

CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2340
Heard at Montreal, Wednesday, 10 March 1993
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
EX PARTE
DISPUTE:

Time claim on behalf of Mr. R. Fitzpatrick, Assistant Track
Maintenance Foreman, alleging that a Trainmaster was engaged in work
activities belonging to employees of the B.M.W.E. pursuant to
Agreement 10.1.

BROTHERHOOD'S STATEMENT OF ISSUE:

In February of 1990, a derailment occurred on the Halton Subdivision
at Brampton, Ontario. The Trainmaster involved undertook to provide
U.C.O.R. Rule 42 protection for the Equipment Department's Auxiliary
workforce while they were cleaning up the derailment site.

The Union contends that: 1) The Company violated Article 34.3 and
Appendix XV of Agreement 10.1 by assigning work at the derailment
site to the Trainmaster. 2) The Trainmaster was not the appropriate
candidate qualified to obtain a Rule 42 protection for the Equipment
Department employees.

The Union requests that: Mr. Fitzpatrick be compensated for all
regular and overtime hours worked by the Trainmaster providing the
Rule 42 protection during the derailment.

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:

K. R. Peel

Assistant Regional Counsel, Toronto

R. Lecavalier

Counsel, Montreal

C. St-Cyr

Manager, Labour Relations, Montreal

And on behalf of the Brotherhood:

D. B. Brown

Senior Counsel, Ottawa

P. Davidson

Counsel, Ottawa

R. A. Bowden

System Federation General Chairman, Ottawa

R. Phillips

General Chairman, Ontario

AWARD OF THE ARBITRATOR

The material placed before the Arbitrator by the Brotherhood establishes, *prima facie*, that obtaining a Rule 42 protection, which is a form of planned protection under the Canadian Rail Operating Rules, is work which has always been performed by its members within the meaning of article 34.3 of the collective agreement, which provides as follows:

QQINDENT 34.3 QQINDENT Except in cases of emergency or temporary urgency, employees outside of the maintenance of way service shall not be assigned to do work which properly belongs to the maintenance of way department, nor will maintenance of way employees be required to do any work except such as pertains to his division or department of maintenance of way service.

The Arbitrator accepts the submission of the Brotherhood that in the case at hand there was no issue of emergency or temporary urgency. That is evidenced by the fact that Rule 42 protection was obtained, that being a form of protection which involves advanced planning. In this regard it is to be distinguished from basic protection available, for example, under rules 40 and 41.

In the Arbitrator's view in the case at hand it is unnecessary to rule upon whether the trainmaster can be the "foreman" who holds Rule 42 protection, as that word is used within the context of the rules. Nor is it necessary to deal with the use of the word "foreman" in other track protection rules, such as Rule 40. Even if one accepts that the trainmaster might so qualify, the issue to be resolved is whether the work in question is, nevertheless, work which properly belongs to the bargaining unit within the contemplation of article 34.3, and Appendix XV.

The evidence and representations advanced by the Brotherhood are to the effect that there has never, to its knowledge, been a comparable circumstance in which Rule 42 track protection has not been held by a foreman from the maintenance of way bargaining unit. Among the examples which the Brotherhood cites are some which involved work or activities entirely unrelated to track maintenance or the work of the engineering department. The Company's representatives, on the other hand, were able to offer no contrary examples to counter the position advanced by the Brotherhood.

On the whole of the material before me, I am satisfied, on the balance of probabilities, that the position of the Brotherhood is correct. In the case at hand there was no practical impediment to the Company assigning a maintenance of way foreman to hold and administer the Rule 42 track protection. In light of the precedents advanced by the Brotherhood, and the lack of any contrary precedents in support of the Company's case, I am satisfied that the work in question properly belonged to the bargaining unit. I am also satisfied that the exception of emergency or temporary urgency is not made out.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that Assistant Track Maintenance Foreman R. Fitzpatrick be compensated for all regular and overtime hours worked by the Trainmaster, subject of course to his being able to establish that he was available for work and subject to an adjustment in his entitlement to compensation having regard to any wages which he in fact may have earned during the period in question.

March 12, 1993

(Sgd.) MICHEL G. PICHER
ARBITRATOR