CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 5

Heard at Montreal, Tuesday, July 6th, 1965

Concerning

CANADIAN PACIFIC RAILWAY COMPANY (PRAIRIE & PACIFIC REGIONS)

and

THE BROTHERH00D OF RAILROAD TRAINMFN

DISPUTE:

Claim of Conductor F. A Peterson for miles lost when not called for spare passenger trip on December 29th, 1962.

JOINT STATEMENT 0F ISSUE:

Conductor F. A Peterson, Winnipeg, who was a regular Conductor in freight service, returned from his annual vacation on December 28th, 1962 and booked 0 K. to resume service at 24.01K on December 29th, 1962 and advised the Calling Bureau at the time of booking on that he was 0.K. for any relief Passenger Conductor's work.

Article 8, Ruling (e) shown on Page 47 of the former Collective Agreement, Re-arranged and Re-printed, October 3rd, 1949, reads as follows:-

> (e) "Regularly set up Conductors who do not desire to do relief work in either passenger, mixed or way freight train service, will so advise the local officers in writing at each general change of time table and when the local officers are so advised, such Conductors will not be called for relief work in the service covered by such advice during the life of that time table if there are other Conductors available; otherwise they will go when called."

Conductor Peterson had complied with the provisions of Article 8, Ruling (e), inasmuch as he had not advised the local officers in writing that he did not desire to do relief work in the classes of service specified, therefore, he was eligible for any relief Passenger Conductor's work.

A Conductor's vacancy occurred on Train No.7 at 9.40K, December 29th, 1962, to which Conductor Peterson was entitled by order of seniority but a Junior man was called instead.

Conductor Peterson submitted a claim for 296 miles at passenger rates, the equivalent of the miles earned on the trip he was not

called for, on the grounds that the Company had violated Article 8, Clause (a) of the 1949 Collective Agreement, which reads:-

(a) "Conductors on leave of absence will be relieved by the senior suitable conductor desiring same."

Payment of the claim as submitted was declined, but later, Conductor Peterson was allowed 50 miles at through freight rates on the basis that Article 14 of the 1949 Collective Agreement applied. Article 14 reads:-

Runarounds

"unassigned crews in freight service will be run first in and first out of terminals When run-around, they will be paid fifty miles for each runaround and stand first out."

The outstanding claim is for the difference between 296 passenger miles and 50 freight miles, which is equivalent to 221 miles at passenger rates.

FOR THE EMPL0YEES:

(Sgd.) S. McDONALD
General Chairman

FOR THE COMPANY:

(Sgd.) R. C STEELE
General Manager
(Prairie Region)

AWARD OF THE ARBITRATOR

The following are reasons for judgment delivered on July 10, 1965 by Mr. J. A Hanrahan, Arbitrator, following a hearing before him held in Montreal, Quebec, on July 6th, 1965, under the authority conferred upon him by the terms of the agreement between the parties dated January 7th, 1965:

The facts in this matter disclosed that the claimant, Conductor Pcterson, who was regularly assigned to the Fretna Wayfreight assignment had been on his annual vacation. On his return on December 28 he reported for any passenger work while waiting to return to his regular assignment due out on Monday, December 31, 1962. It was not disputed that he was then entitled to be called for passenger Train No. .7 on December 29th. The Company explained there had been an oversight on the part of the Calling Bureau. The Claimant was overlooked. Conductor Hutchinson was called in error.

Mr. McDonald claimed Conductor Peterson had gained his superior position for this assignment by reason of Articlc 8 of thc agreement, providing:

"Conductors on leave or absence will be relieved by the senior suitable conductor desiring same."

For the claimant it was also contended what had occurred was in

violation of Article 20 (a) of the agreement then in effect, reading:

> "Where assigned crews are willing to perform extra service during their layover hours, they will not be used in such service if unassigned crews are available, to the detriment of the unassigned crews?"

While admitting no specific penalty was provided in the collective agreement for a breach of these provisions, Mr. McDonald relied upon a judgment delivered in 1918 by an Arbitrator who then found that in such circumstances he was required to give some efficacy to the provision and ruled the Company should pay the employee who had suffered similarly on the basis of the actual detriment suffered, namely, the amount he should have earned had he been ca11ed.

For the Company Mr. Anderson contended the only provision in the then existing collective agreement providing a penalty for such a violation was Article 14, reading:

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> "Unassigned crews in freight service will be run first in and first out of terminals. When run-around they will be paid 50 miles for each run-around and stand first out."

Mr. Anderson told that while this Article provided unassigned crews in freight service to be paid 50 miles for being runaround, the Company had paid Conductor Peterson on this basis for not being called in turn. It was explained that. while the specific wording referred to "unassigned crews in freight service," in practice the Company had extended such payments to individual trainmen or conductors. This language was changed in the revision of the Collective agreement made in 1963 to make clear that individual trainmen as well as unassigned crews were covered by the rule.

Mr. McDonald submitted a resume of fourteen cases showing that during a period of thirty-seven years a number of what he claimed were similar claims had been approved for payment when a conductor trainman earned no mileage because of being run-around. Mr Anderson's analysis of these cases resulted in his conclusion that in only one instance had the circumstances been identical.

It is well established by arbitration judgments that if no ambiguity exists in the applicable provision, making possible a clear interpretation, what has happened in the past cannot be used in support of a claim.

A study of the provisions under consideration convinces the

Arbitrator that Article 14 is specifically designed to cover a situation not to be equated with that of the claimant's. His situation was that provided for in Article 8, Clause (a), dealing particularly with conductors' rights when seniority is to be factor to be considered in replacement, not a list showing first-in who would be entitled to be first-out.

It is true that for either Articles 8 (a) or 20 (a) no specific penalty is provided in the collective agreement. With deference however, I agree with the reasoning of the Arbitrator who in 1918 held: "The measure of the penalty for the violation by the Company of such probition (in that case Article 20 (a) was similarly bereft of a specific penalty) can fairly be taken to be the extent of the detriment suffered by the crew in each particular case."

This reasoning has authoritative support in a decision given by Professor Bora Laskin, in Re Oil Chemical & Atomic Workers & Polymer Corporation, Limited, in which he held,

> "The object of the voluntary submission by the parties to arbitration of their disputes is that there shall be a final and binding settlement of the disputes, and a board of arbitration has an inherent power to award damages where any compensable loss is suffered by either party."

That judgment was taken in successive stages to reverse it before a single Judge of the Supreme Court, the Appellate Division of the Supreme Court of 0ntario and finally to the Supreme Court of Canada. In each Court the judgment was upheld.

In this matter, I find a compensable damage was suffered by Conductor Peterson and hold he should be paid the difference between that amount previously paid and what he would have received had he been called for the trip in question.

J.A. HANRAHAN
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