

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

CASE NO. 4696

Heard in Edmonton, September 16, 2019

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED STEELWORKERS, LOCAL-2004

DISPUTE:

Claim on behalf of Mr. J. Hintz, Mr. C. Cote and Mr. P. Fehr for the difference between their regular rate of pay and the Level II Foreman rate of pay, between April 23 and June 13, 2017 in an alleged violation of Article 9.1 of the 10.1 Agreement and Attachment "A" of Appendix XIV of the 10.8 Supplemental Agreement.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Company assigned Mr. Fehr, Mr. Cote and Mr. Hintz to protect the Sperry & Herzog rail test cars on a number of dates ranging from April 23, 2017 until June 13, 2017 as listed in the Step I grievance dated June 19, 2017.

The Union contends that the Company has violated provision 9.1 of Article 9 (Employees assigned to Higher-Rated and Lower-Rated Positions) of Agreement 10.1 and Attachment "A" of Supplemental 10.8.

The Union is seeking the difference in rates of pay from Brothers Fehr, Cote and Hintz regular rates of pay to the higher Level 2 Foreman rate of pay for all hours worked on the dates outlined above including but not limited to any overtime and associated benefits.

The Company declined the Grievance on September 17, 2018.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

The Union contends that the Company has violated provision 9.1 of Article 9 (Employees assigned to Higher-Rated and Lower-Rated Positions) of Agreement 10.1 and Attachment "A" of Supplemental 10.8.

The Union is seeking the difference in rates of pay between the grievors' regular rates of pay and the higher Level 2 foreman rate of pay for all hours worked on the dates outlined above.

Preliminary objection regarding the arbitrability of this matter:

In this instance, the Union did not progress the grievance within the prescribed time limits provided for in Article 19.2 of Agreement 10.1. As the Union had 60 days in which to proceed, and they did not, and the Agreement stipulates at Article 18.8 that a grievance that is not progressed within the time limits specified shall be considered settled on the basis of the last decision and shall not be subject to further appeal. The Company asks that the Arbitrator decline jurisdiction.

Subsidiarity, the Company disagrees with the Union's contentions and rejects the grievance on its merits.

FOR THE UNION:
(SGD.) T. Lundblad
 Staff Representative

FOR THE COMPANY:
(SGD.) F. Daignault
 Manager, Labour Relations

There appeared on behalf of the Company:

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| F. Daignault | – Manager, Labour Relations, Montreal |
| S. Blackmore | – Senior Manager Labour Relations, Edmonton |
| S. P. Paquette | – Director, Dispute Resolutions and Labour Standards, Montreal |
| B. Kambo | – Manager Labour Relations, Edmonton |
| B. Strachan | – Senior Manager Engineering, Melville |

And on behalf of the Union:

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|-------------|----------------------------------|
| B. Adamczyk | – Staff Representative, Winnipeg |
| G. Colli | – Chief Steward, Toronto |

AWARD OF THE ARBITRATOR

On various dates, between April 23 to June 15, 2017, the three named Grievors were temporarily assigned to pilot the Sperry & Herzog test car (S&H test car). At the time, the Grievors held the following positions:

Patrick Fehr - Permanent Machine Operator;
 Cole Cote - Track Maintenance Foreman;
 Jordan Hintz - Track Maintainer/Truck Driver.

Their duties at the time included piloting or guiding the crew of the S&H test car to ensure that the rules related to track protection are followed and, when necessary, to take remedial actions under Engineering Standards and operating rules including: registering slow orders to portions of the track if a defect is found by the test car.

As set out in Appendix XIV, Attachment A, "*Rail Testing*" falls within the job description of Extra Gang Foreman Level 2. It was not disputed that the duties of an employee working as an Extra Gang Level 2 Foreman, whose responsibility is overseeing

"*rail testing*", must ensure that proper protection is in place for the work performed by the contractors. An employee in this classification is ordinarily responsible for the rail testing operation in that they are generally familiar with the location where the testing is to take place. The Foreman's duties and responsibilities include: arranging for track protection prior to the S&H equipment being put on the track; ensuring that plans are in place in the event the S&H equipment had to be removed to a siding; and, ensuring that - in the event the operator of the S&H equipment indicated that there was an issue that required attention - arrangements are made to have the track repaired or, in most cases, place the required slow order until the situation is addressed.

These duties described above are the duties that the grievors actually performed on the dates in question.

The Union asserts that, pursuant to Article 9.1 of the Collective Agreement, there is no obligation for employees who are temporarily assigned to higher rate positions to be qualified to use the equipment or interpret the data that flows therefrom. The only obligation is for the employee to supervise and oversee the work performed by S&H who operate the equipment. When such circumstances arise, the Union argues that the employees, who perform the functions of "*rail testing*" that fall within the job description of Extra Gang Foreman Level 2, are to receive the higher rates of pay while occupying such positions.

In response, the Company's argument is twofold. Initially, it raises a jurisdictional issue based on the fact that the Union failed to progress the grievance to arbitration within the time lines mandated by Article 19 of the Collective Agreement. In light of the same, it asserts that the grievance is settled, as per Article 18.8, and therefore I lack jurisdiction to hear the matter.

On the merits, the Company argues that there was no violation of either Article 9.1 of the Collective Agreement or Supplemental Agreement 10.8. It asserts that there is no justification to compensate the three Grievor's at the Extra Gang Foreman Level 2 rate - for piloting the test cars or for taking track protection or issuing slow orders – since that work is done by Track Maintenance Foreman. And, the rate of pay the Grievor's received in their positions at the time was equal to, or exceeded that of, Track Maintenance Foreman. In that respect, it refers to Appendix VIII of the Collective Agreement which outlines the duties anticipated for Track Maintenance Foreman as well as the considerations that go into the determination of their pay grade. It asserts that the Grievor's, in this case, have the obligation (as per **AH310**) to:

"...establish that the claim is based upon an assignment to a higher rate of position."

Decision

Jurisdictional Objection

The Company's jurisdictional objection (pursuant to Article 19.2) hinges on the fact that the Union failed to submit the grievance to arbitration within 60 calendar days from the date the Company responded to the last step of the grievance procedure. It is apparent from a review of the material before me that although the Union proceeded

through the grievance procedure in a timely fashion, extended delays occurred after the parties first exchanged their proposed JSI's.

A review of the letters and emails exchanged (Union Exhibits Tab 9) reveals that the problems the Company encountered in processing the JSI/grievance, within its own operation, contributed significantly to that delay.

There is no need for me to detail the specific circumstances apparent in a reading of Tab 9. Although I agree that the delay was extensive, even if it is established that Article 19.2 applies in the specific circumstances, I am satisfied that - having regard to the Company contribution to the delay - there are reasonable grounds for an extension of the time limits.

The Company argued that the delay subjected it to undue prejudice (Submission: para. 28) in that its employees who were responsible for the advancement of the grievance are no longer available to be resourced due to resignations or their unfortunate passing. Frankly I am unsure whether the prejudice the Company alleges, based on the employees absences, is an effect of the delay or was a contributor to the cause.

In all events, I conclude that, given all of the circumstances, there are reasonable grounds for an extension pursuant to *Section 60.1.1* of the *Canada Labour Code* and that the Company is not unduly prejudiced. Accordingly, the time necessary time for taking the appropriate steps is hereby extended.

Merits

Article 9.1 sets out that:

"Employees temporarily assigned to a higher-rated position shall receive the higher rates while occupying such positions."

Attachment A to Appendix XVI specifically refers to the duties of Rail Testing falling within the job descriptions of Extra Gang Foreman Level 2. While I appreciate the extensive argument made by the Company that the work done by the employees in question was work that is also done by Track Maintenance Foreman, a reading of the provision referred to, on its face, suggests that for the periods of time in which the Grievor's did the work described earlier, they were doing work that fell within the parameters of the job description of Extra Gang Foreman Level 2. In that respect, the Union has established that the claim is based on the assignment to a higher-rated position as referred in **AH310**.

The fact that the Grievor's were not qualified to be Extra Gang Foremen, or to perform all of the duties of the same, is not the determinative factor in this case. As discussed by Arbitrator Weatherill in **SHP113**, an article such as the present which provides for the temporary replacement of another employee receiving a higher rate of pay:

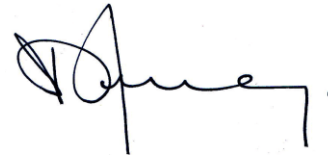
"...does not depend on an employee's qualification for a higher-rated job. That question is resolved - or left aside - by the Company's appointing someone to a higher-rated job. It may be that the employee is not qualified to perform all aspects of the job, but is a situation which the Company must be deemed to accept upon making the appointment."

If the Company wished to narrow the circumstances and the rate of pay under which employees doing substitute work at the Extra Gang Foreman Level 2 are to be compensated, the same detailed description could have been provided in the Collective Agreement as exists under Appendix VIII relative to the compensation for employees performing work of a Track Maintenance Foreman.

The grievance is allowed and the employees shall be made whole.

I retain jurisdiction with respect to the application, implementation and interpretation of this award.

October 31, 2019



RICHARD I. HORNUNG, Q.C.
ARBITRATOR