CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2166

Heard at Montreal, Wednesday, 10 July 1991

concerning

CANADIAN PACIFIC LIMITED

and

UNITED TRANSPORTATION UNION

DISPUTE:

The filling of yardmasters positions at St. Luc departure yard when the incumbents of such positions were not working.

JOINT STATEMENT OF ISSUE:

Effective July 1, 1989, the Company ceased calling yardmasters to work certain positions when the regular yardmaster was not present. Overtime claims were submitted on behalf of Yardmaster S. Bressi, and it was agreed the final decision rendered on Mr. Bressi's claims would determine settlement of all claims.

The Union contended the wage claims of Mr. Bressi were valid and supported by the Collective Agreement, requiring the positions to be filled. The Union therefore requested payment of the claims.

The Union also contended that failure to fill the positions when the regular incumbent was not present constituted a material change, and therefore requested the provisions of Article 15 should be implemented.

The Company has declined on the basis of the grievance being unsupported, and there having been no violation of the Collective Agreement.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) J. R. AUSTIN	(SGD.) E. S. CAVANAUGH
GENERAL CHAIRPERSON	GENERAL MANAGER, OPERATION & MAINTENANCE, IFS

There appeared on behalf of the Company:

G. W. McBurney -- Supervisor, Labour Relations, IFS, Toronto
B. P. Scott -- Labour Relations Officer, Montreal
R. P. Egan -- Assistant Supervisor, Labour Relations, IFS, Toronto
L. S. Wormsbecker -- Labour Relations Officer, Montreal

And on behalf of the Union:

B. Marcolini -- President, UTU--Canada, Ottawa
M. J. Hone -- Research Director, UTU--Canada, Ottawa
S. Keene -- Local Chairperson, London

C. Beaulieu -- Local Chairperson, President Local 634, Montreal
H. Larocque -- Yardmaster, St. Agathe

AWARD OF THE ARBITRATOR

The record reveals that on June 30, 1989 the Company issued a bulletin that it intended to abolish the position of Yardmaster at the St. Luc departure yard within the next six months. It further stated that ``commencing July 1, 1989, shifts not filled by regular men will not be filled by replacements''.

The record discloses that for a number of years a system had been in place whereby, in the event of the illness or absence for any other reason of a regularly scheduled yardmaster in the departure yard, a relief assignment was established. The practice was to first use unassigned yardmasters to fill any vacant shift and, secondly, if necessary to utilize assigned yardmasters to fill vacant shifts which could not be filled by unassigned yardmasters. The assigned yardmasters so assigned were paid on an overtime basis. It does not appear disputed that this practice continued with regularity since at least 1957. With the directive to take effect July 1, 1989, that practice was discontinued and any vacant shift was left unattended. As of that date the yardmaster's functions went unperformed or, alternatively, were distributed among other Company personnel.

The first position of the Union is that the Company was under an obligation to fill the yardmasters' positions on a temporary or replacement basis. Secondly, it maintains that the failure to fill the positions constituted a material change which calls into play the procedures and protections of Article 15 of the collective agreement.

The first argument of the Union is based on Article 3(l)(4) of the collective agreement governing yardmasters which provides as follows:

3(l) No employee will be permitted to work more than five days as Yardmaster in a work week except:
...
(4) Other than as provided for in Paragraphs 1 and 2 of this Clause (l) when there are no unassigned yardmasters available to fill a vacancy, in which event the rules or practices in effect on the individual properties will govern.

The Union submits that the practice at the St. Luc departure yard has consistently been to assign any vacancy to an unassigned yardmaster, or alternatively, failing that, to assign it to an assigned yardmaster on an overtime basis. It maintains that the practice so established is the kind of local practice contemplated within Article 3(l)(4) of the collective agreement and submits that the Company was without authority to unilaterally change the practice by its directive which took effect July 1, 1989.

In support of its position the Union relies, in part, on CROA 152. That case involved a claim for the wrongful assignment of overtime made against the Canadian National Railway Co. by another union,

where the collective agreement contained language similar to that found within the instant agreement. The issue there, however, was not whether overtime work should have been assigned to begin with, but rather whether the overtime work which was assigned should have been given to unassigned employees rather than to regularly assigned employees. The grievances were allowed, as the arbitrator found that the Company had departed from the overtime practice established locally. In the instant case, however, the issue is different. It concerns not who should be called to perform relief or overtime work, but the separate question of whether any relief or overtime work should be assigned in the first place.

The Union further relies on CROA 1511 in support of its plea of past practice. While the Arbitrator agrees that that case stands for the proposition that an employer may be bound to respect a practice which differs from the strict language of the collective agreement, on the basis of estoppel, it does not concern the issue of whether the employer is under an obligation to schedule work, which is the dispute arising in the instant case.

The material before the Arbitrator establishes, without substantial controversy, that the work available to be performed by yardmasters in the departure yard was of diminishing importance in the spring of 1989. This was due, in part, to a decrease in traffic of some 17% from the previous year, and the resulting consolidation of a number of assignments at the Yard Office. The first step taken by the Company was to issue instructions that regular assigned yardmasters who were absent from work would not be replaced. The second step resulted in the ultimate abolishment of all yardmasters' positions at the departure yard as of December 17, 1989, as well as the abolishment of operators' positions at the same location.

The Company refers the Arbitrator to the language of Article 3 of the collective agreement which generally governs the assignment of overtime to yardmasters. I am compelled to accept its interpretation of those provisions, to the extent that they reflect the intention that overtime is to be worked ``by proper authority'' and when ``called or required''. There is, in other words, a reflection in the language of the collective agreement that the Company retains the residual right to decide on the assignment of overtime.

Can it be said that the practice established at the departure yard since 1957 overrides the discretion reserved to management within the collective agreement? The Arbitrator cannot find that it does. What has been agreed between the parties is an understanding as to the pecking order for filling temporary vacancies when they are available. There is nothing, however, before me, to substantiate any agreement between the parties, whether express or implied by practice, that the Company has surrendered its discretion not to fill an available position or, to put it differently, not to declare a temporary vacancy. It has long been recognized that it is within the discretion of an employer to first determine whether a vacancy exists, and that that is a separate matter from the issue of how the vacancy, once established, is to be filled. (See CROA 233, 570, 1287, 1336 and 2206.)

If the Union's position were correct in this case, the result would

be that the Company would be powerless to abolish the practice of replacing regular yardmasters who were absent in the St. Luc departure yard. If that were so, it is difficult to see how the Company would likewise have any discretion to abolish regular yardmasters' positions at that location. Clearly, it cannot be asserted that because the Company has maintained regular yardmasters' positions at the departure yard for a number of years that it is now without authority to discontinue them. Similarly, absent clear and unequivocal language to the contrary, I cannot find that the practice followed by the parties with respect to determining who should replace yardmasters who are temporarily absent, on an overtime basis, can be construed as a limitation on the discretion of the employer to decide whether positions which are temporarily unfilled should be manned at all. The better view, I believe, is that the parties had a well established understanding that so long as yardmasters' work was, in the Company's judgement, available to be performed in the departure yard, it would be assigned on the basis reflected in their agreed practice. With the decline in traffic at that location, which eventually led to the abolishment of the permanent yardmasters' positions, that work ceased to be available, to the extent that, as of July 1, 1989, it could be dispensed with whenever a regularly assigned yardmaster was absent.

In the circumstances the Arbitrator is satisfied that no violation of the collective agreement is disclosed. The Union has not established a past practice which required the filling of assignments which became temporarily available where in fact it is unnecessary to do so. Nor is there any material change disclosed by virtue of the reduction of available overtime shifts to employees who are otherwise fully assigned and employed.

For these reasons the grievance must be dismissed.

July 13, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR