# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 2718

Heard in Montreal, Wednesday, 10 April 1996

concerning

## CANADIAN NATIONAL RAILWAY COMPANY

and

## NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA [CAW-CANADA]

## EX PARTE

### DISPUTE:

Employment security (ES) employees from other bargaining units performing Agreement 5.1 bargaining unit work, contrary to various articles in Agreement 5.1.

### EX PARTE STATEMENT OF ISSUE

Prior to 1992, the Company posted seasonal positions of Engine Watchman (Trapline) in the fall of each year for approximately five months to watch locomotives at Symington Diesel Shop tracks. These employees were also required to perform Classified Labourer duties and other related work. This practice was discontinued and the Company used ES employees from other bargaining units to perform the work in Symington Yard.

It is the Union's position that ES employees from other bargaining units are performing work which was previously performed by Engine Watchmen (Trapline), contrary to Article 7.4 of the ESIMP and Articles 2.1, 3, 11.3, 12.9, 13.11 and 13.3 of Agreement 5.1. The Union further claims a contravention of the Canada Labour Code.

The Company denies that ES employees perform work normally performed by Engine Watchmen (Trapline) and denies any violation of either the ESIMP or Agreement 5.1.

### FOR THE UNION:

**(SGD.) J. D. HUNTER**
**FOR: NATIONAL VICE-PRESIDENT, CBRT&GW**

There appeared on behalf of the Company:

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| D. Baril | – Labour Relations Officer, Montreal |
| R. Fraser | – Technical Officer, Winnipeg |
| D. Fisher | – Manager, Labour Relations, Montreal |

And on behalf of the Union:

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| D. Olshewski | – Regional Coordinator, Winnipeg |
| Don Zueff | – Local Chairman, Winnipeg |

### AWARD OF THE ARBITRATOR

The fundamental position advanced by the Union is that the Company has purported to create a new position of "Diesel Inspector" at the Symington Yard Diesel Shop, and assigned it to Shopcraft employees on employment security status, in circumstances which involve the individuals in question performing essentially the same work which has traditionally been performed by bargaining unit employees holding the position of Engine Watchman

(Trapline). The work in question is seasonal, and involves ensuring that locomotives housed within the yard during cold periods of the winter months remain in operation, to avoid freezing, while also checking certain fuel levels.

As a matter of first impression, if the case were to be decided solely on the basis of the circumstances at Symington Yard, the Union's grievance would appear to be compelling. While it appears that the Company has assigned certain marginal additional functions to the shopcraft employees performing the diesel inspectors' job, the bulk of the evidence would suggest that the work is, in essence, substantially the same as the core functions relating to the duties and responsibilities of the Engine Watchman (Trapline) position as it has traditionally existed at the Symington Yard Diesel Shop. The Arbitrator would not be inclined to give substantial weight to the argument of the Company that the relatively minor addition of certain inspection functions and the recording of some additional fluid levels by the shopcraft employees is such as to change the fundamental character of the work being performed. If the matter were to be resolved on its merits, I would be inclined to conclude that in fact the employees on ES were, in substance, performing little more than the work previously performed within an established bargaining unit position.

That, however, is not the end of the matter. The Company also relies on the fact that the Union cannot claim exclusive work jurisdiction in respect of the cold weather locomotive monitoring performed by the locomotive watchmen at the Symington Yard Diesel Shop. It submits that the practice, system wide, confirms that the same work is performed elsewhere by members of other bargaining units, including shopcraft employees. In this regard it points to the practice at Gordon Yard, Moncton where carmen and machinists are principally assigned that work. Similarly, at MacMillan Yard in Toronto machinists have performed the same functions, as have electricians, carmen and mechanics, as well as hostlers represented by the Union. Finally, the Company notes that in Taschereau Yard, at Montreal, cold weather checks of locomotives are assigned to machinists.

The defence of shared jurisdiction advanced by the Company at the arbitration hearing was not articulated to the Union during the course of the grievance procedure. Regrettably, therefore, the Union prepared diligently to respond to the merits of the Company's initial replies to the grievance, and had no indication, save through a general telephone conversation some two weeks prior to the arbitration hearing, that the Company would seek to plead the practice at other locations as a defence to the grievance. In the result, the Union's representative expressed substantial concern at the hearing, a concern which to the Arbitrator appears understandable, with respect to the difficulty of being met with an entirely new argument late in the day. It goes without saying that the late presentation of arguments which are entirely new to the framework of a dispute as it has progressed towards arbitration can be costly to the good faith relations between the parties. Indeed, if this matter had been presented on the basis of a joint statement of issue confined to the grounds raised in the pre-arbitration stages of the grievance procedure, the Company might well be prevented from raising the defence which it now does.

In fact, however, this matter has been advanced by the Union on the basis of an *ex parte* statement. There has been no statement filed by the Company which would, in the circumstances, restrict its ability to make a defence. The Arbitrator knows of no rule or principle which would prevent it, as late as the arbitration stage, from advancing an argument which was not previously articulated during the course of the grievance procedure. The ability to raise new arguments has been confirmed by this Office in previous cases, to the advantage of both employers and unions, depending upon the case. In this case the Union does not request an adjournment. In the result, the Arbitrator has no basis upon which to exclude the evidence advanced by the Company, and the arguments based upon reference to the mixed jurisdictional practice found in other locations.

For these reasons, I am compelled to conclude that the Union cannot assert that the work performed by the Locomotive Inspectors can be said to be nothing more than the work previously performed by the Locomotive Watchmen (Trapline). It is also work consistent with work that has been assigned elsewhere to members of various shopcraft unions. Nor can the Arbitrator find within the seniority provisions of the collective agreement, as they relate to the Prairie Region, language which would support the assertion of exclusive jurisdiction to the work in question for the benefit of the Union. (*See* **CROA 117, 118, 246, 322, 381, 527, 693, 1160, 2006** *and* **2237**.) In the circumstances, the grievance must be dismissed upon its merits.

April 12, 1996

**(signed) MICHEL G. PICHER**
**ARBITRATOR**