CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2264
Heard at Montreal, Wednesday, 15 July 1992
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DISPUTE:
Claim on behalf of Track Maintenance Foreman W.C. Joyce and Track Maintainer P.V. O'Neil for eight hours each for fire patrol performed by Assistant Track Supervisor B. Troy on May 5, 1990.
JOINT STATEMENT OF ISSUE:
The Brotherhood contends that: 1) That the Company violated Article 34.3 and Appendix XV of Agreement 10.1 by permitting Assistant Track Supervisor Troy to perform work that is currently and traditionally performed by employees in the BMWE bargaining unit: 2) That, in the alternative, the Company's argument that the BMWE membership has no proprietary interest in fire patrol yet must perform such work when called upon to do so is invalid in light of the fact that the Collective Agreement has no provision that creates such a position: 3) That, if, however, the Company's argument as set out in paragraph 2 is found to be correct, a new position or classification was created and the Company violated the Collective Agreement by not fixing compensation for the position in conformity with the provisions of Article 27.1 of Agreement 10.1: 4) That, if the Company's argument as set out in paragraph 2 is found to be correct, the Company violated Article 15 of Agreement 10.1 and Article 3 of Agreement 10.8 by not properly bulletining the positions in question.
The Brotherhood requests: That the grievors be compensated for eight hours each at their respective applicable rates.
The Company denies the Brotherhood's contentions and declines payment.
FOR THE BROTHERHOOD:
FOR THE COMPANY:
(SGD.) R. A. BOWDEN
(SGD.) M. M. BOYLE
SYSTEM FEDERATION GENERAL CHAIRMAN
for: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS
There appeared on behalf of the Company:
D. C. St. Cyr
Manager, Labour Relations, Montreal
R. Lecavalier
Counsel, Montreal
D. C. Gignac
System Labour Relations Officer, Montreal
M. S. Hughes
System Labour Relations Officer, Montreal
N. K. Colasimone
General Supervisor, Repair Facilities, Capreol

And on behalf of the Brotherhood:
D. A. Brown
General Counsel, Ottawa
R. A. Bowden
System Federation General Chairman, Ottawa
P. Davidson
Counsel, Ottawa
J. Rioux
General Chairman, Grimsby
A. Trudel
General Chairman, Chomedy

AWARD OF THE ARBITRATOR

The material establishes, to the satisfaction of the Arbitrator, that the fire patrol conducted by the assistant track supervisor would fall within the category of a ``special patrol''. A special patrol involves a dedicated tour of a stretch of road for the primary purpose of detecting fire. Any track inspection which might be conducted in that circumstance is incidental to the primary purpose of fire patrol. Fire inspections of that kind are to be distinguished from those which are performed during the course of ``working instructions''. In that circumstance, employees whose primary responsibility is to inspect or repair track, are given the subsidiary function of looking out for forest fires.

The material before the Arbitrator confirms that special patrols have traditionally been bulletined positions exclusively to members of the bargaining unit within the Atlantic Region. On the other hand, it is common ground that the practice is different in other parts of Canada. On the St. Lawrence Region, for example, the fire patrol assignments are given to seasonally employed, non-scheduled ``fire rangers''. On the Great Lakes Region fire patrols are primarily performed by Assistant Track Supervisors.

In CROA 2026 this Office was required to consider the application of article 34.3 of the collective agreement to certain automotive services work which the Brotherhood claimed had wrongfully been assigned to the members of another union. In discussing the grievance, the Arbitrator made the following comments:

The issue in the instant grievance is whether the Hy-Rail maintenance work at Transcona can be said to be "... work which properly belongs to the maintenance of way department ...".

In the Arbitrator's view it is significant that the foregoing provision is contained within the terms of Collective Agreement 10.1, which is national, and not merely regional, in scope. While the parties have negotiated separate agreements which govern such factors as job posting procedures in different regions, they have not made separate or distinct provisions in respect of rates of pay or job classifications as among employees in various locations in Canada who are in the Work Equipment Department. This, in my view, is consistent with an intention to establish a relatively consistent system of work assignments and job descriptions from region to region.

Article 34.3 of the Collective Agreement speaks in the broadest terms, in so far as it is situated in a provision of the Collective Agreement which is of general application across all regions of the Company's operations and speaks in terms of work belonging "to the maintenance of way department". The Brotherhood has not referred the Arbitrator to any case which directly supports its submission that work ownership is to be assessed on a regional or local basis for the purposes of the application of Article 34.3 of the Collective Agreement. Its Counsel cites CROA 1966, relating to a dispute involving CP Rail concerning snow removal in two Montreal yards. However, that decision concerns the application of a different kind of provision in respect of a prohibition against contracting out. It does not speak to an issue comparable to the application of Article 34.3 of the Collective Agreement.

Article 34.3 addresses a particular situation, namely the assignment of work to employees of the Company who are outside the maintenance of way service. It is well established in the prior decisions of this Office that where both Maintenance of Way employees and employees within another bargaining unit both perform a particular type of work assignment, work which falls under such a shared jurisdiction cannot be said to belong to Maintenance of Way employees within the meaning of Article 34.3 of the Collective Agreement (see, e.g., CROA 1316). Moreover, there is no indication in the awards of which I am aware that the concept of work belonging to the Maintenance of Way Department is to be assessed on the basis of the practice in specific shops, yards or regions. The tenor of the Collective Agreement, as noted above, is to the contrary. Moreover, a number of prior awards dealing with Article 34.3, as well as its analogue within the Brotherhood's Collective Agreement with Canadian Pacific Ltd., appear to have been argued and decided on the basis of national practice, rather than regional distinctions (see, e.g., CROA 1655, 1803).

For the reasons reflected in CROA 2026, the Brotherhood cannot assert work ownership under the provisions of collective agreement 10.1 on the basis of a practice that is merely regional or local. The evidence discloses that in other parts of the Company's operation, fire patrol work, including special patrols, has not been performed exclusively by members of the bargaining unit. It cannot, therefore, be characterized as ``... work which properly belongs to the maintenance of way department,'' within the meaning of article 34.3 of collective agreement 10.1

For the foregoing reasons the grievance must be dismissed.

July 17, 1992

(Sgd.) MICHEL G. PICHER

ARBITRATOR