CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2274
Heard at Montreal, Thursday, 16 July 1992
concerning
CANADIAN PACIFIC LIMITED
and
UNITED TRANSPORTATION UNION
DISPUTE:
Claims of Relief Yardmasters at Winnipeg due to the Company not filling Yardmaster positions at the Winnipeg South Side Yard Office when for various reasons the regularly assigned Yardmaster was not available to work and that such failure to fill Yardmaster positions constituted a violation of Article 15 of the Yardmaster's Agreement.
JOINT STATEMENT OF ISSUE:
On December 8, 1988, the Company served notice on the Union that pursuant to Article 15, Material Change in Working Conditions, the Yardmaster positions at the Winnipeg South Side Yard Office would be abolished effective March 10, 1989. The change was not implemented on this date because no agreement to minimize adverse effects had been concluded however the change was eventually implemented effective August 17, 1990.
Effective May 27, 1989, the Company stopped calling Relief Yardmasters to work when the regular assigned yardmasters were not available. Wage claims were submitted by Relief Yardmasters, including Yardmaster L. Cook, for a day's pay each time they were not called in these circumstances until the effective date of the change. The Union contends that these wage claims are valid inasmuch as there existed a vacancy in the Yardmaster position which the Company was required to fill pursuant to the provisions of the Collective Agreement.
It is the position of the Company that there was insufficient work to be performed on the Yardmaster positions to require that the positions be filled. Inasmuch as there was, therefore, no vacancy to be filled the claims are invalid. The Company has declined to pay the claims.
FOR THE UNION:
FOR THE COMPANY:
(SGD.) L. O. SCHILLACI
(SGD.) M. E. KEIRAN
GENERAL CHAIRMAN
(for): GENERAL MANAGER, OPERATIONS & MAINTENANCE, HHC
There appeared on behalf of the Company:
R. M. Smith
Counsel, Montreal
M. E. Keiran
Unit Manager, Labour Relations, Vancouver
B. P. Scott
Labour Relations Officer, Montreal
And on behalf of the Union:
M. Church
Counsel, Toronto
L. O. Schillaci
General Chairman, Calgary
L. Cook
Grievor

AWARD OF THE ARBITRATOR

The issue to be resolved is whether the Company's decision to not call relief yardmasters to work when regular assigned yardmasters were not available for work in the Winnipeg South Side Yard Office is in violation of the rights of relief yardmasters, such as Yardmaster L. Cook.

It is not disputed that prior to May 27, 1989, when the Company implemented its decision, the consistent practice had been to assign a relief yardmaster in all cases where the regularly assigned yardmaster was unavailable. The material before the Arbitrator, including the evidence and findings of fact reflected in the award of the Arbitrator in an Ad Hoc award between the same parties, concerning related issues, dated May 1, 1990 discloses that in 1988 and 1989 the amount of yardmaster's work available in the Winnipeg South Side Yard Office had been reduced substantially. At page 7 of that award the following observations were made:

The principal evidence adduced on behalf of the Company was given by Mr. D.J. McMillan, Superintendent of the Winnipeg Division. His testimony establishes to the satisfaction of the Arbitrator that a number of events contributed to a substantial change in circumstances at the Winnipeg Terminal. Firstly, his evidence confirms that there has been a marked decline in the volume of local industrial switching at Winnipeg over the last five years. That is not disputed by the Union and is indeed confirmed in the evidence of Mr. Bruce Gudmundson who worked as a Yardmaster at the Southside Industrial Yard office over that period of time. What the evidence discloses is that the industrial spur switching assignments which were traditionally overseen from the Southside Industrial Yard office, including the St. Boniface Yard assignments, have continued to operate to the present time. The volume of traffic being handled, however, has declined. While the parties are not agreed on the precise amount of the reduction, or its impact on the work of Yardmasters, I am satisfied on the basis of the figures tabled in evidence by Mr. McMillan concerning the number of cars being handled for several major industrial customers that there has been a significant reduction in the scale of industrial switching in the geographic areas traditionally overseen by the Yardmasters working out of the Southside Industrial Yard at Winnipeg.

The material before the Arbitrator in the above case also disclosed that there was a rationalization of operations in the Winnipeg Yards generally, including certain changes in the supervision of piggyback operations and the handling of long through freight movements. These developments enabled the Company to reduce the amount of work given to yardmasters, and to allow certain of their functions to be performed by assistant general yardmasters (AGYMs) whose responsibilities, the Arbitrator found, overlapped those of yardmasters. The Arbitrator specifically rejected the submission of the Union that the transfer of yardmaster's functions to the AGYMs brought them within the ambit of the bargaining unit governed by the yardmasters' collective agreement.

The thrust of the Union's position in this grievance is that the Company has failed to assign vacancies to Yardmaster Cook, in circumstances in which it maintains the Company was obliged to assign a relief yardmaster. It makes a similar claim in respect of Yardmaster E. Shewchuk, albeit to a lesser degree in respect of his claim for compensation. Among the provisions of the collective agreement relied upon by the Union are the following:

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(f)

When service is required by the Company on days off of regular assignments it may be performed by other regular assignments, by regular relief assignments, by a combination of regular and regular relief assignments, or by unassigned Yardmasters when not protected in the foregoing manner. Where regular relief assignments are established, they shall, except as otherwise provided in this Agreement, have 5 consecutive days of work. They may on different days, however, have different starting times, providing such starting times are those of the yardmaster or yardmasters relieved, and have different points for going on or off duty within the same seniority district which shall be the same as those of the Yardmaster or Yardmasters they are relieving.

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(3)

Subject to the provisions of Article 6, Clause (c), when an unassigned Yardmaster is not available to fill a vacancy of less than 5 days, such vacancy will be filled on a day-to-day basis by the senior available employee on the auxiliary list who, in the event that the working hours on his regular position or assignment coincide or overlap the working hours of the Yardmaster's or Assistant Yardmaster's vacancy, can be replaced by a qualified employee on his regular position or assignment. When a vacancy of 5 days or more is not filled by an assigned or unassigned Yardmaster, such vacancy will be filled by the senior available employee on the auxiliary list, who will remain on such vacancy for its duration or until displaced by an assigned or unassigned Yardmaster.

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(a)

All vacancies and all new positions including positions of relief Yardmaster, of known duration of 30 days or more, shall be advertised by written notice posted in the yard office for a period of 5 days. Such notice shall contain information regarding the time of posting and closing of notice, the location of position, hours of assignment, etc.

All positions of Yardmaster and Assistant Yardmaster, including regular five-day week relief positions, will be advertised at the Spring and Fall change of timetable in accordance with the first paragraph of this Clause (a). In the event of no Spring and Fall change of timetable, a date will be agreed to by the General Manager of the Company and the General Chairman of the Union.

(c)
A vacancy of temporary or emergency nature shall be filled by the senior qualified Yardmaster desiring same, providing that Yardmasters holding an assigned position shall not take temporary vacancies unless they are of a known duration of 5 days or more. This, however, will not prevent the use of other regular men to fill vacancies of a lesser period than 5 days when it is found that qualified relief men are not available for certain key positions, this temporary filling of position not to exceed 5 days unless mutually agreed to by Superintendent and Yardmasters' representative.

In the Arbitrator's view the foregoing provisions are of limited assistance in support of the Union's claim. The reference to vacancies in all of the articles cited does not, of itself, confer upon any employee an enforceable right in respect of the determination that a vacancy exists and must be filled. It is well established within Canadian arbitral jurisprudence that, absent contrary language in a collective agreement, in any particular case it is the prerogative of the company to determine whether a vacancy exists and is to be filled. In a number of awards this Office has sustained that approach, and has held that it is for the Company to determine whether it is necessary to fill a position which is temporarily unoccupied. (See CROA 233, 570, 1287, 1336) In a case not unlike the case at hand, in CROA 2166, this Office concluded that the Company was under no obligation to assign replacing yardmasters in the Saint-Luc Yard, at Montreal, when the regular yardmaster was not present. In that case, which involved the same collective agreement, the Arbitrator made the following comments:

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.)

... 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.

Given the consistent prior practice of the Company to always assign a spare yardmaster in the event of the absence of a regular assigned yardmaster in the Winnipeg South Side Yard, it is understandable how Mr. Cook would develop a sense of proprietary right to the work in question. As understandable as his perception may be, however, it does not conform to the legal rights and obligations of the parties. There is nothing in the collective agreement which fetters the right of the Company to determine when a yardmaster's tour of duty left open by the absence of a regular assigned yardmaster is to be considered vacant, so as to require a replacement. It is only when the Company has decided to make a replacement that the collective agreement rights of spare yardmasters come into play.

In the Arbitrator's view the more pertinent issue raised by the Union is whether the assignment of an AGYM to perform yardmaster's work, during what previously would have been a relief assignment given to Mr. Cook, is evidence to confirm that there was in fact a vacancy being filled. However, on a careful review of the evidence and the governing principles, the Arbitrator cannot sustain the Union's position on that issue. As found in the Ad Hoc arbitration award referred to above, it had been the practice of the Company at Winnipeg, for many years, to assign yardmaster's functions to AGYMs. The scope of that practice was such that the Arbitrator concluded that there was indeed a concurrent jurisdiction in respect of that work. In that context, it was open to the Company to cover off work which would have otherwise been assigned to a spare yardmaster by assigning the work, or parts of it, to an assistant general yardmaster. I am satisfied that that, in fact, is what transpired after May 27, 1989, when Mr. Cook and Mr. Shewchuk stopped receiving spare assignments. The handling of the work by an AGYM does not, in that circumstance disclose the filling of a temporary vacancy in yardmaster's work, but merely the assignment of the available work to supervisors in a manner that does not violate the collective agreement. In the result, the Company was within its rights in not declaring or filling a temporary vacancy in yardmaster's work upon the absence of a regularly assigned yardmaster after May 27, 1989.

The thrust of the grievance is that the same conditions which led to the abolishment of those regular assigned yardmasters' positions also eliminated the spare assignment opportunities available to Mr. Cook and Mr. Shewchuk and that they did so prior to the effective abolishment of the regular positions on August 17, 1990. However, the right of the Company to have the work in question performed by AGYMs, on the occasional spare assignment, after May 27, 1990 is no less legitimate than its right to have the regularly assigned work performed in the same way after August 17, 1990. The Company's decision not to declare and fill temporary vacancies was in all respects consistent with its prerogatives under the collective agreement, and did not constitute a material change in working conditions in the sense contemplated in article 15 of the collective agreement. To the extent that the abolishment of the regular assigned yardmasters' positions did ultimately impact Mr. Cook's work opportunities, he is protected by the scope of the Arbitrator's Supplementary Award of July 19, 1990, in the above noted arbitration.

No violation of the collective agreement is disclosed, and therefore, for the foregoing reasons, the grievance must be dismissed.

July 28, 1992

(Sgd.) MICHEL G. PICHER

ARBITRATOR