

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2976

Heard in Montreal, Thursday, 10 September 1998
concerning

ONTARIO NORTHLAND RAILWAY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

The Company's refusal to compensate Locomotive Engineer D. Church pursuant to article 52.18(B) of agreement no. 8.

EX PARTE STATEMENT OF ISSUE:

On April 16, 1996, the Company issued Bulletin E- I modifying the job description of the freight assignment at Hearst, Ontario.

On April 24, 1996, the grievor submitted wage claims under article 52.18(B) of agreement no. 8.

On April 29, 1996, the Company declined payment of the grievor's wage claims because the grievor was assigned to the Hearst freight operation.

The Brotherhood appealed the Company's decision to refuse payment of the grievor's wage claims and Company's unilateral amendment of the Hearst freight assignment.

The Company declined the Brotherhood's appeal.

FOR THE BROTHERHOOD:

(SGD.) B. E. WOOD **GENERAL CHAIRMAN**

There appeared on behalf of the Company:

M. J. Restoule

T. G. McCarthy

J. Mainville

And on behalf of the Brotherhood:

B. E. Wood

S. O'Donnel

M. Kenney

- Manager, Labour Relations, North Bay

- Training Officer, North Bay

- Manager, Train Services, North Bay

- General Chairman, New Bedford

- Loca Chairman, North Bay

- Secretary Treasurer, North Bay

AWARD OF THE ARBITRATOR

The sole issue to be resolved in this award is the Company's objection as

tor its arbitrability. Upon a review of the submissions of the parties, the Arbitrator is of the view that the matter must be viewed as arbitrable, subject to certain qualifications.

The record discloses that the instant grievance arises out of a claim made by Locomotive Engineer Church in respect of the denial of his claim for wages at yard rates of pay in respect of his relief assignment at Hearst, Ontario on April 24, 1996. The grievance alleges that the Company's payment of Mr. Church at way freight rates is contrary to the

provisions of the collective agreement. It appears that the claim, as well two subsequent related claims held in abeyance, was paid by the Company, although not as a settlement of the matter on the merits. Rather, the Company missed the time limits for responding to the Brotherhood's grievance, and paid the three claims on the basis of its obligation to do so under the penalty provisions of the collective agreement governing the failure of the Company to respect time limits in relation to a wage claim. That is reflected, in part, by the following letter dated December 15, 1996 addressed to the Brotherhood's general chairman, Mr. B.E. Wood from the Company's president, Mr. K.J. Wallace:

It is my view that we have not unilaterally modified the Hearst assignment and that the minor switching performed by the crew at Kapuskasing can hardly be viewed as coming within the scope of road switcher service. This is evidenced by the fact that we have not had a claim from the trainmen under a similar article in their agreement. That having been said, we have missed the time limits to respond to your grievance and, as I consider this grievance based on the time claim, we are therefore required to pay the claims to Mr. Church. It is understood that payment under these circumstances does not constitute a precedent nor a waiver of our contentions regarding this matter.

ZD

It is clear that the Brotherhood was not satisfied with that resolution of the matter. In part, it appears that a substantial number of other similar claims on behalf of Mr. Church were being held in abeyance by Local Chairperson S.R. O'Donnel, pending the outcome of the initial grievance. Mr. O'Donnel relates to the Arbitrator that it was his understanding with Superintendent of Train Operations J.L. Thib that the ongoing similar claims of Mr. Church would be held in abeyance by Mr. O'Donnel pending resolution of the grievance. Obviously, the payment of the three claims by the Company in December of 1996 did not resolve the outstanding additional claims being held in abeyance by the Brotherhood.

In the result, by letter dated December 18, 1996 the Brotherhood indicated its intention to proceed to arbitration in respect of this matter. The Company appears to have formed the view the Brotherhood's communication in that regard was in error, and probably in ignorance of the fact that it had paid the three claims. In the result, the matter drifted for some period of months.

In a letter dated May 11, 1998 Mr. O'Donnel wrote to Mr. Thib reaffirming his position that the subsequent claims held in abeyance for Mr. Church remained unresolved. At the hearing the Company in fact took the position that the Brotherhood was not timely in its pursuit of the additional claims, and that it cannot now revive them for the purposes of arbitration. Nor, it submits, can it purport to now arbitrate the three original claims which were in fact paid, on a without prejudice basis.

In the Arbitrator's view the matter must be deemed to be arbitrable, as there was apparently no mutual settlement of the grievance on its merits, and in the mind of the Brotherhood's local chairman, at least, the understanding existed between himself and Mr. Thib that the subsequent claims made by Mr. Church were still unresolved. In my opinion the

appropriate resolution is to have this matter heard upon its merits, with the fullest opportunity being provided to the Company to call evidence from Mr. Thib with respect to the understanding between himself and Mr. O'Donnel concerning the additional claims being held in abeyance. If, as the Company's representatives suggest, there was no knowledge on the part of the Company with respect to additional claims being held in reserve, the issue of the appropriate compensation that might or might not be payable due to unreasonable delay on the part of the Brotherhood can be dealt with in the ultimate disposition of the case. I am satisfied, however, that at a minimum the Brotherhood has not forfeited its right to proceed to an arbitral determination of the matter on its merits. Additionally, should the evidence establish that the Company's officer was aware of the additional claims being held in abeyance there may be scope for an order of compensation, should the grievance succeed.

The matter is therefore remitted to the general secretary for a hearing upon the merits, in accordance with the foregoing.

September 11, 1998

(signed) MICHEL G. PICHER

ARBITRATOR

This grievance was ultimately withdrawn by the Brotherhood and no award issued on the merits of the dispute.