

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1651

Heard at Montreal, Wednesday, May 13, 1987

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Bulletin No. 17, dated November 4, 1985, advertised for Track Maintenance Foreman outlining duties and location and to be effective on or about December 15, 1985. Bulletin No. 19 dated December 2, 1985, awarded the position to Mr. L.E. Dean. On December 6, 12, 16, 17, and 23, 1985, the Company called other employees to perform this work and Mr. Dean was not called for this position until January 5, 1986.

JOINT STATEMENT OF ISSUE:

The Union contends that:

1. The Company violated Sections 7.1, 8.1, 8.5, 14.12 and Understanding No. 2 of Wage Agreement No. 41, when they called Track Maintainers and Trackmen from other Sections.
2. The "Go" transit is Mr. Dean's assigned territory and he is the Track Maintenance Foreman who should have been called for the overtime.
3. Mr. Dean be paid the rate of Foreman at the overtime rate for all hours worked by Mr. K.D. Lawrence on December 6th and 12th, 1985. Mr. J.E. Hyde, December 16th and 23rd, 1985 and by Mr. D.K. Bates December 17th, 1985.

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

FOR THE COMPANY:

(SGD.) R.A. Decicco  
FOR: General Manager  
Operation and Maintenance

FOR THE BROTHERHOOD:

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

There appeared on behalf of the Company:

R.A. Decicco - Supervisor Labour Relations, Toronto

R.A. Colquhoun - Labour Relations Officer, Montreal  
W. McColgan - Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

H.J. Thiessen - System Federation General Chairman, Ottawa  
L.M. DiMassimo - Federation General Chairman, Montreal

#### AWARD OF THE ARBITRATOR

Article 14 of the Collective Agreement provides, in part, as follows:

14.12 Appointments shall be made by the officer issuing the bulletin. The name of the appointee and his seniority number will be shown on the next bulletin. The successful applicant will be required to take over the position without undue delay.

14.13 Bulletined positions may be filled temporarily pending the assignment of the successful applicant.

It is not disputed that as of December 2, 1985, the bulletined position was awarded to Mr. Dean. He did not assume the responsibilities of the position on a full-time basis until January 5, 1986, principally because of the amount of snow clearance required. Snow removal did take place, however, on an overtime basis assigned to other employees on some five occasions between December 6 and December 23 inclusively. The Union maintains that those assignments fell within the job posted and awarded to Mr. Dean and should have been made available to him.

The bulletined assignment was for work on the Galt Subdivision. It is common ground that at the time of the bulletin and prior to his assignment on January 5, 1986, the grievor's regular assignment was on the Goderich Subdivision. In these circumstances the Company relies on the terms of Article 7.1 of the Collective Agreement, including understanding number 2, found in Appendix C, and maintains that it was obligated in the circumstances to assign the overtime in question to employees regularly assigned to the Galt Subdivision. The pertinent provisions are as follows:

7.1 Where work is required by the railways to be performed on a day which is not part of any assignment, it may be performed by an available laid-off or unassigned employee who will otherwise not have forty hours of work that week. In all other cases by the regular employee.

Note: See Understanding No. 2, Appendix C, Page 129.

Subject to the provisions of Section 7.1 of Wage Agreement No. 41 where track work is required on a rest day, preference shall be given to employees regularly working on that track section to perform such work, wherever this is reasonably practicable, before calling men from an adjoining track section.

The Arbitrator has some difficulty with the Company's submission. It is difficult to see what application the provisions of Understanding number 2 have in the instant case. It expressly deals with track work 'required on a rest day'. There is nothing in the material to suggest that the days claimed for Mr. Dean on behalf of the Union were rest days so as to fall within the terms of that provision.

It is common ground that the Company has the latitude to describe the starting time of a bulletined assignment, and can if it chooses describe the assignment as being 'as and when required'. It can, in other words, protect itself and preserve such flexibility as is necessary in the drafting of the bulletin. The Union concedes that if it had done so in the instant case, the grievor would have no claim.

Article 14.12 mandates that the successful applicant is to take over the bulletined position 'without undue delay'. Article 14.13 expressly provides for the assignment of other employees to the bulletined position on a temporary basis prior to the assignment of the successful applicant. In the case at hand, Mr. Dean must be considered as having been assigned as of December 2, 1985, when he was awarded the position. In the circumstances I must accept the Union's interpretation that thereafter any work in that position was to be assigned to him.

Implicit in that conclusion, however, is that for the purpose of assignments, including overtime, his home subdivision must be considered to be the Galt Subdivision, and not the Goderich Subdivision. In other words, after December 2, 1985, Mr. Dean could have no more claim to overtime on the Goderich Subdrvision than could be asserted by any employee regularly assigned to the Galt Subdivision. The Arbitrator agrees with the assertion of the Company that he cannot have it both ways.

For the foregoing reasons, the grievance must be allowed, subject to a deduction in compensation to Mr. Dean for any overtime which he in fact may have worked on the Goderich Subdivision between December 2, 1985 and January 5, 1986, to the extent that such overtime would not have been available to him had he been treated as an employee regularly assigned to the Galt Subdivision between those dates. Subject to that qualification, Mr. Dean shall be compensated for the overtime that was not assigned to him for the work of the bulletined position performed on December 6, 12, 16, 17 and 23, 1985. I retain jurisdiction in the event of any dispute between the parties respecting the interpretation or implementation of this award.

MICHEL G. PICHER  
ARBITRATOR