

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2279

Heard at Montreal, Wednesday, 9 September 1992

concerning

ONTARIO NORTHLAND RAILWAY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The assignment of carload processing work at Hallnor.

JOINT STATEMENT OF ISSUE:

The responsibility for carload processing at Hallnor has been assigned to an operator represented by the Transportation Communication Union working under Agreement No. 2. The Canadian Brotherhood of Railway, Transport and General Workers initiated a policy grievance contending that billing of cars, movement of cars, faxing of bills of lading and signing of documents is work which rightfully belongs to their union. The Union requests that the work be returned to them when the incumbent vacates the position, or when a member of the CBRT&GW is faced with a job loss.

The Company's contention is that the car accounting work at Hallnor has always been the responsibility of the Transportation Communications Union and has denied the Union's request.

FOR THE BROTHERHOOD:

FOR THE COMPANY:

(SGD.) M. LESPERANCE

(SGD.) P. A. DYMENT

REPRESENTATIVE

PRESIDENT

There appeared on behalf of the Company:

M. Restoule

Manager, Labour Relations, North Bay

D. Hagar

Superintendent, Train operations, Englehart

And on behalf of the Brotherhood:

M. Lesperance

Representative, CBRT&GW, North Bay

#### AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that over the years, at remote locations, the Company adopted a practice of assigning certain clerical functions to Operators who are represented by another union. The rationale, to which the Brotherhood did not then take exception, was that there was insufficient work at the location to sustain both an Operator and a Clerk, and that in those circumstances it was acceptable to have one individual perform both functions.

This grievance has been advanced, however, because the circumstances changed with the passing of time. The clerical functions in relation to ordering cars and billing loads for the Kidd Creek Mines at Timmins was first performed out of the South Porcupine office. When that office closed in or about 1977, the work was transferred to the Timmins Station and assigned to the Operator at that location. From there it was subsequently transferred to the Hallnor Office after the Company's tracks were removed from the city of Timmins in 1988. Significantly, as the work evolved, the traditional functions of the Operator, relating to train orders and dispatching, were all eliminated. In the result, the only job functions which remained to the former Operator at Hallnor, whose job title was changed to "Agent", are the clerical functions.

The material before the Arbitrator establishes beyond substantial doubt that the overwhelming preponderance of the functions performed by the agent at Hallnor are those which are regularly and normally performed by employees in the bargaining unit of the Brotherhood. The Company submits that the Brotherhood cannot assert work ownership in the circumstances, because of the mixed practice whereby operators at remote locations, who are members of another bargaining unit, have performed the clerical functions over the years. With respect, the Arbitrator is of the view that that characterization of the events and issues is not appropriate in the unique circumstances of this case.

The awards of this Office have confirmed that the language of collective agreements similar to that of the Brotherhood in the instant case does not contain a work ownership clause. On that basis, in cases involving other railways, the Brotherhood has been unsuccessful in a number of cases which objected to the assignment of work of a type which has, traditionally, been performed by a variety of employees, including employees from other bargaining units and non-unionized employees. By the same token, the cases have recognized that where it is established that the functions of a given position are, for all practical purposes, tasks which relate entirely to classifications under the terms of the Brotherhood's collective agreement, it may be found that the individual performing such works is, in fact, a member of the bargaining unit covered by the collective agreement of the Brotherhood (CROA 2006, 2149).

What the material at hand discloses is that at present, with extremely minor exceptions not material to the outcome, the Agent at Hallnor performs duties which are entirely within the ambit of the job classifications contained in the collective agreement of the Brotherhood. These include such functions as keeping records of cars, assessing demurrage, preparing accounts, checking loads, preparing train documents and bills of lading, tracing cars and advising as to car repair work required, to name a few. The only functions performed which do not conform to bargaining unit functions of the Brotherhood involve the collection of revenue cheques, making bank deposits and the preparation of cash sheets. As noted above, the Agent at Hallnor performs no functions traditionally associated with those of an Operator.

For a number of years the Brotherhood acquiesced in the assignment of clerical functions to the Operator at Hallnor, and persons occupying his predecessor position in Timmins and South Porcupine, because it would have been unrealistic to demand that two separate positions be established, in light of the limited work load involved. Can it be said that it is therefore permanently estopped from asserting a claim to the work, when it has evolved into a full time position of clerical work, with no operator's functions? I think not. At most, it can be said that the Brotherhood tacitly undertook that it would not object to the assignment of the work in question to the Operator so long as the volumes of work involved justified that exceptional arrangement. There is nothing in the material before the Arbitrator to suggest that the Brotherhood made an unconditional surrender of such claim as it might have to the work in the event that it should become an entirely clerical position, with no operator's functions.

That, indeed, is what has transpired. In the circumstances, the Arbitrator can see no basis upon which the Brotherhood can be precluded from asserting the position that the functions of the employee at Hallnor are now entirely those of a clerical employee falling within its bargaining unit. The incumbent in the position can therefore be found to be a member covered by its collective agreement by accretion.

In the exceptional circumstances of this case, the Brotherhood's request for a remedy does not go that far. Out of consideration for the incumbent in the position, who is a long time member of the Transportation Communications Union who is nearing retirement, the Brotherhood seeks only a declaration that upon his departure from the position it be declared a position falling within the bargaining unit of the Brotherhood. In the Arbitrator's view while that request is unusual, it is not inappropriate, nor is it outside the purview of the Arbitrator's remedial jurisdiction. As a party to the collective agreement it is open to the Brotherhood to forebear the exercise of its rights for reasons which it deems appropriate, provided that its election to do so does not violate the rights of the Company. In the instant case, as the Company takes the position that the incumbent is in any event a member of the Transportation Communications Union, there can be no prejudice to its interests, nor any violation of the provisions of the collective agreement between the Brotherhood and the Company should the Arbitrator acquiesce to the remedial order sought by the Brotherhood.

For the foregoing reasons, the grievance is allowed. The Arbitrator finds and declares that the position of Agent at Hallnor is a position which falls within the bargaining unit of the Brotherhood. The Company is directed, at such time as the incumbent in that position should retire or otherwise leave the position, to forthwith assign its functions to a member of the bargaining unit of the Brotherhood.

September 11, 1992

(Sgd.) MICHEL G. PICHER

ARBITRATOR