CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2766

Heard in Montreal, Tuesday, 10 September 1996

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

In 1980, Work Equipment Shop employees were forced to exercise their seniority and move to a new location at Acheson because of an Article 8 Notice. This move resulted in the employees being adversely affected and a letter of understanding was implemented on approximately January 28, 1981 to compensate the W.E.S. employees a transportation allowance of $6.00 per day.

On January 1, 1994, the Company arbitrarily discontinued payment of the $6.00 per day transportation allowance.

EX PARTE STATEMENT OF ISSUE

It is the Brotherhood's contention that the Company has unjustly dealt with the employees of the Acheson Work Equipment Shop by stopping payment of the six dollar ($6.00) per day transportation allowance effective January 1, 1994.

The understanding between the Company and the Brotherhood was that at the time of the move from Edmonton to Acheson, the employees would be adversely affected because public transportation was not available and there were no residential areas near the shop. To date this has remained unchanged.

The letter of understanding, dated January 28, 1981, outlined the agreement reached between the Company and the Brotherhood.

The Brotherhood has requested that the Company continue to pay the affected employees the $6.00 per day transportation allowance.

The Company has denied the Brotherhood's contention and declined the Brotherhood's request.

FOR THE BROTHERHOOD:

(SGD.) G. SCHNEIDER
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

M. S. Hughes	– System Labour Relations Officer, Montreal
N. Dionne	– Manager, Labour Relations, Montreal
S. Michaud	– Labour Relations Officer, Edmonton

And on behalf of the Brotherhood:

D. W. Brown	– Sr. Counsel, Ottawa
R. F. Liberty	– System Federation General Chairman, Winnipeg

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that in 1981, upon setting up the Acheson Work Equipment Shop in a location without public transportation or nearby residential facilities, the Company undertook to pay a daily travel allowance of $6.00 per employee. That arrangement is reflected in a letter of understanding sent to the Brotherhood's System Federation General Chairman by the Company's Regional Chief Engineer, Mr. R.H. Bailey, on January 28, 1981. The letter reads, in part, as follows:

> We are sensitive to the need for assistance for employees who regularly travel to work at the Acheson Work Equipment Shop, because of the total lack of public transportation and because there is no residential community at or close to Acheson, and we can see the need for some type of travel arrangement to that facility. In the interim, and on a temporary basis, we are willing to establish a transportation allowance to those employees who hold regular positions at the Acheson Work Equipment Shop. It will be paid to each employee who works under the direct jurisdiction of the Shop Foreman at Acheson, for each day on which compensated service is performed on their permanent position in the Acheson Shop facility. The transportation allowance will be a flat allowance of $6.00 per employee per day (24 hour period), and will be effective on February 2, 1981. It is intended to be paid only until a transit arrangement extends to Acheson or close thereto or a residential community develops close to the facility, or other arrangement become possible. This transportation allowance is of a temporary nature and may be cancelled by the Company on thirty days' written notice.

The record reveals that from the time of the above letter to the present there has never been a public transit service established to Acheson, nor has a residential community developed nearby. Nor, it seems, has any "other arrangement" become possible, as contemplated in the above letter.

Notwithstanding that fact, in late 1992 the Company gave notice to the Brotherhood that the travel allowance would be terminated effective January 1, 1993. That gave rise to a grievance filed by the Brotherhood on January 21, 1993. The Brotherhood's position, essentially, was then that the letter of January 28, 1981 did not vest a discretion in the Company with respect to the possible termination of the travel allowance. Rather, it asserted the view, as related by its representative before the Arbitrator in this dispute, that it was understood that the notice provision would be available to the Company to terminate the agreement only if conditions should change with respect to the lack of public transportation or nearby residential facilities. That matter was proceeding towards arbitration when it was finally settled by the Company. In a letter dated February 13, 1993 Engineering Officer F. Metcalfe wrote to the Brotherhood's General Chairman stating, in part, the following:

> The $6.00 travel allowance for the employees working at Acheson, will be reinstated effective pay period 05/93 for employees on advance payroll and pay period 04/93 for employees on regular payroll. It will be paid retroactively to 1 January 1993.
>
> This will resolve this Step II grievance in its entirety.

Based on the foregoing the Brotherhood's grievance was discontinued and no arbitral ruling was obtained with respect to its interpretation of the letter of January 28, 1981.

Shortly thereafter, the Company again purported to terminate the arrangement for travel allowance by giving notice to the Brotherhood to that effect on September 17, 1993, indicating that the allowance would be terminated as of January 1, 1994.

The arguments advanced in this case are relatively straightforward. The Company submits that it has a discretion under the terms of the original letter of January 28, 1981, and may terminate the travel allowance at will, by the giving of the notice contemplated. It submits that there is nothing in the letter itself, nor in the settlement of the prior grievance, which would circumscribe the Employer's discretion in this regard.

The Brotherhood submits that the settlement of the prior grievance must be taken as binding upon the Company, and that it forms the ground of an estoppel, should the Employer's strict rights under the letter in fact involve discretion to terminate the arrangement.

In the Arbitrator's view the grievance must succeed. Firstly, without rendering any definitive interpretation of the letter of January 28, 1981, it seems *prima facie* arguable that the Brotherhood proceeded with a grievance of some substance against the original cancellation of the arrangement, projected for January 1, 1993, which formed the basis of the prior grievance. The Brotherhood was then moving to arbitration to obtain an interpretation which would have confirmed its interpretation, namely that the allowance must remain payable so long as the conditions of a lack of public transportation, or a lack of nearby residential facility, continued in effect, with the Company's ability to terminate the agreement by notice being predicated on a material change in those conditions. The settlement of the grievance, which the Arbitrator notes was not on a "without prejudice" basis, foreclosed the Brotherhood from obtaining arbitral confirmation of the interpretation which it then sought. It submits that by the letter of February 19, 1993, settling the matter, the Company must be taken to have accepted the Brotherhood's interpretation, and to have created a condition of reliance by the Brotherhood that, as stated in the letter, the travel allowance of $6.00 per day for employees working at Acheson would be reinstated, effective May of 1993, for employees on advance payroll, and April of 1993 for employees on regular payroll, with retroactive payment to January 1, 1993. In all of the circumstances, the Arbitrator is persuaded that the Brotherhood was then entitled to conclude that the Company effectively represented that it accepted the interpretation of the letter of January 28, 1981 which the Brotherhood was seeking to vindicate through the grievance and arbitration process.

In the circumstances, the conditions of an estoppel are, in my view, amply made out. It was not open to the Company to thereafter rescind its understanding with the Brotherhood, and seek to return to its prior interpretation of its strict rights under the 1981 letter. To put it differently, the position adopted by the Company in the settlement of the first grievance, which was not on a "without prejudice" basis, amounts to a recognition by both parties that the letter of January 28, 1981 would, thereafter, be interpreted so as to allow the Company to give notice of termination of the travel allowance only where a material change in the original conditions described in that letter should come into effect. On that basis, therefore, the grievance would also succeed.

For the foregoing reasons the grievance is allowed. The Arbitrator finds and declares that the Company violated the collective agreement, and the terms of the letter of January 28, 1981 by its purported cancellation of the travel allowance for employees in service at the Acheson Work Equipment Shop. The Arbitrator therefore directs that all affected employees be compensated for all travel allowances withheld for the period commencing January 1, 1994 onwards, and remain payable for the term of the current collective agreement.

September 13, 1996

(signed) MICHEL G. PICHER
ARBITRATOR