CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 149

Heard at Montreal, Tuesday, May 13th, 1969

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

EX PARTE

DISPUTE:

The Brotherhood claims that the Company violated Article 11.10 of Agreement 5.1 by allowing Mr. R.J. Findlater to exercise his seniority rights when he was released from excepted employment.

EMPLOYEES' STATEMENT OF ISSUE:

On September 16, 1968, Mr. R.J Findlater was notified by Mr. A.K. Fryett, Terminal Traffic Manager, London, Ontario, that due to a necessity of reducing their supervisory staff and since there had been little or no improvement in his managerial performance after numerous counselling sessions, he regretted having to inform him that after October 25, 1968 his services would no longer be required as Foreman.

In accordance with Article 11.10 of Agreement 5.1, he was allowed to displace.

On September 23, 1968, Mr. F. Forster, Vehicle Service Clerk, at London, Ontario, was notified by the Terminal Traffic Manager that effective the end of his tour of duty Friday, October 25, 1968, he would be displaced by Mr. R.J. Findlater.

Subsequently, a series of displacements occurred as follows:

Mr. F. Forster displaced Mr. F Donnelly. Mr. F. Donnelly displaced Mr. J Pryce.

Mr. J. Pryce displaced Mr. L Willis. Mr. L. Willis displaced Mr. X

As a result all displaced employees sustained a loss in earnings.

The Brotherhood contends that because Mr. Findlater was released from excepted employment due to discipline measure, that Article 11.10 does not apply and that the displaced employees should be allowed to revert to their former positions and be reimbursed for the loss of earnings.

FOR THE EMPLOYEES:

(SGD.) J. A. PELLETIER
EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:

G. O. McGrath	– Labour Relations Assistant, Montreal
L. Wood	– Superintendent Express, London
A. K. Fryett	– Terminal Traffic Manager, London
B. Noble	– Senior Agreements Analyst, Montreal

And on behalf of the Brotherhood:

J. A. Pelletier – Executive Vice President, Montreal
F. C. Johnston – Regional Vice President, Toronto

AWARD OF THE ARBITRATOR

The Company has, prior to the hearing of this matter, taken the preliminary objection that the matter is not arbitrable. At the hearing, argument was heard upon this objection only, the hearing on the merits being adjourned pending the decision on the preliminary objection.

The Company set out four grounds for its objection:

(1) Article 24.5 of the Agreement was not complied with inasmuch as an aggrieved employee did not raise a complaint.

(2) The complaint raised by the Brotherhood was not submitted at Step 1 of the Grievance Procedure.

(3) The time limits specified in Article 25.3 had expired when the Brotherhood requested arbitration.

(4) The provisions of Section 8 of the Agreement covering the Canadian Railway Office of Arbitration were not complied with.

As to the first ground of objection, Article 24.5 of the collective agreement provides in part as follows:

> **24.5** Any complaint raised by an employee concerning the interpretation, application or alleged violation of this Agreement shall be dealt with in the following manner; this shall also apply to an employee who believes that he has been unjustly dealt with ...

The Company's contention is that no complaint was raised by "an employee" in this matter. Because the preliminary objection may be disposed of on other grounds, it is not necessary for me to make any final disposition of this contention. Two points may be noted, however. First, the Union asserts that in fact an employee did raise the matter as a verbal grievance. Second, it may well be that a grievance may properly be raised by an employee acting through his accredited Union representative. Indeed it is clear from the steps of grievance procedure subsequently set out in Article 24 that Union officials may act on behalf of employees and in the later stages of the process only certain designated Union officials may act. The Company's first contention, then, seems to me to be of doubtful validity.

As to the second ground of objection, step one of the grievance procedure is as follows:

> **STEP ONE:** Within fourteen (14) calendar days from cause of grievance the employee and/or the Local Chairman or his authorized committeeman may present the grievance either orally or in writing to the immediate supervisor, who will give a decision as soon as possible but in any case within fourteen (14) calendar days of receipt of grievance.

The Union asserts that the matter was raised verbally with the Terminal Traffic Manager at London five days before the transfer which has given rise to the grievance. If the announcement of the Company's intention to make the transfer complained of may be regarded as the cause of grievance, then it would appear that step one was followed. The matter was raised in writing in a letter dated October 1, 1968, from an accredited representative of the Brotherhood to the Area Manager of the Company. This was obviously intended as compliance with step two of the grievance procedure. No objection was taken to the grievance in the Company's reply, dated October 21, 1968. The Regional Vice-President of the Brotherhood then appealed pursuant to step three, and it is only in the reply of the Company's Regional General Manager that objection is taken to the procedure. Again, it is not necessary for me to make any final disposition of this ground of objection, but it would appear, in all of the circumstances, that there was substantial compliance with the grievance procedure.

As to the third ground of objection, Article 25.3 of the collective agreement is as follows:

> **25.3** The request for arbitration must be made in writing within twenty-one (21) calendar days following the decision rendered by the Labour Relations Section of the Personnel and Labour

> Relations Department by filing notice thereof with the Canadian Railway Office of Arbitration and on the same date by transmission of a copy of such filed notice to the other party.

The decision of the Labour Relations Section was set out in a letter to the Executive Vice-President of the Brotherhood dated January 16, 1969. The time limits set out in Article 25.3 expired on February 6, 1969, and no request as contemplated by Article 25.3 was received by the Company or by the Office of Arbitration within that time. The Union asserts, however, that such request was in fact made in the proper manner by letter dated January 29, 1969. If this letter had been received in the usual course of post, then the request for arbitration would have been timely.

This raises a difficult question as to the sufficiency of communication by mail, and as to the nature of the onus on any party whose responsibility it is to give sufficient notice in proceedings of this sort. It would appear from the general law that the party whose responsibility it is to give notice bears the risk of breakdown in the method of communication he selects; the matter was not argued, however, and there are no precedents in the labour arbitration area before me. Article 25.3 calls for the "filing" of notice with the office of Arbitration, and the fact is that no such notice was actually filed with the office of Arbitration within the time provided for. While this might be sufficient to dispose of the present case, I prefer in the circumstances not to rest my final decision on this ground.

As to the fourth ground of objection, Section 8 of the Agreement establishing the Canadian Railway Office of Arbitration provides as follows:

> **8.** The Joint Statement of Issue referred to in Clause 4 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement has been misinterpreted or violated. In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours' notice to the other may apply to the Arbitrator for permission to submit a separate statement and proceed to a hearing. The Arbitrator shall have the sole authority to grant or refuse such application.

It is agreed that the union did not comply with this provision. While the matter appears to have been simply an oversight, the Arbitrator has no power to grant relief against any such default in the absence of agreement, and there is no agreement in this case. There has been no waiver or extension of time limits by the Company. By Section 5 of the Agreement establishing the Office of Arbitration, it is provided that the Arbitrator's jurisdiction shall be conditioned always upon the submission of the dispute to the office of Arbitration in strict accordance with the terms of the Agreement.

Having regard to all of the above, it is clear that I have no jurisdiction to hear this grievance. Under the rules of the office of Arbitration, as under the general law, I am strictly bound by the procedures to which the parties have agreed: see **Union Carbide Canada Ltd. V. Weiler**, 70 DLR (2nd) 333, and Canadian Railway Office of Arbitration **Cases Nos. 36, 60, 82, 102** and **142**.

For these reasons, the preliminary objection must be sustained, and the grievance must be dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR