CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3245

Heard in Montreal, Wednesday, 13 March 2002

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Dispute concerning the Company's creation of a composite gang made up of a Welding Department employee and a Track Department employee.

BROTHERHOOD'S STATEMENT OF ISSUE:

In the winter of 2001 the Company advertised two positions with headquarters at Gregg, Manitoba. One was the position of temporary Foreman Welder while the other was that of Trackman/Track Maintainer. The Company's express intention was that the two successful applicants to these positions would together constitute a gang that would perform both Welding Department and Track Department work. The Brotherhood grieved.

The Union contends that: **(1.)** The work assigned to the gang described above has, in the past, always been performed by gangs created exclusively from either Welding Department or Track Department employees. **(2.)** Composite gangs have never before existed without the Brotherhood's consent in the Maintenance of Way service and the Company is therefore estopped from unilaterally creating one or more now without Brotherhood consent. **(3.)** The creation of composite gangs violates the collective agreement because, among other things, it fails to respect duly negotiated lines of promotion. **(4.)** The Company's unilateral creation of composite gangs violates articles 6.1, 6.2, 6.3 and 15.3 of Agreement 10.1 and articles 2.3 (now 2.1), 2.6 (now 2.3), 2.9 (now 2.5), 3.4(a), 3.4(b), 3.15 (now 3.10) and 3.20 (now 3.14) of Agreement 10.8.

The Union requests that: **(1.)** it be declared that the Company's position is in violation of the collective agreement; **(2.)** the Company be ordered to cease and desist from creating composite gangs in the future, and **(3.)** the Company be ordered to award a Welder's position to work with the already established Welder Foreman and a Track Maintenance Foreman position to work with the already established Trackman/Track Maintainer. In addition, the Brotherhood requests that the appropriate Track and Welding Department employees be compensated for any and all wags, expenses and seniority lost as a result of this matter.

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

FOR THE BROTHERHOOD:

(SGD.) R. F. LIBERTY
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

B. Laidlaw	– Manager, Human Resources, Winnipeg
A. Antunes	– Track Supervisor, Brandon
K. Lane	– General Supervisor, Engineering, Winnipeg
N. Dionne	– Director, Labour Relations, Montreal

And on behalf of the Brotherhood:

R. F. Liberty	– System Federation General Chairman, Winnipeg
L. Gladish	– General Chairman, Winnipeg
G. D. Housch	– Vice-President, Ottawa
K. Deptuck	– Vice-President, Ottawa

AWARD OF THE ARBITRATOR

Upon a review of the material filed the Arbitrator is compelled to agree with the position of the Brotherhood in this grievance. It appears that for decades the practice has been that when gangs are established for snow removal they are drawn from the track forces and, conversely, when a welding gang is required its members are drawn from the welding department. What transpired in the instant case was the co-assignment of a foreman welder and a track maintainer to perform a combination of snow removal and grinding, it being understood that the foreman welder, who could hold a track occupancy permit, would perform the grinding that needed to be done while the track maintainer stood watch, and that while the track maintainer cleared snow from switches the welder foreman would stand watch. Other than one instance of a similar situation having been created at South Parry, Ontario, the Company has adduced no evidence to rebut the submission of the Brotherhood that the practice has universally been never to create composite gangs of the kind established at Gregg, giving rise to this grievance.

The Arbitrator accepts the submission of the Company that the language of each of the articles cited by the Brotherhood does not disclose any violation of their terms. It is, on a strict interpretation of the collective agreement, arguable that there is nothing in the language of its provisions to prevent the Company from establishing a composite crew as it did. Significantly, however, the practice, over many years, has consistently been not to do so. In the Brotherhood's submission that has been based on considerations of efficiency and safety. Whatever the rationale, the Arbitrator is compelled to the conclusion that the parties have proceeded on an understanding that the Company would not create composite gangs of the type established at Gregg, even though the language of the agreement might not strictly prohibit such an initiative. The issue before me, therefore, is to be distinguished from the circumstance where there has been an established practice of assigning track and welding employees to work together on a track maintenance project where, for example, track maintainers and assistant track maintenance foremen might well work under the supervision of a welding foreman. An example of that practice, sustained by this Office, was reviewed in **CROA 2836**.

I am satisfied that the doctrine of estoppel does apply to prevent the Company from following the practice which is the subject of this grievance. Firstly, it should be stressed that the actions of the Company depart from the long established practice whereby composite gangs performing work pursuant to a bulletin governing positions established for forty-five days or more were never resorted to. It is, I think, fair to assume that the Brotherhood entered the currency of this collective agreement in reliance on its long

standing belief that that practice would remain in effect, even though it is arguable that the language of the collective agreement might be otherwise construed. While the Arbitrator can appreciate the Company's wish for greater efficiency which underlies the change which it implemented, in the circumstance where, as in the instant case, its long standing prior practice constitutes, as I am satisfied, an effective and long standing representation to the Brotherhood that it would not establish a composite gang for snow removal and grinding, it could not, at least for the term of the current collective agreement, unilaterally implement such an initiative without the agreement of the Brotherhood. Obviously, given the operation of the doctrine of estoppel, it may do so following the expiry of the current collective agreement, as the Brotherhood is now on notice that the Company intends to revert to the strict language of the collective agreement.

In addition, the Arbitrator cannot sustain the suggestion of the Company's representative that there was a violation of the procedural requirements of article 18 by reason of the fact that the Brotherhood did not cite a specific article of the collective agreement which the Company violated. It is obvious from the material forwarded to the Company by the Brotherhood that it was pleading the operation of the general scheme of the collective agreement, and the inherent recognition of the separation of departmental lines found within it, and was taking exception to what it viewed as a radical departure from a long standing practice. If the Company's position were correct, it would be virtually impossible to plead the application of the doctrine of estoppel which, by definition, involves a reversion to the strict terms of a collective agreement.

For the foregoing reasons the grievance is allowed. The Arbitrator finds and declares that the Company did, by the application of the doctrine of estoppel, violate the understanding between itself and the Brotherhood by resorting a composite snow removal gang at Gregg. I consider it sufficient to so declare, and to remain seized of any issue with respect to compensation, if any, which might be appropriate in this matter. There is little reason to doubt that the Company will comply with the Arbitrator's declaration with respect to its practice in the future, for the balance of the term of the collective agreement, it also being understood that it may thereafter consider the estoppel to be at an end, subject of course to whatever the parties may then negotiate.

The Arbitrator retains jurisdiction in the event of any dispute between the parties concerning the interpretation or implementation of this award.

March 15, 2002

(signed) MICHEL G. PICHER
ARBITRATOR