PRELIMINARY AWARD DATED 15 NOVEMBER 1991, INTERIM AWARD DATED 14 FEBRUARY 1992, HOLD FOR FINAL AWARD

CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2191
Heard at Montreal, Thursday, 10 October 1991
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
EX PARTE
DISPUTE:
The operation of locomotives by the use of a belt pack or otherwise falls within the work jurisdiction of the Brotherhood of Locomotive Engineers.
BROTHERHOOD'S STATEMENT OF ISSUE:
It is the Brotherhood's position that the use for which the belt pack is intended by the Company falls within the jurisdiction of Collective Agreement 1.2 and must be operated or manned by locomotive engineers pursuant to the provisions of Collective Agreement 1.2.
The Company refuses to assign the work to the locomotive engineers.
FOR THE BROTHERHOOD:
(SGD.) W. A. WRIGHT
ACTING-GENERAL CHAIRMAN
There appeared on behalf of the Company:
A. Giard
Counsel, Montreal
R. Lecavalier
Counsel, Montreal
M. Delgreco
Director, Labour Relations, Montreal
D. W. Coughlin
Manager, Labour Relations, Montreal
G. C. Blundell
Manager, Labour Relations, Edmonton
M. S. Fisher
Coordinator, Special Projects, Transportation, Montreal
M. Becker
Labour Relations Officer, Edmonton
On behalf of the Brotherhood:
J. L. Shields
Counsel, Ottawa
D. S. Kipp
General Chairman, Kamloops
J. D. Pickle
Canadian Director, Ottawa
G. Hainsworth
Vice-President, Ottawa
C. Hamilton
General Chairman, Kingston

And on behalf of the United Transportation Union:
M. Church
Counsel, Toronto
L. H. Olson
Vice-President, UTU - Canada, Edmonton
J. W. Armstrong
General Chairperson, UTU, CN Lines West, Edmonton
B. Henry
Vice-General Chairperson, UTU, CN Lines West, Winnipeg
At the request of the parties, the hearing was adjourned to November 1991.
On Thursday, 14 November 1991, there appeared on behalf of the Company:
J. Coleman
Counsel, Montreal
D. W. Coughlin
Manager, Labour Relations, Montreal
D. L. Brodie
Labour Relations Officer, Montreal
On behalf of the Brotherhood:
J. L. Shields
Counsel, Ottawa
D. S. Kipp
General Chairman, Kamloops
J. D. Pickle
Canadian Director, Ottawa
G. Hainsworth
Vice-President, Ottawa
C. Hamilton
General Chairman, Kingston
G. Hall
General Chairman, Quebec
And on behalf of the United Transportation Union:
M. McBride
Counsel, Toronto
L. H. Olson
Vice-President, UTU - Canada, Edmonton
J. W. Armstrong
General Chairperson, UTU, CN Lines West, Edmonton
B. Henry
Vice-General Chairperson, UTU, CN Lines West, Winnipeg

PRELIMINARY AWARD OF THE ARBITRATOR

Upon a review of the material filed and the arguments presented, the Arbitrator is satisfied that the preliminary objection of the Company to the arbitrability of the grievance cannot be sustained. It is clear that the position of the Brotherhood is that the assignment of the control of a locomotive to any employee other than one covered by its collective agreement is in contravention of the implicit jurisdictional rights of the Brotherhood reflected in the entirety of the collective agreement. While no specific provision of the agreement can be pointed to to establish that jurisdiction, the agreement itself and decades of practice are relied upon to do so. It is common ground that there has never before been cause for a jurisdictional claim by the Brotherhood of Locomotive Engineers to protect work relating to the control of a locomotive. What results, therefore, is a case of first impression which must, in fairness, be approached in that context.

The Company submits that the Brotherhood has failed to comply with the requirements of article 91 of the collective agreement, in that it has not provided reference to any specific articles of the collective agreement which have been violated. If its position were to be strictly accepted, it would be arguable that no union could ever advance a grievance based on an implied term of a collective agreement. In fact, however, it is well established in Canadian jurisprudence that the scope of bargaining unit work is frequently to be derived solely by inference from the general terms of a collective agreement, including such provisions as job classifications, job descriptions, as well as evidence of past practice (see generally, Brown & Beatty Canadian Labour Arbitration (3d) 5:1200). There must, of necessity, be some latitude in the grievance documentation which relates a claim of work jurisdiction based on past practice and the implied terms of a collective agreement. It appears to the Arbitrator clear that the position of the Brotherhood has, from the outset, been that its collective agreement implicitly confers a jurisdictional right to perform work relating to the control and operation of a locomotive. I am satisfied that its Ex Parte Statement of Issue, and the correspondence between the parties which preceded it, have given a sufficient indication of its position, and must be viewed as being in substantial compliance with the requirements of article 91 of the collective agreement.

There is, moreover, no violation of the terms of clause 4 of the Memorandum of Agreement governing the operation of the Canadian Railway Office of Arbitration. It provides, in part, as follows:

4.

The jurisdiction of the Arbitrator shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of;

(A)

disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and ...

I am satisfied that in the instant case the position of the Brotherhood, that the totality of the terms of its collective agreement disclose an implied work jurisdiction, can be fairly said to fall within the ambit of a dispute respecting the meaning of any one or more of the provisions of the collective agreement within the contemplation of clause 4 of the Memorandum.

The Arbitrator appreciates the concern expressed by counsel for the Company with respect to the possible difficulty which might be encountered in attempting to prepare to meet an argument as broad as that being proposed by the Brotherhood. That difficulty, however, can be dealt with appropriately by a regulatory direction of the Arbitrator made pursuant to clause 6 of the Memorandum, as well as pursuant to the general procedural authority of the Arbitrator. In the circumstances therefore, to avoid unfairness through the risk of surprise and delay by reason of adjournments, the Arbitrator directs that the Brotherhood provide to the Company, not less than ten calendar days prior to the scheduled hearing of the merits of this grievance, a list of all articles of the collective agreement and arbitration awards, if any, it intends to rely on in the presentation of its case.

For the foregoing reasons, and subject to the above direction, the Arbitrator is satisfied that the grievance, as filed, is arbitrable. The grievance shall therefore be scheduled to be heard on its merits.

November 15, 1991

(Sgd.) MICHEL G. PICHER

ARBITRATOR

On Wednesday, 12 February 1992, there appeared on behalf of the Company:
J. Coleman
Counsel, Montreal
M. E. Healey
Director, Labour Relations, Montreal
D. W. Coughlin
Manager, Labour Relations, Montreal
M. S. Fisher
Coordinator, Special Projects, Transportation, Montreal
On behalf of the Brotherhood:
J. L. Shields
Counsel, Ottawa
D. S. Kipp
General Chairman, Kamloops
G. Hainsworth
Canadian Director, Ottawa
G. Hall
Vice-President, Ottawa
C. Hamilton
General Chairman, Kingston
And on behalf of the United Transportation Union:
H. Caley
Counsel, Toronto
M. J. Hone
Research Director, UTU, Ottawa

INTERIM AWARD OF THE ARBITRATOR

The sole issue, for the purposes of this interim award, is whether the Arbitrator should refer this matter to the Canada Labour Relations Board pursuant to Section 65(1) of the Canada Labour Code. The Brotherhood takes the position that this Office should make such a referral, as the dispute is in the nature of a jurisdictional conflict between itself and the United Transportation Union, with regard to the assignment of the automated control of locomotives in Symington Hump Yard, by means of a remote control belt pack. The Company takes the position that the dispute should be referred to the Canada Board by this Office only if the grievance should succeed. The United Transportation Union, on the other hand, does not go so far. It submits that the Arbitrator should refer the matter to the Canada Labour Relations Board only if, having heard the case on its merits, it should appear to the Arbitrator that there is a case of some substance in support of the Brotherhood's position.

The parties drew the Arbitrator's attention to a number of arbitral awards, as well as decisions of the Canada Labour Relations Board, with respect to the exercise of the Arbitrator's discretion to refer a matter to the Board pursuant to the terms of Section 65(1) of the Code. The provisions of the Code which are pertinent are as follows:

65

(1)

Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for a hearing and determination.

(2)

The referral of any question to the Board pursuant to Subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless the arbitrator or arbitration board decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding.

The cases referred to by the parties include Bell Canada and Communication Workers of Canada, (1980), 27 L.A.C. (2d) 163 [Adams]; Re Bell Canada and Communication Workers of Canada, (1982), 3 L.A.C. (3d) 14 [Burkett]; Bell Canada and Communication Workers of Canada and Canadian Telephone Employees Association, an unreported arbitration award dated June 8, 1984 [M. G. Picher]; Canadian Broadcasting Corporation and National Association of Broadcast Employees and Technicians, an unreported arbitration award dated August 31, 1987 [Burkett] and Northern-Loram Joint Venture and Canadian Brotherhood of Railway, Transport & General Workers and International Brotherhood of Teamsters 59 di, decision of Canada Labour Relations Board No. 498, Jan. 21, 1985.

It should be noted that in the instant case the Brotherhood has already made application, itself, to have this matter considered by the Canada Labour Relations Board, both under Section 18 and 65(1) of the Code. The Section 18 application was declined in a decision communicated to the parties by a letter of the Chief Registrar of the Canada Board, dated May 2, 1990. That letter reads, in part, as follows:

Following consideration of the parties' submissions the Board finds that the situation described by the applicant does not warrant a review of its Certification.

The Board is mindful of the fact that this issue might be better dealt with through arbitration. The Board is also aware of the fact that an arbitration award issued pursuant to one agreement might be in conflict with a parallel determination issued under another agreement.

The Board is nonetheless confident that this matter can be totally resolved through arbitration. Should an arbitrator seized with the matter find that coming to a determination might conflict with other awards or require the involvement of the Board, then the arbitrator will be able to resort to section 65 of the Code, which is more suited to this kind of issue than is section 18 of the Code.

The application is dismissed and the Board's file closed.

The application under Section 65 was similarly dismissed, by letter dated July 20, 1990 which reads as follows:

This application filed by the Brotherhood of Maintenance of Way Employees (sic) on July 10, 1990, as well as the additional representations of all parties concerned has been considered by a quorum of the Canada Labour Relations Board comprised of Vice-Chairman Serge Brault and Members Franois Bastion and Michael Eayrs.

I have been instructed to advise the parties that the Board panel has decided not to suspend arbitration proceedings scheduled for July 23, and to dismiss the present application. The Board refers the parties to its decision in Northern-Loram Joint Venture (1985), 59 di 180; 9 CLRBR (NS) 218, (CLRB No. 498), in which the Board stated that the Boards' jurisdiction under Section 65 of the Canada Labour Code (Part I - Industrial Relations) is not exclusive and that an arbitrator has the authority to answer questions that may be referred to the Board under the said section.

In the instant case the Brotherhood has not directed the Arbitrator to any provision of the collective agreement which expressly grants jurisdiction over the work in dispute to the Brotherhood. There is, therefore, at this point in the proceedings no clear indication that this grievance must necessarily lead to a result which will conflict with the agreement between the United Transportation Union and the Company with respect to the assignment of the work in question. The Brotherhood's grievance proceeds, in large measure, on the submission which it intends to make to the effect that the totality of the provisions of the collective agreement, taken together with the past practice of the parties, construed in light of the certificate which the Brotherhood holds from the Canada Labour Relations Board, establishes that it has jurisdictional rights to the work in question which are enforceable through its collective agreement.

At this point the Arbitrator is simply in no position to assess the merits of that submission. In the result, two outcomes are possible: the Brotherhood may fail to establish any claim to the work on the basis of the collective agreement or, secondly, it may establish such a claim. It is only if the second eventuality becomes likely that jurisdictional conflict with the United Transportation Union will have matured into a reality. For the reasons amply articulated in the jurisprudence, it is at that stage that the Arbitrator should consider referring the matter to the Canada Labour Relations Board, which has broader jurisdictional tools to resolve a labour relations conflict of that kind, in a manner which is final and binding on all parties concerned, and which avoids the anomaly of conflicting arbitral decisions made under two separate collective agreements.

In the circumstances, for the foregoing reasons, the Arbitrator deems it appropriate to reserve on the request of the Brotherhood to suspend the arbitration proceedings and to refer the matter to the Canada Labour Relations Board. I am satisfied that the interests of all parties are better served if the matter proceeds to be heard on its merits. The question of the referral under Section 65(1) may then be addressed in light of the fuller articulation of the Brotherhood's case at the conclusion of the hearing. The Arbitrator will then be in a better position to make a determination with respect to the Section 65(1) issue.

The matter shall therefore be docketed to be heard on its merits.

February 14, 1992

(Sgd.) MICHEL G. PICHER

ARBITRATOR