CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO.317

Heard at Montreal, Tuesday, November 9th, 1971

Concerning

CANADIAN PACIFIC RAILWAY COMPANY (CP TRANSPORT)

and

BROTHERHOOD OF RAILWAY, AlRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

DISPUTE:

The dispute involves

(1) the proper application of the graduated rate scales contained in Article 26 of the collective agreement,

(2) the extent of retroactivity, if any, to which the following employees were entitled:

V. Hrechkosy	D. Boddis
D. Nault	G. G. Stakiw
N. Dyck	B. J. Kells
D. Kemp	B. K. Currie

JOINT STATEMENT OF ISSUE:

These employees had been paid a wage rate equal to the first year rate specified in the collective agreement.

The Brotherhood contended these employees should have received Step Rates as outlined in the Agreement for "second year" or "thereafter" as contained in the Agreement.

Subsequently the Company paid the employees the "second year" or "thereafter" rates of pay retroactively as outlined in Article 17.6 of the Agreement.

> "The settlement of a dispute shall not involve retroactive pay beyond a period of sixty calendar days prior to the date that such grievance was submitted in writing by the employee or his accredited representative."

The Brotherhood contends that the extent of retroactivity granted the employees should not have been restricted to the period of sixty days as referred to in Article 17.6. The contention of the Company is that, in making the retroactive adjustment based on the principle set out in Article 17.6, the employees concerned already received a

benefit to which they were not entitled and there is no justification for extending the period of retroactivity which was granted.

The parties are also in disagreement as to the proper application of the graduated rate scales contained in Article 26.1 of the collective agreement. The contention of the Brotherhood is that the "second year" rates apply to employees upon their completion of one year of employment relationship with the Company, and likewise, the "thereafter" rates apply upon their completion of two years of employment relationship with the Company. The contention of the Company is that the "second year" rates apply to employees upon their completion of one year of service performed, or working service, and that likewise, the "thereafter" rates apply upon their completion of two years of service performed, or working service.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) L. M. PETERSON GENERAL CHAIRMAN	(SGD.) C. C. BAKER DIRECTOR, PERSONNEL AND INDUSTRIAL RELATIONS

There appeared on behalf of the Company:

C. C. Baker	Director, Personnel & Industrial Relations, C.P. Transport, Vancouver
D. Cardi	Labour Relations Officer, C.P.R., Montreal

And on behalf of the Brotherhood:

L. M. Peterson	-	General Chairman, B.R.A.C., Toronto
F. C. Sowery	-	Vice General Chairman, B.R.A.C., Montreal
G. Moore	-	Vice General Chairman, B.R.A.C., Toronto

AWARD OF THE ARBITRATOR

The employees in question are known as "casual" employees, in that they do not hold regular full-time assignments, but work as and when required. They are included in the bargaining unit, and are therefore covered by the provisions of the collective agreement. They are entitled to be carried on the seniority list, as contemplated by Article 11.2:

> "11.2 A seniority list of all employees in each local seniority group showing name and last date of entry into the service in a position covered by this agreement shall be posted in a place suitable for the employees concerned. District and Regional seniority lists shall be maintained on the same basis."

A person becomes "permanently employed" when he has accumulated six months compensated service, in accordance with Article 11.7:

> "11.7 A new employee shall not be regarded as permanently employed until he has accumulated six months compensated service and, if retained, shall then rank on the seniority roster from the date first appointed to a position covered by this agreement. In the meantime, unless removed for cause which in the opinion of the Company renders him undesirable for its service, the employee shall be regarded as coming Within the terms of the agreement."

As to pay, "casual" employees, like others, are entitled to payment in accordance with Article 26.1.4, which is as follows:

> "26.1.4 An employee will be paid the wage rate appropriate to his classification and length of service from the date of last entry into service in a position covered either by this Agreement or other Agreements covering similar classifications between the Company and its employees. Employees promoted to a higher classification will, in the application of the graduated rate scale set forth herein be credited with prior service performed in the position or positions from which promoted."

The wage rates are graduated according to length of service. The first question which arises in this case is whether length of service for casual employees is to be calculated as of their seniority date, or whether it is to be calculated by accumulation of days actually worked. It is the company's contention that length of service means "working service" or "service performed" and not the length of time which the employee has spent in an employment relationship with the company. The union takes the contrary position.

It is to be noted that the collective agreement does not deal with "casual" employees as such. They just happen not to hold regular assignments. Apart from this, however, there would seem to be no ground for treating them differently from other employees. If it is "working service" that governs their rates of pay, then it will be "working service" that governs the pay of all employees.

In general, it would be my view that where, in a collective agreement, reference is made to "length of service" what is meant is the whole period during which an employment relationship has persisted, irrespective of time lost through illness, holidays, vacations, or other absence of one sort or another. This is subject, of course, to the particular terms of any agreement, and in particular to the seniority provisions. Under this agreement, it is clear, a position on the seniority list is not attained until six months "compensated service" has been accumulated: Article 11.7.

It is the company's position, as has been noted, that under this collective agreement, "service" means "working service" or "compensated service", and the language used in a number of provisions of the agreement is preferred to in support of this. Thus, in Article 26.1.4 itself, there is a reference to the crediting of employees with "service performed" in positions from which they

have been promoted. In my view, however, the word "performed" does not have any critical significance as it is used in that phrase. The purpose of the provision seems to me quite clearly to be to provide that where an employee has, for example, been entitled to the "2nd year" rate for a Job, and is promoted to a higher classification, he is to be paid in the new Job at the 2nd year rate. It is surely not intended that his attendance while in his former job should be analysed so that a total may be taken of the days he was actually at work - unless, of course, that is the principle to be applied throughout the collective agreement wherever there is a reference to "service", and if that is the case, the seniority list will probably have to be drastically revised, for it is the implication of this position that an employee "enters into service" on a daily basis. It is an implication which obviously cannot be accepted and which is indeed contradicted by Article 26.14 (which, in referring to a "date of last entry into service" contemplates dates which could be some years in the past) and, perhaps, by Article 11.7 in which there is an express reference to "accumulated" service, something not found in Article 26.1.4.

A special meaning of "service" is, indeed, found in Article 21 of the collective agreement, which deals with vacations. There, however, the word "service" is rarely used, vacation entitlement being based on a continuous employment relationship" and the completion of stated numbers of days of "cumulative compensated service". The precision with which the concept of "service" is altered in that provision is not found in Article 26.1.4, and it is not necessarily implied in that context. In some contexts, as for example in Article 11.12, it would have to be said that "service" means the performance of work, but its more general meaning is that of being in an employment relationship, and in Article 26.1.4, it is my view that that is the meaning required.

On this aspect of the case, then, the union is entitled to succeed, and all employees are to be paid on the graduated rate scales according to their length of service as above defined.

The second question which arises in this case is as to the extent of retroactivity of payments to which "casual" employees may be entitled. Those who, in conformity with the interpretation of Article 26.1.4, set out above, are entitled to the "second year" or "thereafter" rates, may in fact have been entitled to such rates for some time. Article 17 of the collective agreement deals with "discipline and grievances", and Article 17.6, set out in the joint statement of issue, limits the amount of retroactive pay which may be made in the settlement of a dispute. This limitation is binding on the parties and on the Arbitrator: it would apply in respect of any claim involving payment Suppose, for example, an employee were wrongfully discharged, but did not file a grievance until more than sixty days after his discharge. Leaving to one side the question of delay in filing the grievance, it is clear that while it could be awarded that the grievor be reinstated with compensation for loss of earnings, no such compensation would be payable in respect of the period more than sixty days before the filing of the grievance, even though the grievor would have been entitled to compensation had he filed his grievance promptly.

The same thing is true of a grievance relating to wages. Where an employee is not paid the appropriate rate, he may file a grievance, and in a proper case the award would be that he be paid the correct rate. He would also be entitled to compensation for his past loss, by not having been paid the correct rate, but this compensation, again, would not be payable in respect of the period more than sixty days before the filing of the grievance. That is the effect of Article 17.6, and it clearly applies in this case.

For the foregoing reasons, it is my award that employees be paid in accordance with the interpretation of Article 26.1.4 set out above in this award. Employees entitled to the "2nd year" or "thereafter" rates are to be compensated for any loss of earnings attributable to the company's failure to pay such rates, where appropriate, from and after sixty calendar days before the date the grievance was submitted in writing.

J. F. W. WEATHERILL
ARBITRATOR