CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2276
Heard at Montreal, Tuesday, 8 September 1992
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
EX PARTE
DISPUTE:
Work awarded to laid-off shopcraft workers rather to track employees belonging to the BMWE.
BROTHERHOOD'S STATEMENT OF ISSUE:
Between August 22 and November 18, 1988 30 employees represented by the IBB&B worked on Special Maintenance Gangs removing track near Moncton. The Union contends that: 1) Work of this type has traditionally been performed by BMWE members. 2) Union members were available to perform this work. 3) In failing to bulletin and fill these positions with BMWE members the Company violated Article 34.3 of Agreement 10.1, Article 3 of Supplemental Agreement 10.8 and Article 4.12 of the ESIMP.
The Union requests that: All affected BMWE employees be compensated for all wages lost as a result of the work in question being assigned to shopcraft employees.
The Company denies the Union's contentions and declines the Union's request.
FOR THE BROTHERHOOD:
(SGD.) R. A. BOWDEN
SYSTEM FEDERATION GENERAL CHAIRMAN
There appeared on behalf of the Company:
D. C. Gignac
System Labour Relations Officer, Montreal
D. C. St-Cyr
Manager, Labour Relations Officer, Montreal
J. R. Ivany
Project Coordinator, Operations, Moncton
J. Little
Coordinator, Special Projects, Engineer, Montreal
And on behalf of the Brotherhood:
D. W. Brown
Senior Counsel, Ottawa
R. A. Bowden
System Federation General Chairman, Ottawa
P. Davidson
Counsel, Ottawa

AWARD OF THE ARBITRATOR

While this dispute is submitted on an ex parte basis, there is no disagreement as to the material facts. Between August 22 and November 18, 1988 the Company established three 10-man gangs to do track removal work in the lower Moncton Yard. The employees assigned were members of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB&B) who were then receiving Employment Security benefits. It is common ground that they worked under the direction of a foreman from the ranks of the Brotherhood of Maintenance of Way Employees (BMWE) and that during the duration of the assignment the thirty employees paid union dues to the BMWE.

The parties are in some disagreement as to whether there were laid off BMWE members available to perform the work in question. It is work of a type often assigned to Extra Gang Labourers (Collective Agreement 10.3), and would normally be made available on a priority basis to laid off Track Maintenance employees (Collective Agreement 10.8). On the basis of the fact that Extra Gang Labourers were being hired at the time, the Company submits that the inference to the drawn is that there were no regular track maintenance staff under Supplemental Collective Agreement 10.8 then on layoff. The Brotherhood's representative suggests, however, that there may have been such employees on layoff who would simply have declined Extra Gang Labourers' work, preferring to receive lay-off benefits. In the Arbitrator's view the resolution of that issue is not necessary at this time, as the parties are agreed that I may remain seized of the matter for the purposes of determining the appropriate remedy, should the grievance succeed.

The central issue is whether the Company was entitled to assign the work in question to employees who were not members of the BMWE bargaining unit. It was not suggested by either party that the payment of dues to the Brotherhood brought the employees in question within bargaining unit membership for the purposes of the collective agreement. It is common ground that they were not made subject to the terms of the BMWE collective agreements, but rather were in all respects treated as employees under the IBB&B collective agreement. The Company concedes that the removal of track is work which belongs to the Maintenance of Way Department and which cannot, except in cases of emergency or temporary urgency, be assigned to employees from another bargaining unit.

In the circumstances the Arbitrator is compelled to conclude that the Company has violated article 34.3 of collective agreement 10.1. There is nothing in the material before me to suggest or establish that the work was performed as the result of an emergency or temporary urgency. Moreover, the fact that the Company might have been at liberty to contract out because of a lack of BMWE employees (a matter on which the Arbitrator draws no conclusion) could not assist the merits of its case in this grievance. Even accepting, as the Company submits, that its only other options were contracting out or hiring Extra Gang Labourers, there is nothing in the collective agreement which contemplates the option which it pursued, namely assigning the work to employees from another bargaining unit.

Accordingly, the grievance must be allowed. The Arbitrator finds and declares that the assignment of track removal work to members of the IBB&B in the Moncton Yard between August 22 and November 18, 1988 was in violation of article 34.3 of Collective Agreement 10.1. I am also satisfied that the failure to assign the work to members of the bargaining unit involved a violation of article 3 of Supplemental Agreement 10.8. In so finding, however, I draw no conclusion as to whether the Company would have been required to assign the work in its entirety to track maintenance forces under agreement 10.8, or whether their proper involvement would have been limited to the supervision of Extra Gang Labourers. Given these conclusions, I find it unnecessary to comment on the allegation respecting article 4.12 of the ESIMP, save to observe that the brief filed by the Brotherhood made no submission with respect to that article, and dealt rather with article 7.4(b), alleging a violation of that provision.

The disposition of the instant grievance does not involve an acceptance by the Arbitrator of the submission by the Brotherhood that the Company was necessarily under an obligation to schedule the work in such a way as to make it available to employees at a later date, when they might face the hardship of a layoff. While that outcome might be sensible and desirable, the business prerogatives of the Company remain for it to decide, absent bad faith, arbitrariness or discrimination. I am satisfied that it would have been open to the Company to perform the work at the time it did, so long as it did so with employees, newly hired or otherwise, who are members of the bargaining unit, as contemplated by article 34.3 of the collective agreement 10.1.

The Arbitrator retains jurisdiction in respect of any further remedy which might be appropriate in the circumstances.

September 11, 1992

(Sgd.) MICHEL G. PICHER

ARBITRATOR