CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2187
Heard at Montreal,
Tuesday, 8 October 1991

concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

The Union grieves that the Company has promulgated a rule requiring a number of employees represented by the Brotherhood of Maintenance of Way Employees in the Engineering Department to purchase and maintain a Railway Grade Watch.

JOINT STATEMENT OF ISSUE:

The Railway Transport CommIttee Order Number R-18073, dated 12 February 1974, states in part:

> "All maintenance of Way and Bridge and Building Foremen shall henceforth be required, if working on a line of operating railway, to have in their possession Railway Grade Watches and they shall in all other respects comply with the requirements of Rules 2 and 3 of the Uniform Code of Operating Rules."

Further the UnIform Code of Operating Rules states in rule 2:

> "Each conductor, engineman, trainman, fireman, yard foreman, yardman, and such other employees as the company may direct, must carry, while on duty, a reliable railway grade watch approved by the proper authority and for which there must be a prescribed certificate on file with a designated railway officer.

A report to the National Transportation Agency dated June 17, 1988 in the matter of a collision of a VIA passenger train and a CNR freight train near Komoka, Ontario was issued. This report, on page 19, noted that the CN track maintenance foreman and assistant track maintenance foreman were in breach of Order R-18073.

Subsequent to the report, by notice to all employees in the Engineering Department, the Company advised Engineering employees (Supervisors and Scheduled) which were qualified in the Regulations Governing the Railway Protection of Track Units and Maintenance Work and the U.C.O.R. "D" or "A" Book

that they must have an approved railway grade watch. The Company's notice affected a large number of members of the Brotherhood.

This is a policy grievance against the Employer's rule or policy which requires the purchase of Railway Grade Watches being applied to those employees It represents.

The Union seeks a declaration that the Company has issued an unreasonable rule or policy and an order that the Company reimburse all employees who have purchased a Railway Grade Watch pursuant to the Company's directive.

The company disagrees with the Union's position and further submits that the grievance is not arbitrable.

FOR THE BROTHERHOOD:
(SGD.) R. A. BOWDEN
SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) W. W. WILSON
for: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

D. C. St. Cyr - Manager, Labour Relations, Montreal
R. Lecavalier - Counsel, Ottawa
M. M. Boyle - Director, Labour Relations, Montreal
N. Dionne - System Labour Relations Officer, Montreal
D. Gignac - System Labour Relations Officer, Montreal
J. Little - Co-ordinator, Special Projects, Engineering, Montreal
J. D. Bennett - System Engineer Track, Montreal
J. F. Essiembre - Assistant Manager Rules, Montreal
S. Ranger - Superintendant, Operation W, E East, Montreal
S. Fournier - Supervisor, Track Evaluation, Montreal
C. Lavalee - B&B Master, Montreal

And on behalf of the Brotherhood:

D. McKee - Counsel, Toronto
R. A. Bowden - System Federation General Chairman. Ottawa
R. Phillips - General Chairman. Roslin
J. Rioux - General Chairman, Grimsby
A. Trudel - General Chairman, Chomedy
D. Brown - Assistant to the Vice-President, Ottawa

AWARD OF THE ARBITRATOR

At the hearing Counsel for the Brotherhood made It clear that the objection taken by the Brotherhood is not to the requirement that employees in the Engineering Department who are in possession of the UCOR "D" or "A" Book be required to possess an approved railway grade watch. The sole objection taken by the Brotherhood is that It is unreasonable and

contrary to the collective agreement to require the employees to pay for the watch.

The Company objects to the arbitrability of the grievance, on the basis that there is no provision in the collective agreement which the Brotherhood can point to substantiate an obligation on the part of the Company to pay for the employees' watches. The Arbitrator is satisfied that the preliminary objection is well founded. It is common ground that for a number of years the parties have periodically negotiated arrangements whereby the Company pays for all or a portion of certain equipment or materials, such as tools and certain items of safety clothing. For example. overalls. hardhats, safety gloves and glasses, as well as other protective and safety equipment worn by employees has been paid for, in whole or in part, by the Company, apparently as a result of negotiations between the Company and the Brotherhood. It is common ground, however, that the practices or understandings which have resulted from those negotiations have remained outside the collective agreement. Even assuming, without finding, that such long standing Company practices can be said to have become an ImplicIt term of the collective agreement, or that their continuation is enforceable through an application of the doctrine of estoppel, the circumstances are considerably different with respect to the purchase of timepieces.

The material before the ArbItrator establishes, beyond controversy, that from 1974 onward certain employees in the bargaining unit, namely Maintenance of Way and Bridge and Building Foremen, were required to be in possession of a railway grade watch. That requirement was clearly in conformance with UCOR Rule 2 as well as RTC Order No. R-18073. From that time to the present while foremen have been required to be in possession of watches, they have not been paid for by the Company, but rather have been provided at the employees' own expense. This appears, moreover, to have been the general usage and practice in other railway trades. In 1988 the Company was compelled, by a finding of the National Transportation Agency, to issue a directive to ensure strict compliance with Section 7 of Order No. R-18073. Consequently, by letter dated June 9, 1988 it issued a requirement that all employees in engineering that are qualified in the `D' and `A' Books must have a railway grade watch."

No exception as to the reasonableness of that requirement Is taken by the Brotherhood in these proceedings. The sole issue, as noted above, Is whether the Company's requirement requiring that the employees purchase their own watches is unreasonable, and in contravention of the collective agreement.

As noted above, there is nothing in the terms of the collective agreement which places an obligation upon the

Company to pay for the watches which its employees are, by regulation, effectively required to possess. Moreover, as the evidence discloses, the practice, since at least 1961, has been for foremen who are required to be in possession of a watch to pay for it themselves, a practice which appears to be in general keeping with the norms of the industry. Lastly, the evidence is uncontradicted that where the Company has paid for clothing or equipment, whether in whole or in part, it has been as the result of a negotiation with the Brotherhood, generally outside the purview of the collective agreement.

On the whole, the ArbItrator Is unable to find any provision within the collective agreement which can be said to have been violated by the Company in the implementation of Its decision in June of 1988 to require all employees qualified in the "D" and "A" Books to be in possession of a railway grade watch at the employees' own expense. In this regard I can find no express or implied term of the collective agreement which could form the basis of a grievance to be heard at arbitration. Additionally, in light of the practice of the Company with respect to employees in both this and other bargaining units being required to bear the cost of a railway grade watch, I can give no weight to the argument of estoppel advanced by Counsel for the Brotherhood.

For the foregoing reasons the Arbitrator is satisfied that this grievance is not arbitrable as It cannot be said to Involve the interpretation or alleged violation of any provision of the collective agreement. Alternatively, for all of the reasons related herein, if the grievance could be said to be arbitrable, It could not succeed on its merits. For these reasons the grievance is therefore dismissed.

October 11, 1991

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MlCHEL G. PlCHER
ARBITRATOR