CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2705

Heard in Montreal, Thursday, 15 February 1996

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Bargaining unit ownership of position of Plantman at Britt Fuel facilities.

BROTHERHOOD'S STATEMENT OF ISSUE:

In 1982 CP Rail purchased the Britt Fuel facility. The position of plantman at the facility was staffed by an employee of ESSO retained under contract until 1988, when the position was filled by a BMWE member, Trackman G. Deschevy. Only July 30, 1993 the BMWE was informed by the Company that the position would be henceforth be performed by management.

The Union contends that the Company's actions in this regard constitute a violation of Appendix B-18 and article 32.3 of Agreement #41.

The Union requests that this position be staffed only by scheduled employees of the maintenance of way service and that all adversely affected employees be fully compensated for any lost wages and benefits.

The Company denies the Union's contentions and declines the Union's request.

FOR BROTHERHOOD:

(SGD.) D. McCRACKEN
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. J. Martel	– Labour Relations Officer, Toronto
D. T. Cooke	– Manager, Labour Relations, Montreal
G. D. Wilson	– Counsel, Montreal
R. G. Tumak	– District Manager, Engineering Services, Winnipeg
G. N. Paquin	– Manager, Road Operations, Sudbury

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D.W. Brown	– Senior Counsel, Ottawa
R. Heinrichs	– General Chairman, Prairie Region
G. Beauregard	– General Chairman, Atlantic Region

AWARD OF THE ARBITRATOR

The instant case involves the application of article 32.3 of the collective agreement, as well as Appendix B-18. Those provisions are as follows:

> **32.3** 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.
>
> **NOTE:** See Appendix B-18, page 154

APPENDIX B-18

April 21, 1989

Mr. M.L. McInnes
System Federation General Chairman
Brotherhood of Maintenance of Way Employees
Suite 1 - 2775 Lancaster Road
Ottawa, Otario, K1V 7Y6

Dear Mr. McInnes:

During the negotiations, your union expressed concern about supervisors performing work normally performed by employees covered by the collective agreements between CP Rail and the BMWE.

The Company is prepared to investigate any complaints in this regard brought to the attention of the Manger, Labour Relations. When warranted corrective action will be taken.

This understanding does not preclude the Union exercising their rights to final determination under the disputes resolution procedures of the applicable collective agreement.

Yours truly

(Sgd.) D. V. Brazier
Assistant Vice-President
Industrial Relations

The material before the Arbitrator establishes that commencing in 1988 a bargaining unit employee, Track Maintainer Gerry Deschevy, was assigned by the Company to operate the Britt Fuel facility. The facility consists of large diesel fuel tanks located on Georgian Bay, which are refilled by ship, and which contain diesel fuel to supply the Company's Northern Ontario operations. The Britt Fuel facility was previously owned and operated by the Imperial Oil Company (Esso) from which it was purchased by the Company in 1982. At the time of the purchase the Esso plant operator, Mr. Stan Deschevy, was retained on a contract basis to continue to operate the plant for the Company. In 1988, when Mr. Deschevy was unable to continue with his contract because of illness, arrangements were made for the work to be transferred to his son, Mr. Gerry Deschevy. It is common ground that Mr. G. Deschevy, who was then a track maintainer with the Company, was paid as a track maintainer for the work which he performed in the position of plantman in the Britt Fuel facility. However, given the nature of the duties involved, which are continuous, twenty-four hours a day and seven days a week, the Company eventually paid Mr. Deschevy an additional premium for the work in question.

The thrust of the evidence, however, is that for a period of some five years the grievor was treated as being on the payroll of the bargaining unit, and union dues were deducted in his name. Moreover, on occasion Mr. Deschevy was relieved by another member of the BMWE bargaining unit, Mr. C.R. Watkinson. Mr. Watkinson was paid for his relief work at the track maintenance foreman's rate, pursuant to time sheets which he submitted to the Company on Maintenance of Way Labour Distribution Reports.

The instant dispute arises by reason of the decision of the Company to treat the position of Mr. Deschevy as being outside the bargaining unit, effective July 30, 1993. The position of the Brotherhood is that by that date the work in question had become work "normally performed by employees covered by the collective agreements between CP Rail and the Brotherhood of Maintenance of Way Employees" within the meaning of Appendix B-18 and that the plant operator's work came to be "... work which properly belongs to the maintenance of way department" within the meaning of article 32.3 of the collective agreement.

The Company disputes that interpretation of the facts. It stresses that the assignment of the work in question to Mr. Deschevy evolved to him naturally by reason of the fact that his father was the previous plant operator, retained by the Company on a contract basis. It is by helping his father that Mr. Gerry Deschevy came to learn the operation of the plant, and not through any work previously performed in his capacity of track maintainer. With respect to relief of Gerry Deschevy, the Company also stresses that in the earlier part of his tenure as plant operator, he was occasionally relieved by his father, who continued to be paid on an invoice basis, rather than as part of the bargaining unit. The Company's representatives also argue that the payment of union dues by Mr. G. Deschevy over the years should not be taken as other than a reflection of his own intention to continue to protect his seniority standing in the Brotherhood's bargaining unit. It argues that none of the functions performed by the plant operator at the Britt Fuel facility can be said to be the same as, or even similar to, work traditionally performed by members of the Brotherhood's bargaining unit. The Company also notes that there was no bulletin issued, as is required by section 14 of the collective agreement in respect of new positions, to fill the position held by Mr. Deschevy, nor any grievance by the Brotherhood in respect of that failure.

Section 1 of the collective agreement defines Maintenance of Way employees in the following terms:

> **1.1** By Maintenance of Way Employees is meant employees working the Track and Bridge and Building Departments, for whom rates of pay are provided in this agreement.

It is generally accepted that a bargaining unit can come to encompass newly established positions, absent any provision in the collective agreement to prevent such a development. The Arbitrator has been directed to nothing in the instant collective agreement which would prevent the Company from establishing a new position, such as the position of Plant Operator at the Britt Fuel facility. Indeed, the issue before me is whether it in fact did so. In determining that question, reference must be had to the objective reality, and not necessarily to the belief or intention of the employee concerned, or indeed of the Company itself. If, on the evidence, it is established that the Employer has in fact treated a given position as being within the bargaining unit of the Union, by reference to such normal *indicia* as rates of pay or payroll and seniority practices, it may not be able to deny that such a position has come to be part of the unit, possibly by accretion, even though it might intend otherwise. (*See, generally, Adams,* **Canadian Labour Law**, *(2d), para 7.730*.) While in some circumstances it may befall the Canada Labour Relations Board to resolve a dispute as to whether a newly established position falls within a given bargaining unit, by amendment of certificates if necessary, the issue of accretion can also present itself to a board of arbitration, based on the application and interpretation of the language of the collective agreement in question.

In the instant case can it be said that the work of the operator of the Britt Fuel facility is work in the Track and Bridge & Building Departments, as contemplated in article 1.1 of the collective agreement, and is work which "properly belongs to the maintenance of way department" within the contemplation of article 32.3 and, by extension, Appendix B-18? In the Arbitrator's view the evidence is compelling that it can. When the work in question was removed from Mr. Deschevy Sr., and reassigned to Mr. Deschevy Jr., it was, of course, open to the Company to negotiate a contract of compensation with Mr. G. Deschevy, who was then on its payroll as a track maintainer. In fact, no such thing was done. Mr. Deschevy was paid, initially, entirely on the basis of his rate of pay as a track maintainer. Thereafter, it appears, he was paid a further premium, apparently in recognition of the full-time nature of his responsibilities. Through the entire period, however, union dues continued to be deducted for him and, it is not disputed, he maintained all rights as an employee with seniority under the terms of the collective agreement. Further, it does not appear disputed that when it became necessary to obtain relief for Mr. G. Deschevy, the Company had recourse to another bargaining unit employee, Mr. C.R. Watkinson. Again, the evidence does not suggest that some separate contract of compensation was negotiated with Mr. Watkinson. On the contrary, it does not appear disputed that he was remunerated at the normal rate which applied to him as a Track Maintenance Foreman, again under the bargaining unit, and that he used department forms to claim his wages.

In the Arbitrator's view the Company cannot have it both ways. If it chose to remunerate both Mr. Deschevy and Mr. Watkinson, both of whom are bargaining unit members, on the basis of bargaining unit wage rates, while continuing to deduct union dues on their behalf, it is not well positioned to argue that it did not treat the work in question as falling within the bargaining unit, at least from 1988 onwards. On the contrary, the preponderance of the evidence is, as the Brotherhood suggests, that with the minor exception of some relief work performed by Mr. Deschevy Sr., on a very limited basis, commencing in 1988 the only Company employees to have done the work of the plantman at the Britt Fuel facility are members of the BMWE. In the circumstances, the Arbitrator is not inclined to give great credence to the plea of the Company that it might have violated the collective agreement by failing to bulletin the work, as it would have been required to do under the terms of the collective agreement. In the result, on the basis of the objective facts, I must share the view of the Brotherhood that the work in question evolved to be customarily performed by a member of the bargaining unit and can, as of 1993, be said to have become work belonging to the Maintenance of Way Department or, in the words of Appendix B-18, work normally performed by employees covered by the collective agreement.

In my view the foregoing conclusion does not foreclose such ability as the parties may have, within the framework of the collective agreement, to negotiate a separate classification and/or wage rate for the position of plantman at the Britt Fuel facility. That issue is, however, not before me. There is, moreover, no evidence before me that any employee other than Mr. G. Deschevy or Mr. Watkinson possessed the skill and ability to perform the work in question, and can therefore be said to have been deprived of any wages by reason of the practice followed by the Company. In the result, the Arbitrator is satisfied that, for the present, a declaration, as requested by the Brotherhood, is an appropriate and sufficient remedy in the instant case.

The Arbitrator therefore declares that the duties of the position of plantman at the Britt Fuel facility consists of work that is normally performed by and properly belongs to the BMWE bargaining unit. I have no doubt that that declaration will give the parties sufficient direction to resolve any further issues with respect to the implementation of this award. Should I be wrong in that assumption, and should further disputes arise, the matter may be spoken to.

February 16, 1996

(signed) MICHEL G. PICHER
ARBITRATOR