company denies any violation of the collective agreement. It submits that what transpired was a relatively minor degree of flagging which was performed by the supervisors as incidental to their normal duties. On that basis it maintains that they were

entitled to perform the flagging work which they performed from late June to November of 2011.

Section 13.1 of the collective agreement provides as follows:

13.1 Except in cases of emergency or temporary urgency, employees outside of the maintenance of way service shall not be assigned to do work which properly belongs to the Maintenance of Way department, nor will Maintenance of Way employees be required to do any work except such as pertains to their division or department of Maintenance of Way service.

Additionally, Appendix C, the Flagging Agreement, reads, in part, as follows:

3. Any employee filling a flagman position, under the terms of this agreement, will receive the TMF rate of pay, except when B&S employees are filling flagman positions in connection with work being performed on track bridges and/or structures, in which case the B&S Foreman rates will apply.
4. Vacancies of less than forty five (45) days will be filled in accordance with Article 10.13(a) of Wage Agreement No. 41.
5. Vacancies greater than forty five (45) days will be advertised in accordance with Article 10.1. Such positions will be awarded to the senior applicant, based on TMF seniority or B&S Foreman seniority, as the case may be. Then in accordance with the line of promotion.

The Arbitrator has some difficulty with the submission of the Union. Its representative suggests that the Flagging Agreement was executed as a means of confirming the absolute right of bargaining unit members to perform flagging for contractors engaged to perform track maintenance work. With the greatest respect, a close review of the language of the Flagging Agreement does not reveal any specific obligation on the part of the Company to assign flagging to bargaining unit members at any particular time or in relation to any particular project. Rather, as is evident from the language of Appendix C, the agreement outlines the bulleting process by which flagging positions are to be filled when vacancies exist and the rate of pay to be provided to

employees who fill a flagman position. There is nothing in the text of Appendix C which can be fairly construed as giving to the bargaining unit an absolute right to perform all flagging in relation to projects of contractors.

I must agree with the Union that as a general rule section 13.1 of the collective agreement would prohibit the Company from using persons outside the bargaining unit to do work “which properly belongs to the Maintenance of Way department.” I would also be prepared to conclude that if the Union could demonstrate that a supervisor or another employee from outside the bargaining unit was assigned to perform flagging duties on a full time basis, such an assignment would be in violation of the prohibition clearly established in section 13.1 of the collective agreement.

However, the facts of the instant case are substantially different. The unchallenged submission of the Company is that in essence supervisors were assigned to supervise and monitor the contractor’s work. Their general duties are described as follows in the Company’s brief:

- Verify that sufficient materials were on [site] for current and future work.
- Ensure adequate inventory of cars and bill loaded used tie cars.
- Order ballast as needed for turnouts.
- Ensure contractor is adhering to Company safety protocols and that proper safety equipment is being used.
- Manage slow orders.
- Coordinate with Signal Maintainer regarding Signals and Communications work.
- Conduct morning job briefing and all subsequent job briefings with contractor employees.
- Plan future work.
- Liaise with the Network Management Centre and Rail Traffic Controllers to maximize block time.

- Inspect track and turnouts on an ongoing basis and determine if the track is suitable for trains to pass.
- Provide track protection in the form of a TOP for contractors.
- Meet with contractor concerning any work that did not meet Company standards.

The Company's position is that the flagging which was done by the supervisors was minor in respect of their working time, estimated as being little more than 5 to 10% of the working time of a given day. On a twelve hour shift worked by the crews the Company estimates that flagging would have been no more than between thirty minutes and one hour. The Company contrasts this situation to projects where the flagging demand is in fact high and a full time dedicated flagman is required.

In my view the Flagging Agreement itself contemplates an exception for a circumstance such as the case at hand. Paragraph 1 of the agreement states: "This agreement does not apply to basic track protection applications, incidental to normal duties." While the Union's representative suggests that the reference to work incidental to normal duties is meant to apply only to employees in the bargaining unit, I can see no basis for such a restriction of the language. When the instant case is considered, it is extremely common for supervisors to take track protection as a matter incidental to their duties, and to perform occasional or sporadic flagging in relation to those normal duties.

I find it difficult to conclude that by the terms of Appendix C of the collective agreement the parties would have intended that the Company is under an obligation to retain a bargaining unit employee as a full time flagman on a project where he or she might have little more than thirty minutes of flagging to do in a twelve hour working day.

Flagging of that kind is, in my view, plainly incidental to the normal duties of a supervisor who, in accordance with long standing practice, can hold track protection authority and provide such flagging protection as may be incidentally needed in relation to a project which they supervise. That, clearly, is what happened in the case at hand.

It should be stressed that each case depends upon its own facts. Whether a supervisor who spends 40%, 50% or 60% of his or her time performing flagging would be acting in violation of section 13.1 of the collective agreement is not an issue raised in these proceedings, and is one in relation to which I need make no comment. Suffice it to say that on the facts of the instant case it would be difficult to find a more clear case of a supervisor providing a relatively small amount of flagging in a manner that is incidental to the supervisor's normal duties.

In the circumstances, I can see no violation of section 13.1 of the collective agreement or of Appendix C. The grievance must therefore be dismissed.

July 26, 2012

(signed) MICHEL G. PICHER

ARBITRATOR