CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO.1309.
Heard in Montreal, December 11, 1984.

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(Eastern Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim of Messrs. Ferrelli, Lucifero, Sciartino and Paquette,for the difference between the Leading Track Maintainer's rate ($10.791) and the Track Maintainer's rate ($10.384) for the period June 17, 1983, until July 11, 1983, inclusive.

JOINT STATEMENT OF ISSUE:

The Union contends that:

1. The Company violated Section 26.9, Section 27.5 and Section 27.17, Wage Agreement 41, in not paying the Leading Track Maintainer rate while occupying such positions.

2. All four employees be paid the difference in rate from Track Maintainer to Leading Track Maintainer, from June 17, 1983 until July 11, 1983, inclusive.

The Company declines the Union's contentions and denies payment.

FOR THE BROTHERHOOD:

(SGD.) H. J. THIESSEN
System Federation
General Chairman.

FOR THE COMPANY:

(SGD.) G. A. SWANSON
General Manager

There appeared on behalf of the Company:
Mr. J.H. Blotsky - Asst. Supervisor, Labour Relations, Eastern Region, CP Toronto.
Mr. R.A. Colquhoun, Labour Relations Officer, CP Montreal.

And on behalf of the Brotherhood:
H.J. Thiessen, System Fed. General Chairman, BMWE, Ottawa.
G. Valence - General Chairman, BMWE, Sherbrooke.

AWARD OF THE ARBITRATOR

The issue in this case is whether the four grievors were entitled to the Leading Track Maintainer's (LTM) rate of pay in accordance with Article 26.9 of the collective agreement during the period of time they were allegedly performing LTM duties on a temporary basis. It

is common ground that the grievors were regularly employed as trackmen (trainees) and never qualified for the LTM rate of pay because they had not completed the required training. In this regard, CROA cases #854 and #1098 clearly stand for the proposition that pursuant to Article 26.1 that the LTM rate of pay is only payable "upon the successful completion of the training programme". Accordingly, since the grievors had never complied with the prerequisite of completing the required training programme the company was under no obligation to compensate the grievors, as requested, even if it may be assumed they were performing LTM duties during the period in question.

The trade union relied upon Article 27.5 to answer the company's allegation that the grievors were not qualified for the LTM rate because they were not trained. It is submitted that because the company controls the opportunities in which training can occur the grievors ought not to be prejudiced with respect to their own advancement because they have not been extended such opportunity to train. Article 27.5 reads as follows:-

> "The Company shall determine the order in which employees will receive their training. The selection will be based on seniority order to the extent practicable. However, a senior employee shall not lose seniority in a higher classification to a junior employee when, through no fault of his own, such senior employee has not had the opportunity to take training and qualify. Until he takes training, such senior employee shall, while occupying a position in a higher position, be paid the rate applicable to qualified employees."

The uncontradicted evidence established that the grievors A. Ferrelli and B. Lucifero (whose hire dates were on September 10, 1979 and June 18, 1979 respectively) were extended an opportunity to train on April 22, 1981 but failed to respond to the company's posting with an application form. The posting was adduced in evidence and shows that a copy was forwarded to Mr. L. Dimassimo, the trade union's business agent. Accordingly, the trade union cannot be heard to rely on Article 27.5 with respect to them.

But even if that were not the case and both Messrs. Ferrelli and Lucifero along with the two other grievors were not extended an opportunity to train, it would appear from the language of Article 27.5 that the situation raised in this case is not a circumstance in which that provision would apply.

Article 27.5 appears to allow protection to a more senior employee with respect to job advancement in circumstances where the company has favoured a more junior (qualified) employee because the more senior employee, through no fault of his own, has not had the opportunity to take training and qualify. In that situation the more

senior employee cannot be prejudiced by virtue of a temporary assignment made to a more qualified junior employee.

In this case the trade union has not established that any of the four grievors have been denied the LTM rate of pay because the company has made an assignment to a more junior qualified employee. Accordingly, even if the grievors could establish that their failure to qualify (and this would certainly apply to Messrs. Paquette and Sciortino) was due to no fault of their own, the circumstances for invoking the pro- tection afforded by Article 27.5 have not been demonstrated. In other words, at no time were the grievors by-passed for more junior employees.

As a result, it is not necessary for me to deal with the company's alternative submission with respect to whether or not the grievors per- formed LTM duties at all during the period in question.

Because the grievors were not qualified to receive the LTM rate of pay as required by Article 26.1 of the collective agreement, their claims must be denied.

DAVID H.
ARBITRATOR.