CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO.260

Heard at Montreal, Tuesday, February 9th, 1971

Concerning

CANADIAN PACIFIC RAILWAY COMPANY (PRAIRIE REGION)

and

UNITED TRANSPORTATION UNION (T)

EXPARTE

DISPUTE:

Claim of Moose Jaw Conductor H. S. Henderson and crew, for the difference in payment between eight hours at yard rates which was claimed by the employees and 100 miles at through freight rates which was allowed by the Company, in respect of switching service performed at Broadview, Saskatchewan, on January 19th, 1970.

EMPLOYEES STATEMENT OF ISSUE:

Conductor Henderson and crew were ordered at Broadview at 1850 on January 19th, for Extra 8411 West in straightaway service from Broadview to Moose Jaw. The crew were required to and did perform switching at Broadview, both in connection with their train and also not in connection with their train. Due to D.E. Unit 8411 becoming inoperative before train departed from Broadview, the crew were cancelled at 2100 and placed last out in unassigned service. The crew submitted a claim for payment of eight hours at yard rates on the basis of decision given by the Canadian Railway Board of Adjustment No. 1, in Case No. 471. The Company allowed payment of 100 miles at through freight rates on the basis of Article 25, Clause (a), of the Collective Agreement, which reads:

"ARTlCLE 25 - Called and Cancelled

(a) Trainmen in all classes of service called for duty and cancelled before starting work will be paid through freight rates on the minute basis of 12 1/2 miles per hour with a minimum of 33 miles and will hold their turn. lf cancelled after work has commenced, they will be entitled to not less than 100 miles at the rate of class of service called for and will stand last out in unassigned service and hold their turn in assigned service. The application of this clause is not to result in any duplicate payment."

The Union contends that Article 25, Clause (a), specifies the payment to a crew when cancelled after work has commenced will not be less than 100 miles at the rate of class of service called for and, as Conductor Henderson's crew were required to perform yard switching not pertaining to their own train, they are entitled to payment of

yard rates which is greater than the payment allowed by the Company. The Union contends that the Company has misinterpreted Article 25, Clause (a), by allowing this crew payment of only 100 miles at through freight rates.

FOR THE EMPLOYEES:

(SGD.) R. T. O'BRIEN
GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. D. Wilson — Labour Relations Officer, CP Rail, Montreal

And on behalf of the Brotherhood:

R. T. O'Brien — General Chairman, U.T.U.(T) - Calgary

AWARD OF THE ARBITRATOR

The company has raised the preliminary objection that this matter is not arbitrable. At the hearing argument was confined to the question of arbitrability. It is the company's contention that the grievance has been finally disposed of, having been submitted to arbitration on an earlier occasion, and then withdrawn by the union prior to the hearing for which it had been docketed.

On September 1, 1970, the union submitted the following dispute to the Canadian Railway Office of Arbitration, on an "ex parte" basis:

> "Claim of Conductor H. S. Henderson and crew, Moose Jaw, for the difference in payment of 100 miles at through freight rates and eight hours at yard rates, when called at Broadview on January 19th, 1970 and later cancelled after performing yard switching.

It will be seen that the dispute there submitted was stated in terms virtually identical to those in the instant case. There is no doubt that in fact the same grievance is involved, being a claim by Conductor Henderson and crew in respect of certain work performed on a particular day. The dispute in the instant case was filed by the union by letter dated January 6, 1971, in which it was stated that "This dispute was referred to your office on September 1, 1970 for hearing in October".

The grievance sought to be decided in the instant case is in fact the very grievance which was put forward earlier. By letter dated September 8, 1970, the union requested that its submission of the dispute be disregarded, as it was expected that a Joint Statement of the dispute would be agreed to by the parties. The company thereupon submitted, by letter dated September 14, 1970, that there had been no understanding or agreement between the parties, and that it did not agree to the proposed withdrawal. The company also submitted that the matter had not been properly processed to arbitration, and was not arbitrable for that reason.

On September 18, 1970, the union wrote to the Arbitrator, contending

that no consent was necessary for the withdrawal of a case by a party which has submitted it to arbitration. Reference was made to what was said in the interim awards in Cases 189 and 195. In the first of those case it was said, after it had been determined that a matter brought on ex parte was arbitrable, that "it would be most helpful if the parties were able to agree on a joint statement" relating to the circumstances of the case. In the second, after it had been determined that sufficient notice had been given by the union in bringing an ex parte proceeding, and that the matter was arbitrable, it was said that the parties were not prevented from presenting a joint statement to the Arbitrator, if one were subsequently achieved. Neither of those statements, though true, is of assistance to the union in this case. Certainly, even though the matter had been docketed on an ex parte basis, it was open to the parties to agree on a joint statement and to present it to the Arbitrator. In this case, the matter had been docketed on an ex parte basis, the union had apparently some hope of achieving agreement on a joint statement, but nevertheless sought to withdraw the case.

The Company, however, had advised the Arbitrator and the Union that it did not agree to the withdrawal, and that there was no understanding or agreement between the parties. lt was in the face of this that the union wrote to the Arbitrator on September 18, 1970, as above noted. The Arbitrator then called upon the parties to make representations in writing as to the proposed withdrawal and the objection thereto. It was pointed out that it had been understood in the Office of Arbitration that the original request for withdrawal had been made in conjunction with the proposed submission of a joint statement of issue. Had it been clear that the union was simply withdrawing the case from arbitration, then it would have been the Arbitrator's ruling as a matter of course that the matter was withdrawn.

To this, the company responded, in effect, that it had no objection to the simple withdrawal of the case, saying, quite correctly, that the initiator of a case is entitled to do so. lt did, however, object to any sort of conditional withdrawal: it was its position that the matter should either be heard or withdrawn. Accordingly, the Office of Arbitration advised the union as follows, by letter dated September 25, 1970.

> "You will have received a copy of Mr. Presley's letter of September 24th referring to the matter of your exparte submission re Conductor H. S. Henderson and crew. From the letter it is clear that the Company does not take any objection to the withdrawal of this matter and from your letter to me of September 18th, it appears that you simply seek to withdraw the case.
>
> On this understanding the matter is withdrawn from the October docket and no further proceedings will be taken in this case. I regret that there has been some misunderstanding as to precisely what procedure was sought to be followed."

The effect of this notice was to grant the union's request, withdrawing the matter from arbitration. The granting of the request was acknowledged by the union.

For the reasons given in Case No. 26 and Case No. 259, it is apparent that the particular grievance in question has been finally disposed of, and cannot be brought to arbitration a second time. As in Case No. 259 the matter was, whether for good reasons or bad, finally determined by the action of the union in withdrawing it from arbitration. There is no jurisdiction to list the matter for arbitration again, in these circumstances. Had the company agreed to a conditional withdrawal or adjournment of the case, then of course it would not have been finally determined, and, subject to the conditions of the agreement, would still be arbitrable. Even apart from this if the company had misled the union into withdrawing the case, it may be that the withdrawal would be a nullity, and the matter would still remain to be determined. That is not the case, however, the company having made its position perfectly clear before the withdrawal was granted.

It was argued by the union that there have been cases in which decisions have been reversed. In such cases, the arbitrator has, in a particular case, come to a conclusion different from that reached in the earlier case, and expressed the opinion that the earlier decision was wrong. That is, of course, a very different matter from hearing the same case twice and reversing what the parties properly expected to be the final determination of it. It is perhaps possible that, in the future, Conductor Henderson and crew will make a claim for payment just like that made in this case. If such a matter were to proceed to arbitration it would be an arbitrable matter, and fully arguable. But their claim in respect of switching service performed at Broadview, Saskatchewan, on January 19, 1970 was submitted to arbitration was unconditionally withdrawn, and must now be deemed to have been finally determined. I have no jurisdiction to proceed further in the matter, and the grievance must accordingly be dismissed.

J. F. W. WEATHERILL
ARBITRATOR