CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1803

Heard at Montreal, Thursday, June 16, 1988

Concerning

CANADIAN NATIONAL RAILWAY

And

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

This is a claim by the Union that the Company has violated the Collective Agreement by assigning bargaining unit work, track patrol and inspection, to supervisory personnel.

BROTHERHOOD'S STATEMENT OF ISSUE:

On January 19, 1987, the Company gave notice to the Union that it was re-organizing the Track Section of the St. Lawrence Region Engineering Department. Track inspection methods were to be changed resulting in a reduction of 51 bargaining unit positions and the creation of 28 nominally management positions.

The Brotherhood contends that the patrolling and inspection of track has historically been performed by Track Maintenance Foremen and is properly performed by persons within the bargaining unit. Article 34.3 prohibits the Employer from assigning such work to persons not within the bargaining unit. In the alternative, Assistant Roadmasters to whom the work has been assigned perform bargaining unit work to such an extent as to bring them within the bargaining unit.

The Company disagrees with the Union's position.

FOR THE BROTHERHOOD:

(SGD) R.A. BOWDEN
System Federation General Chairman

There appeared on behalf of the Company:

T. D. Ferens	- Manager, Labour Relations, Montreal
R. Lecavalier	- Counsel, Montreal
G. C. Blundell	- Labour Relations Officer, Montreal
A. Watson	- Labour Relations Trainee, System, Montreal

C. Labarre	- Regional Engineer, Maintenance of Way, Montreal
M. Hughes	- Employee Relations Officer, Montreal
R. Paquette	- Senior Analyst, Montreal

And on behalf of the Brotherhood:

D. McKee	- Counsel, Toronto
R. A. Bowden	- System Federation General Chairman, Ottawa
M. Gottheil	- Counsel, Assistant to Vice-President, Ottawa
G. Schneider	- System Federation General Chairman, Winnipeg
R. S. Dawson	- Federation General Chairman, Winnipeg
C. J. McInnis	- Federation General Chairman, Dieppe
R. E. Phillips	- General Chairman, Roslin
J. Rioux	- General Chairman, Hornepayne
A. Trudel	- General Chairman, Chomedy
L. Boland	- Witness
E. Glenn	- Witness
I. Lupien	- Witness
B. Beauregard	- Witness

AWARD OF THE ARBITRATOR

The claim of the Brotherhood is based on Article 34.3 of the Collective Agreement which provides as follows:

> Performance of Maintenance of Way Work by Employees Outside of Department
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> 34.3 Except in cases of emergency or temporary urgency, employees outside of the maintenance of way service shall not be assigned to do work which properly belongs to the maintenance of way department, nor will maintenance of way employees be required to do any work except such as pertains to his division or department of maintenance of way service.

The material facts are not in dispute. The Company has reorganized the track section of the St. Lawrence Region Engineering Department in a way that has resulted in the performance of track inspection which was previously done by Track Maintenance Foremen, who are within the bargaining unit, by a category of management personnel designated at "Assistant Roadmasters". The result of this reorganization has been a net reduction of fifty-one bargaining unit positions within the Region. The Brotherhood asserts that the patrolling and inspection of track has traditionally been the task of Track Maintenance Foremen and that the Company is prohibited from assigning such work to non-bargaining unit personnel by virtue of the provisions of Article 34.3 of its Collective Agreement. It asserts

firstly that the Company's action violates the Brotherhood's right to the exclusive performance of the work in question and, alternatively, that the Company has in effect established a category of non-bargaining unit staff whose duties involve little more that the core function of the patrol and inspection work which it maintains the parties have recognized through the terms of their Collective Agreement and consistent practice since 1963 is the sole preserve of Track Maintenance Foremen.

The notice to the Brotherhood was tendered under Article 8 of the Employment Security and Income Maintenance Plan which provides for certain procedures and a measure of job security in the event of an organizational change which impacts negatively on permanent employees. The notice gave advice of the Company's intention to rationalize 105 track sections which included 84 Track Maintenance Sections, 14 Inspect and Repair Sections and 7 Wayside Maintenance Sections into 67 new Track Maintenance Sections. According to the Company's assessment the complement of 409 track employees within the St. Lawrence Region was thereby reduced to 358. It appears to be common ground that almost all of the 28 Assistant Roadmaster positions created were awarded to Track Maintenance Foremen who previously performed the patrol and inspection function as bargaining unit employees. While it is not material to the merits of the grievance, no employees were in fact laid off as a result of the organizational change implemented effective April 20, 1987.

It is common ground that Roadmasters, who occupy supervisory non-bargaining unit positions, have themselves been responsible for conducting track inspections for as many years as can be traced through the records. Their authority to do so is not disputed and appears to have devolved, in recent years, from Board Order R-21295 of the Railway Transport Commission, which issued on 12 September 1975. That order provides, in part, as follows:

> The inspection of track by railway employees shall be of such method and frequency to ensure beyond reasonable doubt that the track is safe for the operation of railway rolling stock at current authorized operating speed.
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> The Roadmaster responsible for the territory has the responsibility and jurisdiction to authorize additional inspections that, in his opinion, may be required to ensure safety of railway operation.
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> It cannot be over-emphasized that the following are minimum requirements for track inspection and do not relieve the Railway Company of responsibility to carry out track patrols where required due to emergent conditions such as flooding, fire, or rock falls. All levels of Supervisory employees in the Maintenance of Way Department of the Railway have the responsibility of ensuring track is safe for authorized operation.

The Order further provides for the frequency of track inspection, based on the classification of track.

It appears indisputable, therefore, that the obligation of the Roadmaster for the inspection and maintenance of the Company's roadway vests by the operation of federal law. It is common ground that as a matter of general practice, at least since 1963, Roadmasters on the St. Lawrence Region, as elsewhere in the Company's operations, have been required by internal Company directives, and in particular Standard Practice Circular 3100, to personally conduct at least one inspection per week of that portion of track for which they are responsible insofar as Class A, B, C and D track is concerned and once every two weeks for Class E track. S.P.C. 1300 also provides that A, B, C, and D track is to be inspected by track motor car or hy-rail at intervals of not more than two calendar days between inspections, and for Class E and F track not more than two calendar days between inspection and train operation. Since at least 1963 these subsidiary inspections, or inspections other than those conducted weekly by a Roadmaster, have been assigned to Track Maintenance Foremen. Typically such inspections have been on the basis of two to three times per week over those smaller portions of track sections assigned to the Track Maintenance Foreman who normally patrols the track in the company of a second employee, performing minor maintenance service on such faults as can be repaired during the course of the inspection.

Fewer disputes generate more concern for a trade union than those which involve what it perceives as an encroachment on its work jurisdiction under the terms of a collective agreement. That is manifestly the case in the instant grievance. In dealing with the instant dispute it is appropriate to review, however briefly, the history of Article 34.3 and the work assignments of bargaining unit personnel with respect to the patrolling of track over the years.

The Canadian National Railway Company originated as a composite of a number of smaller railways. It appears undisputed that the language of Article 34.3 first appeared in the Collective Agreement of a predecessor Company dating back to April 1919, and that the language of the article has remained unchanged to this day. The Company first established the position of Assistant Roadmaster in 1951. It then assigned track inspection duties to Roadmasters and Assistant Roadmasters, apparently in response to the introduction of the forty-hour work week effective June 1, 1951. That action was grieved before the Canadian Railway Board of Adjustment No. 1, the predecessor to this Office. The Company's action was then upheld by an award of the Board dismissing the grievance on Tuesday, March 11, 1952. The Board of Adjustment provided no reasons for its decision in that case. It is not disputed that Assistant Roadmasters were subsequently used in a track inspection capacity during the course of the 1950's and the early 1960's. For reasons not apparent in the material, however, their utilization dwindled progressively and, by 1963, all track patrol duties other than those performed on a weekly basis by Roadmasters came once again to be assigned to bargaining unit personnel, and in particular to Track Maintenance Foremen. It would seem that the Company has not employed Assistant Roadmasters from 1963 to the present.

The issue in the instant grievance is similar to that considered by this office in C.R.O.A. Case No. 1655, which concerned a grievance between the Brotherhood and Canadian Pacific Ltd. (Pacific). In

that case the Brotherhood protested the introduction of Deputy Roadmasters to perform track inspection duties previously assigned to bargaining unit personnel. It should be noted that in that case the language of Article 32.3, which the Brotherhood alleged was violated, is identical to the wording of Article 34.3 which is at issue in this case. In C.R.O.A. Case No. 1655 the Arbitrator made the following observations and conclusions:

> The language of Article 32.3 has been retained, without amendment in the Collective Agreement between the parties since at least 1951. At that time it was the subject of a grievance decided in case no. 612 of the Canadian Railway Board of Adjustment #1, a decision dated Tuesday, March 11, 1952. In that case the Union protested the assignment of Roadmasters and Assistant Roadmasters to perform track inspection duties. The use of Roadmasters and Assistant Roadmasters in that capacity was apparently prompted by the introduction of the 40-hour week on June 1, 1951. The Company argued, among other things, the need to have the fundamental requirements of track inspections performed by persons in supervisory authority. The grievance was dismissed, without reasons.
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> It is difficult, in the Arbitrator's view, to distinguish the issue before the Board of Adjustment in Case #612 and the instant dispute, particularly given the identical language within both Collective Agreements. It is, in other words, doubtful that by preserving the language of Article 32.3 in the wake of the decision in Case #612 the parties could have done other than acknowledge that the Article would not be violated in the event that a Roadmaster or an Assistant Roadmaster exercising supervisory authority within the Maintenance of Way service is assigned to perform track inspection which is also done on occasion by bargaining unit employees.
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> The same conclusion is supportable on more general principles. A number of decisions of this Office have held that clear and specific language is required to establish that Bargaining Unit work may not be performed by supervisory personnel. Absent such language grievances of this kind have been rejected. See e.g., C.R.O.A. case #322, #324, and #1379. In the latter case the Union protested the assignment of a Roadmaster and Deputy Roadmaster to track parol functions on a holiday weekend. In rejecting that grievance the Arbitrator made the following observation:
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> Nor can I find that there was any standing order that required the grievors to report for work in order to discharge track inspection duties pursuant to the Maintenance of Way Rules and Instructions. Those duties are only imposed upon the Track Maintenance Foreman to the extent he is instructed by the Company to discharge those functions. ... (See also CROA case #793)
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> The authorities cited, and general arbitral jurisprudence, do not, however, stand for the proposition that work which has

> been exclusively performed by bargaining unit members can freely be transferred into the hands of non-bargaining unit employees. It is generally accepted that when a supervisor performs bargaining unit work in a substantial degree, he or she may thereby be brought within the bargaining unit. If it were otherwise, the very concept and integrity of the bargaining unit would be substantially undermined. (See generally, Brown & Beatty, Canadian Labour Arbitration, 2nd ed. (Aurora 1984) at pp. 218-20). In the instant case, however, those principles do not apply, as the work of track inspection has for many years been performed both by supervisors and by bargaining unit members, as assigned.
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> In the instant case it was within the prerogatives of the Company to amend standard practice circular #32, an engineering document issued unilaterally by the Company. There is, as noted, nothing in the language of the Collective Agreement to prohibit the amendment of the standard practice of that circular by Bulletin #21, as applied to the Lethbridge Subdivision. The evidence establishes that for many years on that Subdivision, as elsewhere on the system, supervisors have conducted the track inspection on a regular and substantial basis. While that function was also substantially delegated to Track Maintenance Foremen, the Company did not, by any provision of the Collective Agreement, surrender its right to reduce the extent of that delegation.
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> For the foregoing reasons the grievance must be dismissed.

The thrust of the Brotherhood's case in the instant grievance is that the facts at hand are distinguishable from those which obtained in C.R.O.A. Case No. 1655. It maintains that the decision in that case turned in substantial part on the fact that the Company had maintained a cadre of Assistant Roadmasters and Deputy Roadmasters throughout its operations in Canada in the years following the decision in Canadian Railway Board of Adjustment Case No. 612, thereby preserving the prerogative of the employer to utilize supervisory non-bargaining unit personnel for track patrol duties on a broader basis. Counsel for the Brotherhood argues that in this case no Assistant Roadmasters have been utilized by the Company for a period in excess of twenty years in any capacity, including track patrol. He submits that the regular assignment of that work to bargaining unit personnel qualifies it as "work which properly belongs to the Maintenance of Way Department" within the contemplation of Article 34.3.

He further argues that the weekly inspection of the entire section of track under the jurisdiction of a Roadmaster is different in kind from the more frequent inspections conducted by Track Maintenance Foremen over a smaller portion of track on a more frequent basis. On that ground he submits that the patrolling so performed is work within the meaning of that article which is exclusively bargaining unit work, being qualitatively different from the inspection work of the Roadmaster.

The Arbitrator accepts that there is an arguable distinction in the patrolling work which has been performed by Track Maintenance Foremen over smaller sections of track on a basis of two to three times a week as compared with the broader inspection performed weekly over larger stretches of territory by the Roadmaster. The critical question, however, is whether there is a material difference sufficient to qualify the inspection and patrolling function performed by Track Maintenance Foremen as "work which properly belongs to the Maintenance of Way Department" within the meaning of Article 34.3. I have great difficulty in seeing how it does. Putting it at its highest, it may be argued that the inspection of the Track Maintenance Foreman is done more slowly and in greater detail because it involves more time and less distance. In the Arbitrator's view that is a factor, but not the only factor, to be considered in resolving this dispute, and standing alone it does not tip the scales.

As reflected in C.R.O.A. Case No. 1655, and in many other awards which have issued from this Office, the interpretation of collective agreements which have been renewed over the years must be done carefully, with a view to the historic application of the agreement, giving the fullest weight to prior arbitral decisions. As a general principle, when the parties to a collective agreement dispute the meaning of a particular provision, and a final and binding determination of that dispute has been made, when the language of their collective agreement continues unchanged through subsequent rounds of bargaining, absent some clear evidence to the contrary it should reasonably be presumed that they intended to accept and renew the adjudicated result as part of their subsequent collective agreements. That approach has, in different cases, operated to the benefit of Union and Company alike, as both have argued forcefully for its preservation as a means of achieving certainty in their contractual relations.

In the instant case the language of Article 34.3 has remained unchanged for nearly seventy years. It is undeniable that the obligation to inspect and maintain the Company's roadway in a safe and operative condition is vested by law in the Company, and in particular in the Roadmaster. I do not deem it necessary to consider the question of whether the Company could, by the terms of a collective agreement, contract away a portion of that responsibility to a particular group of its employees. I find it sufficient to conclude that, consistent with C.R.O.A. Cases 322, 324 and 1379, it would require clear and unequivocal language in a collective agreement to support the conclusion that it has done so.

As recently as the early 1960's the Company made use of Assistant Roadmasters in the performance of the very track inspection which has been performed by Track Maintenance Foremen. Its authority to do so was confirmed as a result of a final and binding decision of the Canadian Railway Board of Adjustment No. 1 with respect to the interpretation and application of the language of Article 34.3. That provision, which is the basis of the instant grievance, has remained unchanged through successive rounds of bargaining to the present date

While the Arbitrator appreciates that in the perception of the Brotherhood and its members track inspection may be seen as belonging

to them as a matter of recurrent practice, it cannot be concluded, in light of the history of the article, that it has become so as a matter of law. Without attempting to define in any conclusive way the meaning of "work which properly belongs to the Maintenance of Way Department", by what principle can an Arbitrator conclude that track inspection work has come to vest in the Brotherhood merely by the passage of time? If this grievance could not have succeeded in 1965, or in 1975, how can it succeed today? The reality is that the Brotherhood has not had exclusive jurisdiction over track inspection, a task whose core functions have been performed by Roadmasters consistently through the years, and at times by Assistant Roadmasters, in keeping with Board Decision No. 612. For a number of years the Company has chosen to delegate a certain amount of track inspection to Track Maintenance Foremen. There is no evidence to suggest that it has agreed to vest exclusive jurisdiction over that work in the Brotherhood. Absent any change in the language of Article 34.3 since Board Decision No. 612, or any other change in the collective agreement material to this issue, the arguments advanced by the Company must be viewed as more compelling.

On the whole, the Arbitrator cannot conclude that the facts of the instant case and the principles which must apply are operatively different from those which obtained in C.R.O.A. Case No. 1655. For these reasons the grievance must be dismissed.

June 30, 1988 (SGD) MICHEL G. PICHER
ARBITRATOR