CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2295
Heard at Montreal, Tuesday, 10 November 1992
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
EX PARTE
DISPUTE:
Claim by the Union that the Company failed to Bulletin a position of Welder Foreman.
BROTHERHOOD'S STATEMENT OF ISSUE:
On or about January 22, 1990, Mr. F. Cormier was promoted to the position of General Foreman for the purpose of learning how to operate a Fairmont Switch and Crossing Grinding Machine. Thereafter, Mr. Cormier was required to get protection for the Machine, ensure its daily operation and oversee the applicable Work Equipment Operator.
The Union contends that: 1) The work performed by Mr. Cormier has traditionally been performed by, and belongs to, the position of Welder Foreman. 2) Therefore, a position of Welder Foreman should have been Bulletined pursuant to Article 3 of Agreement 10.5. 3) The Company violated Appendix XV of Agreement 10.1, Articles 2, 3, and 5 of Agreement 10.5, as well as any other relevant provision of the collective agreement.
The Union requests that: Full redress and remuneration be made to the senior Welder Foreman not working as such. Also, full redress and remuneration be made for recall of Welder or Helper from the laid-off list in that given seniority territory.
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:
M. S. Hughes
System Labour Relations Officer, Montreal
D. C. St-Cyr
Manager, Labour Relations, Montreal
D. C. Gignac
System Labour Relations Officer, Montreal
J. P. Rainville
System Labour Relations Officer, Montreal
A. Linkletter
Regional Supervisor, Rail Maintenance, Moncton
K. Lane
System Rail Maintenance Engineer, Montreal
J. Little
Coordinator Special Projects -- Engineering, Montreal
And on behalf of the Brotherhood:
P. Davidson
Counsel, Ottawa
R. A. Bowden
System Federation General Chairman, Ottawa
D. Brown
Senior Counsel, Assistant to the Vice-President, Ottawa

AWARD OF THE ARBITRATOR

The equipment which is the subject of this grievance is the Fairmont Switch and Crossing Grinder. Three such machines are utilized in the Company's operations for reshaping and reprofiling rails at switches and crossings which cannot be serviced by larger rail grinding trains. Two of the Fairmont grinders used in the Company's operations belong to private contractors from whom they are leased, while the third is owned by the Company. It is common ground that the Company-owned machine is staffed with CN employees, and the machines which are leased are staffed by the employees of outside contractors.

The Brotherhood does not point to any specific provision in the collective agreement which vests the operation of the Fairmont grinder in any particular employee in the bargaining unit. It relies, however, on the fact that when the machines were first introduced in 1986, for three seasons until 1988, the Company's machine was operated by Foremen Welders in the Mountain Region. It is not disputed that in 1989, and thereafter, the Company assigned the work to supervisory personnel. The Brotherhood relies on the provisions of Appendix XV of Collective Agreement 10.1 which states, in part:

QQINDENTThis will confirm the opinion expressed by the Company's representative that the Main function of such supervisors should be to direct the work force and not engage, normally, in work currently or traditionally performed by employees in the bargaining unit.

QQINDENTIt is understood, of course, there may be instances where, for various reasons, supervisors will find it necessary to become so engaged for brief periods. However, such instances should be kept to a minimum.

The fundamental question is whether the work in question can fairly be characterized as work "... currently or traditionally performed by employees in the bargaining unit" as contemplated in Appendix XV. The material before the Arbitrator discloses that, in a general sense, the mechanical grinding of rail has not traditionally been performed by bargaining unit employees. It is common ground that the work of larger rail grinding trains has normally been contracted out in the past. Insofar as the practice regarding the Fairmont grinder is concerned, that work has also been preponderantly contracted out, and the only practice with respect to the use of bargaining unit members relates to the assignment of a Foreman Welder to a single machine on the occasion of three seasons in the Mountain Region.

On the whole, the Arbitrator cannot conclude that the work in question can fairly be described as having been "... currently or traditionally performed by employees in the bargaining unit" in the jurisdictional sense contemplated in Appendix XV. The grinding of rail has, as noted above, generally been performed on a contracted out basis. That pattern has continued with the advent of the Fairmont grinder for switches and rail crossings, since 1986, with only minor exceptions. This Office appreciates the importance of collective agreement provisions which preserve jurisdiction over work clearly belonging to the bargaining unit (see e.g. QQBOLDCROA 2145 and QQBOLD2164QQBOLD). However, the purpose of Appendix XV is to protect only such jurisdiction as clearly exists. It cannot, as a general rule, be interpreted or extended to vest work in the bargaining unit which has in fact been performed preponderantly outside the bargaining unit. That is the case for the grinding of rail, whether by large rail grinding trains or by the application of the Fairmont grinder. In the circumstances there is no violation of Appendix XV of the collective agreement disclosed, and the Company was under no obligation to comply with articles 2, 3 and 5 of collective agreement 10.5 in the assignment of the work in question. For the foregoing reasons the grievance must be dismissed.

November 13, 1992

(Sgd.) MICHEL G. PICHER

ARBITRATOR