CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2870

Heard in Montreal, Thursday 12 June 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

The Company's decision in Western Canada to pay a fixed weekend travel allowance, rather than an allowance based upon actual miles travelled.

EX PARTE STATEMENT OF ISSUE:

In early fall of 1995, the Company decided that all BMWE employees in Western Canada would receive a fixed weekend allowance ($21.00) each way). The Brotherhood objected to this blanket implementation on the basis that previously most weekend travel allowances were calculated on the basis of actual miles travelled.

The Union contends that: 1.) the intent of the parties to Appendix XIII of Agreement 10.1 was that "a variety of means" must be applied to assist employees with weekend travel. In other words, Appendix XIII requires that each individual situation be considered on a case-by-case basis with fairness and practicality as the guiding principles. 2.) The Company is in violation of Appendix XIII and Article 22.1 (new) of Agreement 10.1 and has unjustly dealt with its employees in violation of article 18.6 of Agreement 10.1.

The Union requests that every affected employee be compensated for all expenses incurred but not reimbursed as a result of this matter.

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

FOR THE BROTHERHOOD:

(SGD.) R. F. LIBERTY
GENERAL CHAIRMAN

There appeared on behalf of the Company:

S. Michaud	– Assistant Manager, Labour Relations, Edmonton
D. Lanthier	– Labour Relations Officer. Edmonton
N. Dionne	– Manager, Labour Relations, Montreal
P. Payne	– Manager Administration, Edmonton
F. Metcalfe	– Engineering Officer, Edmonton

And on behalf of the Brotherhood:

D. Peterson	– Counsel, Ottawa
R. F. Liberty	– System Federation General Chairman, Winnipeg

AWARD OF THE ARBITRATOR

On a review of the materials the Arbitrator is satisfied that the Company has acted within the strict wording of Appendix XIII of Agreement 10.1 by adopting a general policy whereby travel assistance is paid to employees in Western Canada by means of a fixed expense weekend travel allowance. Appendix XIII of the collective agreement provides, in part, as follows:

> **Qualification**
> In order to qualify for weekend assistance an employee must be required to work away from his home location on a regular basis (a minimum of 5 consecutive days prior to the weekend). If such work is on a permanent position, which has an established Headquarters location, there must be an acceptable reason for the employee not relocating his home to the Headquarters location, such as remoteness of the location or limited housing at the location.
>
> **Travel Assistance**
> As mentioned above the means to be used to assist employees with weekend travel will vary and the determination of which will apply in each case will rest with the appropriate Company Officers. The means that may be employed are:
>
> **(a)** Train Service
> **(b)** Company vehicles
> **(c)** A fixed expense allowance
> **(d)** A mileage allowance which is to be determined separately for the eastern and western Regions. Such allowance will be based on actual bus fares in effect on August 1st of each year on sample bus routes. The sample bus routes to be used are attached as Appendix "A". The fares will be converted into an average mileage rate and rounded to the nearest cent. For example, if a round trip is 104 miles and costs $10.00, the cost per mile is therefore $10.00 ÷ 104 = 9.62 cents. Sample bus fares, once converted, are then averaged to determine the applicable mileage rate.
>
> **(e)** Any other means which meets the criteria mentioned in the first paragraph of this letter; or
> **(f)** Any combination of a, b, d, and e above.
>
> The adequacy of train service where it is considered as a means of weekend travel is of course a very relative matter. Waiting time, travelling time, and the alternatives available must all be considered. This basic criteria are that the means used must be fair and practical, must not interfere with the performance of the work and must not place an unreasonable economic burden upon the railways. Where there is a difference of opinion between an employee and his Supervisor in this regard, the local Union representative or the General Chairman and the Supervisor should confer in an effort to resolve the difference.
>
> Where a work location is accessible by road the Company shall be under no obligation to provide assistance when the distance travelled is forty miles or less in one direction (eighty miles or less return).
>
> The Company's obligation under this arrangement shall not exceed beyond the limits of the Region on which the employee is working.

It does not appear disputed that for a number of years Company officers in Western Canada did use a variety of the options available under Appendix XIII to assist employees with the burden of weekend travel. A substantial number of employees came to receive the mileage allowance provided for in sub-paragraph (d). That allowance, it may be noted, was adjusted upwards annually based on the current rate of actual bus fares. By contrast, the fixed expense allowance for sub-paragraph (c) has remained unadjusted since 1984, when it was set at $21.00 one way and $42.00 return.

For some time the collective agreement has provided for a general *per diem* rate to cover meals and lodging for employees at an away from home location. With the renegotiation of the collective agreement, effective June 14, 1995,

article 22.1 of the collective agreement came to provide a new *per diem* rate of $72.00 as a reasonable expense for meals and lodging. The article goes on to provide, in part:

> … However, the assistance provided under the terms of Appendix XIII of Agreement 10.1 (Weekend Travel Assistance) will be expanded to include employees receiving per diem expenses ….

As a first matter, the Arbitrator cannot accept the argument of the Brotherhood, to the effect that the framework of Appendix XIII requires the appropriate Company officer to give individual consideration to all options in each and every case of an individual claim for weekend travel assistance by a single employee. In this regard Appendix XIII reads as follows:

> The parties have concluded that a variety of means must be employed to assist the employees with weekend travel and that the determination of the means to be applied in any given situation must rest with the appropriate Company officers.

In the Arbitrator's view the above passage confirms that it is for management to determine what is the appropriate means of providing weekend travel assistance in a general sense, as applied to the circumstances of groups of employees who may fall under the appendix. There is nothing in the language which would indicate that the options for travel assistance are to be reviewed, considered and weighed in each individual case on an ongoing basis. Nothing in this provision would, in my view, prevent the Company from adopting a general approach to a given group of employees, so long as it does so for valid business purposes, and in a manner that is neither arbitrary, discriminatory nor in bad faith. Indeed, it appears that notwithstanding that the general approach of the Company, following the agreement of June 14, 1995, has been to apply the fixed expense allowance, it has nevertheless made continuing use of other options in certain specific situations. Based on an interpretation of Appendix XIII, therefore, the Arbitrator cannot sustain the position of the Brotherhood that the decision to adopt a general preference for the fixed expense allowance in Western Canada is, of itself, a violation of the letter or spirit of Appendix XIII of the collective agreement.

There is, however, more to consider. The grievance is argued primarily on the basis of the adverse impact of the Company's more recent policy in favour of the fixed expense allowance on employees who, for many years, were given the advantage of the alternative payment of mileage allowances, an amount which was adjusted upwards annually in accordance with actual transportation costs. On the evidence presented, the Arbitrator has concerns as to the manner in which the Company's new policy with respect to the general application of a fixed expense allowance came about. Firstly, it does not appear disputed that for many years, through a number of collective agreements, a substantial portion of the employees on whose behalf this grievance is brought were provided with mileage allowance for weekend travel to and from their homes. The parties went to the bargaining table for the renewal of the current collective agreement without any indication from the Company that it intended to apply its strict rights and change to the payment of the lesser amount of a fixed expense allowance. For the purposes of clarity, there is no suggestion before the Arbitrator that the Company entertained any such intention at the time of bargaining. Be that as it may, however, it was only after the collective agreement was negotiated, and more particularly in January of 1996, that the Company moved to change the method of payment for those who previously had received the mileage allowance.

In the Arbitrator's view the situation so described gives rise to the application of the principles of estoppel. At a minimum, I must find that for a number of years the parties operated under a tacit understanding, and indeed an implicit representation by the Company, that for a substantial portion of employees the payment of a mileage allowance for weekend travel in Western Canada constituted what was considered to be the appropriate means and measure of travel assistance under Appendix XIII. The Brotherhood entered the new collective agreement in the reasonable expectation, absent any contrary indication from the Company, that the established administration of Appendix XIII would continue through the current agreement for employees in receipt of the mileage allowance. Although during the course of bargaining the parties agreed to establish a new $72.00 rate for the meals and lodging *per diem*, and extended the application of Appendix XIII to employees entitled to receive that amount, there were apparently no discussions or negotiations to suggest that there would be a dramatic change in the established pattern of applying travel assistance to given situations in Western Canada.

There can be little doubt that the change to a fixed expense allowance for those employees in Western Canada who previously were provided a mileage allowance represents a significant financial loss. In the Arbitrator's view the equitable principles of estoppel must operate in this circumstance, to prevent the Company from reverting to the stricter or more narrow application of Appendix XIII, given that its prior course of conduct in the administration of that provision was tantamount to a representation to the Brotherhood that it considered the payment of mileage allowance, at least in those circumstances where such allowances were paid on a regular basis, to be the appropriate means of assistance under that appendix. Having concluded the collective agreement without any opportunity to bargain about an alternative method of payment, the Brotherhood is now without any ability to deal with this issue through bargaining and will be so constrained until the next open period.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator finds that the Company is estopped, for the duration of the current collective agreement, from applying the fixed expense allowance to certain employees in Western Canada in circumstances where previously a mileage allowance for weekend travel assistance was consistently paid. Should the collective agreement be renewed without any material change in the wording of Appendix XIII, the Company will be at liberty to pursue the policy which it has adopted.

The matter is referred back to the parties for the purposes of identifying those employees in respect of whom a regular pattern of mileage allowance can be proved, in the expectation that the parties will be able to work out the appropriate payments of compensation owing. In the event that they fail to do so, the matter may be spoken to.

June 20, 1997

(signed) MICHEL G. PICHER
ARBITRATOR