CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2932

Heard in Montreal, Thursday, 12 February 1998

concerning

Canadian National Railway Company

and

Canadian Council of Railway Operating Unions [United Transportation Union]

EX PARTE

DISPUTE:

Various time claims submitted under article 61.8.

The Company has declined the Union's appeal.

EX PARTE STATEMENT OF ISSUE:

On various dates in December 1994 and January 1995, several Toronto NOD employees submitted claims under the provisions of article 61.8.

The Company declined the time claims maintaining that all regularly assigned employees were properly notified of the cancellation of their assignments.

It is the position of the Union that the affected employees remained available for service in accordance with accepted local practices and, in addition, the Company is now estopped from changing such practices. The tickets are, as a result, valid and should be put in line for payment.

The Company has declined the Union's appeal.

FOR THE COUNCIL:

(SGD.) M. P. GREGOTSKI

GENERAL CHAIRPERSON

There appeared on behalf of the Company:

P. Marquis – Labour Relations Officer, Toronto

D. Fournier – Supervisor, CMC, Moncton

G. Search – Assistant Manager, Labour Relations, Toronto

P. Parker –

S. Thomas –

And on behalf of the Council:

G. Anderson – Secretary/Treasurer, London

R. Beatty – Senior Vice-General Chairman, Hornepayne

AWARD OF THE ARBITRATOR

The Company raises a preliminary objection as to the arbitrability of this grievance. It appears that prior to the hearing the Council gave to the employer a notice of its intention not to rely on the argument of estoppel. On that basis, the Company argues that there is nothing left to be arbitrated, based on the *ex parte* statement of issue.

The Arbitrator cannot sustain the objection. It is, of course, true, as the Company submits, that articles 8 and 12 of the memorandum of agreement of September 1, 1971, governing the Canadian Railway Office of Arbitration restrict the Arbitrator's jurisdiction to issues defined within a party's *ex parte* statement of issue. A close reading of the statement of issue in question, however, reveals that there are in fact two grounds for the grievance as revealed within the statement. The first is the interpretation of article 61.8 "in accordance with accepted local practices". The second matter raised "in addition" is the issue of estoppel. In the Arbitrator's view, the withdrawal of the estoppel argument by the Council does not, of itself, eliminate the separate argument which is based on agreements and understandings in respect of local practices. The Council draws to the Arbitrator's attention the provisions of article 85.4 of the collective agreement which are as follows:

> **85.4** No local arrangements which conflict with the generally accepted interpretation of the provisions of the agreement will be entered into unless first approved by the General Chairperson affected and the proper officer of the Company.

Its representative submits that in the case at hand there was a local agreement established in respect of the Toronto-South Parry assignments for conductors working out of the Toronto North terminal, the terms of which effectively amend or alter the application of article 61.8 of the collective agreement. That, it seems to the Arbitrator, is an issue separate from estoppel. Whether or not it can be established on its merits, it is a matter outstanding on the face of the Council's *ex parte* statement of

issue, and one which, in my opinion, remains arbitrable. For these reasons the Company's preliminary objection is declined.

I turn to consider the merits of the dispute. It is common ground that on December 19, 1994 the Company posted notices advising of a substantial number of train cancellations on the Great Lakes Region for the 1994-95 Christmas/New Year's period. The grievors, who operate trains out of the Toronto North terminal between MacMillan Yard and South Parry were affected by the notice. The evidence establishes that they work in a special arrangement whereby they are considered as holding regular assignments, but are nevertheless assigned within time pools. If their regular assignment is cancelled, they retain the opportunity for further work, being treated as available in unassigned service for the balance of their time block. The assignment arrangement for Toronto North crews was plainly advantageous to both the Company and the Council. It provides to the Company a pool of available conductors in unassigned service, who are required to keep themselves available for the duration of their time block. While they are not paid any premium should there be no additional assignment to them during the time block, the employees do enjoy the advantage of obtaining a run in unassigned service, thereby realizing earnings equivalent to the earnings they would have earned had their regular assigned train not been cancelled.

The instant grievance is brought on behalf of a number of conductors out of the Toronto North terminal who received timely notice of the cancellation of their regularly assigned trains. The thrust of the Council's position is that the conductors in question were never personally cancelled, although their regularly assigned trains were. In the result, they remained available for service, on an "on call" basis, through all of the dates in the Christmas and New Years period for which they were scheduled. The Council submits that in that circumstance the employees concerned should be entitled to the penalty payment provided under article 61.8 of the collective agreement.

Article 61.8 reads as follows:

> **61.8** Except in emergencies such as accident, engine failure or washout or where the line is blocked on their own or adjacent freight section or assigned territory, if less than 2 hours' notice of cancellation is given prior to the time required to report for duty, employees on regular assignments in road service will be paid a basic day at the minimum rate applicable to the class of service to which assigned for each tour of duty lost. The provisions of this paragraph apply only at the home terminal of an assignment and do not apply where employees are deadheaded or used in unassigned service under the provisions of article 27, from the home terminal to the away from home terminal, to handle the return trip of their assignment.

The Council submits that the agreement made between the Company and the Council at the fall change of timetable in 1994, whereby employees whose regularly assigned trains were cancelled would remain available to protect unassigned trains, has the effect of amending and expanding the scope of article 61.8 of the collective agreement. On that basis it claims that employees who are required to remain available for duty to protect unassigned service are entitled to receive two hours' notice of cancellation of their personal service, and that failing such notice, and any call to work, they should be entitled to a basic day at the minimum rate for the tour of duty.

The Arbitrator cannot sustain the Council's interpretation. As a general matter, employees in unassigned service are not paid any wages, beyond their monthly guarantee, in the event that they are not called for service when they are required to be available. It would appear to the Arbitrator that in creating the hybrid employee, such as was done in the agreement at Toronto North, whereby a conductor can move from assigned service to unassigned service in a time pool upon the cancellation of his or her regular assignment, the parties should be expected to provide clear and unequivocal language to confirm that in unassigned service, if not called, the employee is to receive some higher rate of compensation or premium payment than would otherwise be realized by an employee in unassigned service who is not utilized. The parties to this collective agreement are not unfamiliar with the drafting of collective agreement provisions of some complexity. They should, I think, be expected to have made some clear provision in writing, in the fashioning of their arrangement in the fall of 1994, if the mutual intention was to provide to hybrid conductors working in time pools at Toronto North with the protection of a basic day's pay when not called in unassigned service, particularly where they have received timely notice of the cancellation of their regular assignment, in keeping with the provisions of article 61.8 of the collective agreement. The Council's position involves a dramatic reversal of long established wage norms under this collective agreement. So radical a change should be established on clear evidence. There is, however, no language in documentary form, nor any verbal understanding, which the Council can point to to support the interpretation which it now advances.

In the Arbitrator's view the position argued by the Council fails to appreciate the value and workings of the trade off realized when the local arrangement at Toronto North was established. It is true that the assignment of conductors within time pools, so that they are treated as being in unassigned service if their regular assignment should cancel, places upon the employee a greater obligation in respect of availability for unassigned service for the duration of the time block. However, the commensurate advantage to the employee in the form of lucrative work opportunities which allow the conductor to make wages similar to those lost by the cancellation of his or her regular assignment are a significant advantage over the previous arrangement. If the interpretation which the Council advances in the instant case is accepted, the

employee in fact would have gained much more than the mere opportunity for additional compensatory work: he or she would in fact be assured pay for a basic day, notwithstanding the timely cancellation of a regular assignment, in a manner consistent with the language of article 61.8 of the collective agreement. As noted above, the Arbitrator is of the view that to find so significant an improvement over previously long established arrangements in respect of the payment of wages to employees in unassigned service would require clear and unequivocal language, language not found in the documentation before me.

In the result, I am satisfied that the interpretation advanced by the Company is to be preferred. The grievors were given proper notice of the cancellation of their regular assignments. Consequently they reverted to unassigned service for the dates of their normally scheduled time blocks. There is nothing in the language of the collective agreement, nor in the arrangements made in respect of the assignment of conductors in the Toronto-South Parry service from 1994 onwards to sustain the claim made by the grievors.

For the foregoing reasons the grievance is dismissed.

February 16, 1998 **(signed) MICHEL G. PICHER**

ARBITRATOR