

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1844

Heard at Montreal, Wednesday, 9 November 1988

Concerning

CANADIAN PACIFIC LIMITED

And

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Mr. C. Jobin, Extra Gang Foreman, Surfacing Gang #5 is claiming 2 hours overtime daily, from May 22, 1985 to August 20, 1985, a total of 84 working days, account Company used Supervisor to set up flag protection in morning and removal of same at night.

JOINT STATEMENT OF ISSUE:

The Union contends that:

1. The Company violated Section 32.3 of Wage Agreement No. 41 by using a non-scheduled employee to perform work normally done by the foreman in charge.
2. The Company violated Rule 170, 173 and 235, as well as the notation that appears under "NOTE" pages 8-9-10 of Form 568, and also the Uniform Code of Operating Rules.
3. Mr. Jobin be compensated 2 hours at overtime rate for each day from May 22, 1985, a total of 84 working days, in accordance with Sections 7.1, 8.1, of Wage Agreement No. 41.

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

FOR THE BROTHERHOOD:

FOR THE COMPANY:

(Sgd) M. L. McINNES  
System Federation  
General Chairman

(Sgd) J. A. LINN  
General Manager  
Operation & Maintenance

There appeared on behalf of the Company:

M. K. Couse	- Assistant Supervisor, Labour Relations Toronto
G. W. McBurney	- Supervisor, Labour Relations, Toronto

L. Winslow	- Labour Relations Officer, Montreal
H. B. Butterworth	- Assistant Supervisor, Labour Relations, Toronto
J. G. Smith	- Assistant Roadmaster, Smith Falls

And on behalf of the Brotherhood:

L. DiMassimo	- Federation General Chairman, Ottawa
R. Della Serra	- General Chairman, Montreal
R. Wegryzn	- General Chairman, Toronto
R. Achmin	- Local Chairman, Montreal
C. Jobin	- Grievor

#### AWARD OF THE ARBITRATOR

I am satisfied, on the material before me, that for many years it has been the consistent practice of the Company, on the Atlantic Region, to assign to foremen of surfacing gangs the responsibility for the placing of protective signal flags and their removal pursuant to Rule 42 of the Uniform Code of Operating Rules. While the practice appears to have differed elsewhere in the Company's operations, there is no evidence of substance to sustain the Company's position that the placing and removal of flags in those circumstances on the Atlantic Region is not bargaining unit work within the meaning of Article 32.3 of the Collective Agreement, which provides as follows:

32.3 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.

For the purposes of this grievance I am satisfied that the term "employees" utilized in the foregoing provision is intended to refer to bargaining unit members, as distinguished from members of management or supervision. That is clearly reflected in the definition of "maintenance of way employees" contained in Article 1.1 of the Collective Agreement. The narrow issue therefore becomes whether, in the region in question, the work in dispute is work which, in the terms of Article 32.3, properly belongs to the maintenance of way department. It should be emphasized that the instant case does not raise a circumstance where a surfacing gang is without a foreman or whether, for some other reason, it is impracticable to adhere to the established practice whereby the surfacing gang foreman has traditionally been responsible for setting up and removing signal flags.

On the foregoing basis the Arbitrator must conclude that the grievance must succeed. The grievor shall therefore be compensated at two hours overtime rate for each day from May 22, 1985, for a total of eighty-four working days, pursuant to the overtime provisions of the Collective Agreement. For the purposes of clarity the findings in this award should not be construed as extending beyond the specific work and locations upon which the claim is based.

I retain jurisdiction in the event of any dispute between the parties  
respecting the interpretation or implementation of this award

November 10, 1988

(Sgd.) MICHEL G. PICHER  
ARBITRATOR