CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO.663

Heard at Montreal, Wednesday, May 10, 1978

Concerning

CANADIAN PACIFlC LIMITED (C.P. RAIL)

and

UNITED TRANSPORTATION UNION (T)

EXPARTE

DlSPUTE:

Whether the award of the Honourable Emmett M. Hall, the arbitrator appointed under the Maintenance of Railway Operations Act, 1973, dated January 8, 1975 relating to the crew consist issue forms part of the current collective agreements between the parties.

COMPANY'S STATEMENT OF ISSUE:

The Company's position is that the "Crew Consist award" forms part of the current collective agreements because by agreement of the parties dated February 1, 1974 and by virtue of the Maintenance of Railway Operations Act, 1973 it formed part of the collective agreements in force in 1974 which, in that particular, have never been revised or superseded. On the proper construction of, inter alia, the "Duration of Agreement" articles of the collective agreements the terms of the crew consist award therefore continue in force as part of the current agreements.

FOR THE COMPANY:

(SGD.) C.R.O. MUNRO, Q.C.
SOLICITOR FOR CANADIAN PACIFIC LIMITED, on behalf of:

J. M. Patterson,
General Manager, Pacific Region,
C. P. RAIL

R. J. Shepp,
General Manager,
Prairie Region,
C. P. Rail

L. A. Hill
General Manager,
Eastern Region,
C. P. Rail

R. A. Swanson,
General Manager,
Atlantic Region,
C. P. Rail

There appeared on behalf of the Company:

M. S. Bistrisky - Assistant General Counsel, Canadian Pacific Ltd.,Mtl.
R. Colosimo - Asst. Vice-President, Industrial Relations,CP Rail, Mtl

T. Moloney	-	Solicitor	- Canadian Pacific Ltd., Montreal
Joyce Gildon	-	Solicitor	- Canadian Pacific Ltd., Montreal

And on behalf of the Brotherhood:

M. W. Wright, Q.C.	-	Counsel	- Ottawa
G. W. McDevitt	-	Vice President	- U.T.U. Ottawa
L. H. Breen	-	General Chairman	- U.T.U.(T), Scarborough, Ont.
R. T. O'Brien	-	Vice President	- U.T.U., Richmond, B.C.

INTERIM
AWARD OF THE ARBITRATOR

The matter before me, as in Case No. 633, is in the nature of a "company grievance" seeking, it would appear, a declaratory award to the effect that the collective agreements currently in effect between the parties include the "crew consist" award which was a part of the award issued by the Honourable Emmett M. Hall pursuant to the Maintenance of Railway Operations Act, 1973.

The union has raised a numter of preliminary objections to this matter now being heard in the Canadian Railway Office of Arbitration. The first is that the grievance is identical to an earlier grievance involving the same subject- matter and seeking the same relief, and which was, in effect, abandoned. It is argued that it is not now open to the company to proceed with the same grievance. The second objection is that there is no provision in the collective agreement for "company grievances" and that I have no jurisdiction to hear such. The third objection is that the subject-matter of the grievance is sub judice. I shall deal with these three arguments in inverse order.

The matter is sub judice, it is argued, because an action for a declaration that the crew consist awards form part of the current collective agreements, that is, an action having the same subject-matter as that sought to be raised in these proceedings, is now before the Court. Such an action was brought by the company and was dismissed by the Trial Division of the Federal Court. Notice of appeal was filed, and while that appeal was pending it was held, in Case No. 633, that the matter was sub judice and that proceedings in this office should be adjourned. The company subsequently advised the Office of Arbitration that its proceedings in Case No. 633 were "wholly discontinued". The appeal in the action was dismissed by the Federal Court of Appeal, and the grievance on which the company now seeks to proceed in this Office was then filed. At the time this matter was heard, there had been no appeal taken from the judgment of the Federal Court of Appeal.

In the instant case, then, there is no appeal pending, and the issue is not before the Court in the same way in which it was before the Court at the time Case No. 633 was heard. The matter, in my view, was not sub judice at the time of the hearing and may proceed, if it is otherwise properly before the Office of Arbitration. If an appeal from the decision of the Federal Court of Appeal should be brought,

it would be my view that these proceedings should then be adjourned, pending the disposition of such appeal.

The second objection is that the grievance before me is one brought by the company, and that the collective agreement makes no provision for such a procedure. In Case No. 633, I indicated that there was, in this connection, a question of jurisdiction which ought to be fully argued if the matter proceeded in this office. The question was argued at the hearing of the instant case. As well, it was dealt with by the Federal Court of Appeal in the course of its reasons for judgment.

Section 155 of the Canada Labour Code provides as follows:

> 155. (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged violation.
>
> (2) Where a collective agreement does not contain a provision for final settlement as required by subsection (1), the Board shall, on application by either party to the collective agreement, by order, furnish a provision for final settlement, and a provision so furnished shall be deemed to be a term of the collective agreement and binding on the parties to and all employees bound by the collective agreement."

In the collective agreements between the parties, arbitration would appear to be selected as the means of final settlement of differences between the parties. There are detailed provisions relating to the submission of employee grievances, and for dealing with them at the several stages of a grievance procedure. There are no such provisions with respect to "company" or "union" grievances. The agreements do, however, provide under the heading "Final Settlement of Disputes" that:

> "All differences between the parties to this agreement concerning its meaning or violation which cannot be mutually adjusted shall be submitted to Canadian Railway Office of Arbitration for final settlement without stoppage of work".

Thus, while there is no grievance procedure specified in the collective agreement for dealing with the grievances of the parties themselves (although there is such a procedure for the grievances of employees), it is nevertheless expressly contemplated that "all differences between the parties" may be subject to submission to arbitration.

My jurisdiction is founded both on the collective agreement and on the Memorandum of Agreement of September 1, 1971 establishing the Canadian Railway Office of Arbitration. The latter agreement includes the following provisions which are material to be considered here:

4. The jurisdiction of the Arbitrator shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of;

(A) disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and sub- sisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and

(B) other disputes that, under a provision of a valid and subsisting collective agreement between such railway and bargaining agent, are required to be referred to the Canadian Railway Office of Arbitration for final and binding settlement by arbitration,

but such jurisdiction shall be conditioned always upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this Agreement.

7. No dispute of the nature set forth in Section (A) of Clause 4 may be referred to the Arbitrator until it has first been processed through the last step of the Grievance Procedure provided for in the applicable collective agreement. Failing final disposition under the said procedure a request for arbitration may be made but only in the matter and within the period provided for that purpose in the applicable collective agreement in effect from time to time or, if no such period is fixed in the applicable collective agreement in respect to disputes of the nature set forth in Section (A) of Clause 4, within the period of 60 days from the date decision was rendered in the last step of the Grievance Procedure.

No dispute of the nature set forth in Section (B) of Clause 4 may be referred to the Arbitrator until it has first been processed through such prior steps as are specified in the applicable collective agreement.

Thus the "Canadian Railway Arbitration Agreement" requires, as a condition of jurisdiction of the arbitrator, that any matter referred to him have passed through the stages of the grievance procedure in accordance with the requirements of the particular collective agreement involved. It does not follow that where (as in the instant case), there is no grievance procedure provided for a grievance of this type, the matter cannot be arbitrated. The first paragraph of article 7 of the Canadian Railway Arbitration Agreement refers to "the Grievance Procedure provided for in the applicable collective agreement", while the second paragraph of that article refers to "such prior steps as are specified in the applicable collective

agreement". Now the collective agreement, as I have noted, expressly contemplates the submission of differences between the parties (that is, between the company and the trade union) to arbitration. The fact that the agreement does not specify a particular internal grievance procedure applicable to such grievances does not require the conclusion that they are not arbitrable - particularly where the collective agreement expressly contemplates that they should be. In giving the reasons for judgment of the Federal Court of Appeal, Ryan, J., stated at pp. 19, 20 of the reasons, as follows:

> It is my opinion that there has been a dispute between Canadian Pacific and the Union as to the meaning of subsisting and valid collective agreements at least from the time of the exchange of letters between counsel for the parties in September 1975. The dispute arose because of the declared intention of the railway companies to implement the crew consist award, and, therefore, presented an immediate problem raising a question of interpretation. As such, it seems to me to have fallen within the terms of the Canadian Railway Arbitration Agreement, even though it did not involve a grievance of an employee that would have required processing through the various steps of the grievance procedure. It was an apt question for direct submission to the arbitrator in accordance with the procedure provided in the Arbitration Agreement itself.

I am, with respect, in agreement with this view. The Court went on to determine that not only was the matter one within the jurisdiction of the Canadian Railway Office of Arbitration, but that the selection by the parties of arbitration as the means of final settlement constituted a special assignment of jurisdiction to determine such a matter.

For the foregoing reasons it is my conclusion that this matter is one which may properly be brought before the Canadian Railway Office of Arbitration and in which I would, subject to compliance with the Arbitration Agreement, have jurisdiction.

The third objection relates to the effect of the company's "discontinuance" of the arbitration in Case No. 633. It is the union's contention that that was tantamount to a withdrawal of the grievance, and that it is not now open to the company to file what is essentially the same grievance a second time. The union relies particularly on the decisions in Cases 259 and 260. In those cases, grievances were withdrawn from arbitration before hearing, and it was held that they could not subsequently be submitted to arbitration. Withdrawal of a case from arbitration is, it was said, tantamount to an acknowledgement of settlement.

In the instant case, the company argues first, that its "discontinuance" of the earlier arbitration was not the same as a "withdrawal", and second that the matter in dispute in the instant case is really in the nature of a continuing grievance which may be brought as long as the situation complained of continues.

Certainly the issue raised in the instant case is identical to that

sought to be raised in Case No. 633, as the company acknowledges. It may be that a new collective agreement has been signed, amending the preceding agreement or agreements in certain respects not here material. The question of substance raised by the grievance is in any event the same as that raised on the earlier occasion. In Case No. 260, a claim had been made for certain payment in respect of services performed on January 19, 1970. The grievance was submitted to arbitration, but then withdrawn by the union prior to the hearing for which it had been docketed. When it was sought to be submitted to arbitration a second time, the company objected, and that objection was sustained. It was held that the matter had been finally determined by the action of the union in withdrawing it from arbitration. That, of course, was a case involving a claim for payment for services on a particular day: the circumstances giving rise to the grievance may be considered to have constituted a single incident. The same may perhaps be said as to the circumstances in Case No. 259, although the matter is less clear. There, what was in issue was the propriety of the company's closing out of an account for sleeping accormodation for certain trainmen. The grievance there had been withdrawn prior to the hearing, and was then sought to be brought again. It was said in the award that "--a case which is brought to arbitration and is then withdrawn has the same status as a case which has been decided or settled: the proceedings have gone as far as they can go and are terminated. Withdrawal of a case from arbitration is, and must be regarded as tantamount to an acknowledgement of settlement. There is, of course, no determination by the arbitrator which might have an effect in future cases, but there is a conclusion to the particular case." In Case No. 260, the company's closing-out of the account for accommodation followed upon its re-bulletining of an assignment so as to change its home terminal. Thus what was really in issue would appear to have been a particular event or incident.

In the instant case the question to be determined on the merits is one of the interpretation of the collective agreement or agreements in a general way: whether or not the current collective agreements include the "crew consist" award. That is, as the judgments of the Federal Court indicate, a dispute concerning the meaning of a collective agreement. It does not involve a particular incident or set of circumstances and it would not be appropriate to consider the "withdrawal" of the earlier grievance as somehow foreclosing the right of the parties to litigate the merits of the question. In this respect, the case is analogous to those "continuing grievances" which may (without retroactive effect) be brought as long as a certain state of affairs (as for example, an underpayment of wages) continues.

In the light of the foregoing it is not necessary to determine whether, in the context of arbitration proceedings such as these, the "discontinuance" of the matter had any different effect than a "withdrawal". I would not have thought, for instance, that in the circumstances of Case No. 260, the result would have been affected by the terminology used (although different considerations might arise if the time for filing a grievance had not expired).

For the foregoing reasons, it is my conclusion that the "discontinuance" by the company in Case No. 633 does not preclude

its raising the same issue bv way of the present grievance.

In the result, having regard to all of the foregoing, I find that the matter is arbitrable, and that it is properly before me. It will therefore be docketed for hearing in the usual way, although, as I have noted, if the matter proceeds to appeal, these proceedings will be adjourned.

J.F.W. WEATHERILL
ARBITRATOR

There appeared on behalf of the Company - Tuesday, June 13, 1978:

R. Colosimo	Assistant Vice-President, Industrial Relations
M. Bistrisky	Assistant General Solicitor
Ms. J. Gilden	Solicitor

And on behalf of the Union:

G. W. McDevitt	Vice-President, UTU
R. T. O'Brien	Vice-President, UTU
M. Robert	Lawyer - Robert, Dansereau, Barre, Marchessault & Thibeault

ADJOURNMENT

Following the issue of the Interim Award in this matter, in which I held that the matter was arbitrable and was properly before me, the matter was set down for hearing the the usual course. Prior to the commencement of the hearing, counsel for the union served notice of a motion before the Quebec Superior Court seeking a writ of evocation to quash or revise the Interim Award. On the return of the motion, argument will be addressed to the question whether a write introductive of suit should be issued. If such a writ is issued (and the motion, I am advised, is returnable very shortly), its effect will be, pursuant to Section 848 of the Quebec Code of Civil Procedure, the suspension of these proceedings pending determination of the question before the Court. It may be that the Court would, in any event, order the suspension of proceedings for a limited time pursuant to Section 847 of the Code, but that is a matter on which I do not speculate.

At the hearing of this matter, counsel for the Union sought to have the matter adjourned pending decision of the proceedings now before the Superior Court. Counsel for the Company was opposed to any delay, and stressed the continuing expenses which the Company was suffering as a result of the continuation of the case.

After hearing argument and taking time for consideration, I made the following ruling:

> My jurisdiction to hear this case on its merits is now being challenged in the courts. These proceedings are not, however, under suspension at the present time, although it may be that the Union would seek some form of interim order to that effect.

As I understand the law, this tribunal has, at the present stage of the proceedings, a discretion to grant or not to grant an adjournment at the request of one of the parties or on its own motion. Whether or not the matter should proceed to hearing on the merits is to be determined having regard to all of the circumstances. It is argued that the Company will be prejudiced if the matter is delayed, but that, in my view, assumes the company's position on the merits is correct. Even if there were an award on the merits in favour of the Company, the Union could eqully argue that it and its members would be prejudiced if such an award were sought to be applied while proceedings affecting the validity of the award were still outstanding.

In my view, it is important in this case that the question of jurisdiction be determined before I proceed further. I note as well that counsel who is acting for the Union in respect of the merits of the grievance is before another tribunal on this day, although that is not a determinative consideration.

If the writ now sought is refused then I might have to determine whether or not to proceed if an appeal is taken, and I would in any event entertain representation as to the correct procedure to foo=llow at any stage of the proceedings. Further, I think that, as in any long-delayed case, every effort should be made not only by the parties but by this office to proceed with the matter. On the request made today, however, I am of the view that an adjournment is the proper course, at least pending the hearing of the motion now before the court.

I now confirm that ruling. The matter is adjourned sine die.

(The Railway subsequently withdrew the dispute pursuant to a settlement reached by the parties on March 29, 1979).

J.F.W. WEATHERILL
ARBITRATOR