CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2389
Heard at Montreal, Wednesday, 15 September 1993
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
EX PARTE
DISPUTE:
BROTHERHOOD:
The payment of union dues by Company employees in supervisory positions who formerly worked in the Maintenance of Way Service and who continue to benefit from any and all of the duly negotiated provisions of Agreement 10.1 and/or supplementals thereto.

COMPANY:
Payment of union dues by employees formerly covered by Agreement 10.1 and/or supplemental agreements thereto following promotion from the unionized ranks to official or excepted positions within the Company.

BROTHERHOOD'S STATEMENT OF ISSUE:
As one of its demands in the last round of negotiations, the Brotherhood requested that Company employees who move from the Maintenance of Way service to supervisory positions, and who continue to have their seniority protected by the Brotherhood, pay union dues in the same manner as all Brotherhood members. During negotiation, this matter threatened to become a strike issue. Because of this, the Brotherhood and the Company, in the spirit of good faith collective bargaining, agreed to put the matter in abeyance until a later date. Since that time the Company has been approached on several occasions abut has remained intransigent.

The Brotherhood contends that the Company is in violation of article 38.1 and Appendix VIII of Agreement 10.1 in general, and paragraph 3 of Appendix VIII in particular.

The Brotherhood requests that it be ordered that all Company employees in supervisory positions who benefit from any of the duly negotiated provisions of Agreement 10.1 and/or suppelemntals thereto pay union dues in the regular amount at the regular rate. It is also requested that such payments be made retroactive to July 27, 1992, the date at which formal request for payment was made to the Company.

The Company denies the Brotherhood's contentions and declines its requests.

COMPANY'S STATEMENT OF ISSUE:
The Brotherhood contends that Company employees who are promoted to management positions but who, because of the provisions of section 16.4 of the collective agreement, retain their seniority should pay union dues or have them collected and remitted by the Company. The Company contends that the agreement as it presently stands is clear and that section 16.4 applies in the circumstances. The

Company also contends that it is clear that the provisions of the agreement dealing with rates of pay, hours of work, overtime rules, promotion and displacement as well as the provisions of Appendix VIII do not apply to employees occupying official or excepted, that is management, positions.

The Company contends that there is no provision in the collective agreement that provides for or supports the remedy sought by the Brotherhood. Indeed, the Company has not collected or remitted union dues for employees promoted from positions covered by agreement 10.1 to an official or excepted position since the inception, in 1953, of the contractual language now essentially found as Appendix VIII.

The Company denies that it is in violation of any provision of the collective agreement including article 38.1 or any section of Appendix VIII. Accordingly, the Company has denied the Brotherhood's request.

FOR THE BROTHERHOOD:
(SGD.) R. A. BOWDEN
SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:
M. M. BOYLE
for: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:
C. J. McDonnel - Solicitor, Toronto
N. Dionne - Manager, System Labour Relations, Montreal
W. T. Lineker - Asssitant Vice-President, Labour Relations, Montreal
D. C. St-Cyr - Manager, Labour Relations, St. Lawrence Region, Montreal
M. Hughes - Labour Relations Officer, Montreal
J. Watt - Labour Relations Officer, Montreal

And on behalf of the Brotherhood:
D. Brown - Senior Counsel, Ottawa
P. Davidson - Counsel, Ottawa
R. A. Bowden - System Federation General Chairman, Ottawa

AWARD OF THE ARBITRATOR

The history of this matter is not in dispute. During negotiations for the renewal of their collective agreement, in the spring of 1992, the parties remained at impasse on the proposals put forward by the Brotherhood with respect to its proposed payment of union dues by persons working in a management capacity who retain seniority rights and the ability to return to positions in the bargaining unit represented by the Brotherhood. To resolve the impasse the parties executed a letter of understanding dated May 1, 1992, in the following terms:

> Mr. Terry Lineker
> Assistant Vice-President,
> Labour Relations,
> CN Rail
>
> Dear Sir:
>
> One of the proposals made by the Union in the current negotiations, relates to the issue of the payment of Union dues by Union members working in a management capacity. In this period of good faith collective bargaining, the Union is willing to put this issue into abeyance for the present time. However, this is done so with the understanding that the Union is not in any way derogating from its original position and at any time during the life of the proposed agreement the union may at its discretion approach the Company with a view to negotiating further this issue or refer the issue to an Arbitrator, tribunal or court for binding resolution.

If you are in agreement with the above, please signify by signing in the appropriate space below.

I concur:

(SGD) R.A. BOWDEN	(SGD) W. T. LINEKER
Chairman, B.M.W.E.	Chairman, CN Rail

The parties are agreed that this Office is to deal with the instant grievance on the basis of a rights dispute, and not as an interest dispute. This is not, in other words, a circumstance in which the parties have agreed to refer to an item upon which they could not agree during negotiations for final resolution by an interest arbitrator who would effectively write the disputed provision of their contract. Rather, in the instant case the Arbitrator is, by the agreement of the parties, called upon to interpret the provisions of the current collective agreement and to determine whether its terms require the deduction of union dues for management personnel who retain residual seniority rights under it.

The issue is one of obvious significance and concern to the Brotherhood. In difficult economic times, and particularly in times when bargaining unit positions are subject to substantial reduction, the prospect of management personnel returning to bargaining unit ranks as a result of overall reductions in employment levels within the Company is a highly sensitive issue going to the job security of rank and file employees. The dispute also goes, to some degree, to union security, to the extent that dues are the lifeblood of any bargaining agent.

As important as the issues raised may be, however, for the purposes of this arbitration it is the terms of the collective agreement, as well as of the Canada Labour Code, interpreted in light of established arbitral principle, which must determine the outcome. It is common ground that union dues have never been deducted for the management personnel who are the subject of this grievance. Union dues check-off was introduced as a provision of the 1953 collective agreement. The terms of that understanding have remained virtually unchanged to the present day, and are found within Appendix VIII of the collective agreement. It provides, in part, as follows:

> UNION DUES AGREEMENT
>
> Deduction of Dues
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> 1. The Railways shall deduct on the payroll for the pay period which contains the 24th day of each month from wages due and payable to each employee coming within the scope of this Collective Agreement an amount equivalent to the uniform monthly union dues of the appropriate Organization, subject to the conditions and exceptions set forth hereunder.
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> 2. The Amount to be deducted shall be equivalent to the uniform, regular dues payment of the appropriate Organization which is signatory to the Agreement covering the position in which the employee concerned is engaged and shall not include initiation fees or special assessments. The amount to be deducted shall not be changed during the term of the applicable Agreement excepting to conform with a change in the amount of regular dues of the appropriate Organization in accordance with its constitutional provisions. The provisions of this Article shall be applicable to each individual Organization on

receipt
by the railway concerned of notice in writing from such Organization of the amount of regular monthly dues.

3. Employees filling positions of a supervisory or confidential nature not subject to all the rules of the applicable Agreement as may be mutually agreed between the designated officers of the individual Railway and of the Organization concerned shall be excepted from dues deduction.

4. Membership in any of the Organizations signatory thereto shall be available to any employee eligible under the constitution of the applicable Organization on payment of the initiation or reinstatement fees uniformly required of all other such applicants by the local lodge or division concerned.

Membership shall not be denied for reasons of race, national origin, colour or religion.

5. Deductions for new employees shall commence on the payroll for the first pay period which contains the 24th day of the month.

The following provisions of the collective agreement are also pertinent to the grievance:

1.1 Unless otherwise provided, this Agreement covers all Maintenance of Way employees for whom rates of pay are provided in Agreements Supplemental hereto.

16.4 The name of an employee who has been or is promoted to an official or excepted position with the Company will be continued on the seniority list for the group from which promoted, and he shall retain his seniority rights and continue to accumulate seniority while so employed. If released from such official or excepted position within a period of one year, he may return to his former position; after one year he may only displace the junior employee or bid a vacancy in his seniority group on his

basic seniority territory.

38.1 The agreement signed at Montreal, Quebec on February 7, 1953 by and between the Railways and the respective labour organizations providing in article 3 for the deduction of dues is made a part hereto, as Appendix VIII, as are subsequent amendments thereto, and employees hereby will be subject to these provisions.

The Brotherhood further relies upon the provisions of section 70 of the Canada Labour Code governing the compulsory check-off of union dues. In particular, it stresses the following parts of that article:

70.1 Where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union forthwith.

70.4 "regular union dues" means, in respect of:

(a) an employee who is a member of a trade union, the dues uniformly and regularly paid by a member of the union in accordance with the constitution and by-laws of the union, and

(b) an employee who is not a member of a trade union, the dues referred to in paragraph (a) other than any amount that is for payment of pension, superannuation, sickness insurance or any other benefit available only to members of the union.

The Brotherhood's position, reflected in the summary of its argument contained in its brief, filed at the hearing, is essentially that Appendix VIII of the collective agreement expired when the agreement expired on December 31, 1991. It submits that thereafter it is entitled to assert the rights which it has under section 70 of the Canada Labour Code. It argues that its rights under that article must prevail, and that they effectively result in the application of paragraph 1 of Appendix VIII of the collective agreement, by the operation of law.

Before dealing with the interpretation of the provisions put forward, the Arbitrator must express some concern with the logical underpinning of the Brotherhood's argument. It submits, in part, that paragraph 1 of Appendix VIII of the collective agreement prevails over paragraph 3 of the Appendix because: "...in the absence of agreement on paragraph 3, paragraph 1, the legal rule, must apply." In these proceedings the Brotherhood cannot assert that paragraph 3 of Appendix VIII does not exist, although it may well differ with the Company as to the proper interpretation of its terms, as indeed it does. However the fact that two parties may be disagreed as to the interpretation of a given provision of their collective agreement cannot, by any principle of which I am aware, give greater force and effect to another provision. As a matter of contractual interpretation the Arbitrator is bound to take cognizance of all of the provisions of the collective agreement which is in force, and to interpret them as a rational whole, subject of course to the provisions of the Canada Labour Code.

Compulsory union dues check-off, protected by statute, is a cornerstone of union security, and represents one of the most hard fought gains which trade unions have achieved in recent times. It is, I think, arguable that parties to a collective agreement cannot lawfully negotiate a union dues check-off provision which would confer a lesser right than that provided for section 70.1 of the Canada Labour Code. In that sense it can be argued that paragraph 3 of Appendix VIII of the collective agreement cannot stand, and that, as the Brotherhood argues, only the more general provisions of paragraph 1 of the Appendix remain in force. That is an academic point, however, as dues have always been remitted for persons who are employees in the bargaining unit who exercise supervisory or confidential duties.

It does not appear disputed that since 1953 paragraph 3 of Appendix VIII has been interpreted and administered by the Company as applying only to employees working within the bargaining unit who exercise basic supervisory functions, such as the numerous "foremen" who fall under the terms of the collective agreement and the supplemental agreements, including such positions as Extra Gang Foreman, Track Maintenance Foreman, B&B Foreman, Welding Gang Foreman, as well as several others. Significantly, it is not disputed that since 1953 there has never been an exemption from union dues of any employees in those categories or, with respect to the Brotherhood, of any employees falling under the rules of the collective agreement, and by extension, falling under paragraph 3 Appendix VIII of the collective agreement. In light of the history of the provision, the Arbitrator cannot find that paragraph 3 of Appendix VIII was intended at any time since it's inception to apply to all managerial or non-scheduled personnel. In my view the collective

agreement makes a clear distinction between persons "promoted to an official or excepted position" (article 16.4) and bargaining unit employees holding positions of a supervisory or confidential nature (paragraph 3 of Appendix VIII).

For the Brotherhood to succeed in this grievance it must establish that either a provision of the collective agreement or section 70 of the Canada Labour Code mandates the deduction of the dues for the persons in respect of whom it seeks a dues deduction. On the face of the agreement, persons who have been promoted into management positions which do not fall within the pay provisions of the collective agreement or the supplemental collective agreements would not be subject to any terms of the collective agreement, "unless otherwise provided" as is contemplated by the language of article 1.1 of the collective agreement. Similarly, paragraph 1 of Appendix VIII confines the obligation of union dues deduction to employees "...coming within the scope of this collective agreement...". The record before the Arbitrator discloses, without controversy, that for close to forty years the understanding between the parties appears to have been that promoted management personnel, including promoted management personnel who retain residual seniority rights under article 16.4 of the collective agreement, have not been employees coming within the scope of the collective agreement for the purposes of paragraph 1 of Appendix VIII. Moreover, with the exception of article 16.4, they do not appear to be covered by any other provision of the collective agreement.

Can it be said, as the Brotherhood argues, that the obligation to deduct union dues extends beyond members of the bargaining unit, and includes persons who are no longer active in the bargaining unit but who retain certain residual rights under the collective agreement? In approaching that question it is important to bear in mind that it is not uncommon for persons not active within a given bargaining unit to nevertheless enjoy certain rights under the terms of a collective agreement. Retired employees, persons on leaves of absence or laid off employee with recall rights come readily to mind as examples of such persons. In such a context, a board of arbitration should exercise substantial care. On balance, the language of paragraph 1 of Appendix VIII appears to address the deduction of dues for persons who are active wage earners working and being paid under the terms of the collective agreement. That interpretation is consistent with the ability of the Brotherhood to verify the amount of dues paid against the wages earned by the employees, based on rates in the collective agreement. The Brotherhood has no knowledge of the salaries of management personnel and is not in a position to verify the accuracy of dues deductions for such persons. Neither the definition of "employee" in section 1.1 of the agreement nor the history and practice of some 40 years would support the conclusion urged by the Brotherhood.

Can it be said that the terms of section 70 of the Canada Labour Code have changed the result? I think not. That section speaks very explicitly to the rights of a bargaining agent to the deduction of dues, "...for employees in a bargaining unit ...". Further, the provision with respect to the check-off of dues which is statutorally included in the collective agreement requires the

deduction of dues from the wages "of each employee in the unit affected by the collective agreement". In the result, the use of the word "unit" and the phrase "bargaining unit" clearly circumscribes the ambit of employees in respect of whom the statutory obligation of dues check-off is to apply.

Needless to say, much jurisprudence has evolved with respect to the fashioning of appropriate bargaining units by labour boards in the course of the certification of unions. And the concept of the bargaining unit is well understood in arbitration awards dealing with the protection of the integrity of the bargaining unit by negotiated collective agreement provisions such as prohibitions against contracting out and the assignment of bargaining unit work to non-unit personnel, including supervisors and managers. When section 70.1 of the Canada Labour Code is interpreted in light of well-established industrial relations norms, there can be little doubt that Parliament intended the dues check-off provision to apply to employees in the bargaining unit which is covered by the collective agreement in question, that is to say persons who earn wages under the terms of that collective agreement. The provisions of section 70 of the Code cannot, in my view, be fairly interpreted as establishing an obligation on the part of the Company to mandatorilly deduct union dues from managers who are no longer members of the bargaining unit, notwithstanding that they may retain residual seniority rights and the ability to some day resume the status of bargaining unit employees.

In the result, the Arbitrator can see no basis upon which the collective agreement, read together with the Canada Labour Code, can be construed in a manner which would support the interpretation advanced by the Brotherhood. Clearly, the practice of many years by the parties reflects a mutual understanding that union dues are not to be deducted from persons who are not actively employed within the bargaining unit. That understanding is well reflected in the language of article 1.1 which restricts the application of the agreement to employees for whom rates of pay are provided within the supplemental agreements, unless otherwise specifically provided. Similarly, the language of article 38.1 and Appendix VIII of the agreement reveals that the bargaining unit is the basis for union dues check-off. For example, paragraph 2 of Appendix VIII speaks of dues being deducted and paid to the union "...which is signatory to the agreement covering the position in which the employee concerned is engaged...". Finally, in light of the practice of many years, as noted above, the Arbitrator cannot accept the suggestion of the bargaining agent to the effect that paragraph 3 of Appendix VIII was ever mutually intended to extend to all managers who were formerly bargaining unit employees. That paragraph speaks to "employees" who fill supervisory or confidential positions, and must be construed in a manner consistent with article 1.1 of the collective agreement to apply to "employees" who are supervisory foremen and persons in similar classifications whose rates of pay are provided for in agreements supplemental to the collective agreement.

For all of the foregoing reasons the grievance must be dismissed. September 17, 1993 (sgd.) MICHEL G. PICHER
ARBITRATOR