CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 919

Heard at Montreal, Tuesday, March 9, 1982

Concerning

CANADIAN PACIFIC TRANSPORT COMPANY LIMITED

and

BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES

EX PARTE

DISPUTE:

Claims in favour of Mr. R. A. Head of eight hours at punitive rate, also two hours at punitive rate.

BROTHERHOOD STATEMENT OF ISSUE:

Mr. T. J. Murphy, an unassigned employee, performed work for eight hours on Saturday, September 26, 1981. (0645 - 1458 hrs.)

Mr. E. Harris, Terminal Operation Supervisor, performed work normally performed by scheduled employees for two hours on September 26, 1981 (1458 hrs. to 1650 hrs.)

Mr. Murphy is employed by an outside Company on a full-time basis.

Letter of Understanding (page 80 of Collective Agreement) refers to Supervisors performing scheduled work.

The Company rejected request of payment of ten hours at punitive rate in favour of R. A. Head.

FOR THE BROTHERHOOD:

(SGD.) R. WELCH
SYSTEM GENERAL CHAIRMAN

There appeared on behalf of the Company:
N. W. Fosbery – Director Labour Relations, Willowdale

And on behalf of the Brotherhood:
R. Welch – System General Chairman, Vancouver
D. Herbatuk – Vice General Chairman, Montreal

AWARD OF THE ARBITRATOR

Under the letter of understanding referred to, Supervisors are advised that they are expected to ensure that work is done properly and efficiently, and that except in an emergency they are not to carry out any duties normally carried out by members of the bargaining unit.

In the instant case, the material before me shows that, during the course of a two-hour period on Saturday, September 26, 1981, a Supervisor gave instruction in the use of a fork lift to a new employee. In the course of this instruction, the Supervisor operated the fork lift, although he did not do so for the whole period, nor did he replace the employee – who had had previous experience with such equipment – who remained at work throughout. This degree of instruction and assistance, which has no effect whatever on the bargaining unit or any employee's rights, can scarcely be called the performance of duties normally carried out by members of the bargaining unit, and certainly gives rise to no valid claim by Mr. Head, there being no ground for thinking that any work was somehow taken away from him, and which he would have had a right to perform.

The second grievance is said to be based on Articles 36 and 11 of the Collective Agreement. Article 36 deals with "Casual Employees", and provides that they may be employed in Vancouver Terminal. There appears to be no provision for their employment at Victoria, where the work in question was performed. The Union Statement of Issue describes Mr. Murphy as an "unassigned employee", although the thrust of the argument is that he was employed on a casual basis and therefore should not have been employed at all. It was not made clear how, even if that were so, it would follow that Mr. Head, rather than anyone else, should be compensated.

Mr. Murphy was hired by the Company in July, 1981. It would appear that he has been available for work as needed. He is regarded by the Company as an unassigned employee, in that he does not have a regularly scheduled or bulletined assignment. By Article 36.1, casual employees are to be distinguished from unassigned employees. While the terms are not defined, it would seem appropriate to consider Mr. Murphy as "unassigned" (he appears to meet the Union's requirement of being available for work at most times) rather than "casual". The mere fact that Mr. Murphy had outside employment does not, of itself, have any necessary implications for his employment with this Company, whatever its basis, whether assigned, unassigned or casual. If such outside employment affected his availability for work, that could be dealt with as a disciplinary matter.

For the foregoing reasons, both of Mr. Head's grievances must be dismissed.

A recurring matter of dispute between the parties, which arose again in the instant case, relates to the form of submission of the grievance to arbitration in this office. Submission to arbitration is made, where provided for in the Collective Agreement, pursuant to Clause 5 of the Memorandum establishing the Canadian Railway Office of Arbitration. That clause is as follows:

> **5.** A request for arbitration of a dispute shall be made by filing notice thereof with the Office of Arbitration not later than the eighth day of the month preceding that in which the hearing is to take place and on the same date a copy of such filed notice shall be transmitted to the other party to the grievance. A request for arbitration respecting a dispute of the nature set forth in Section (A) of Clause 4 shall contain or shall be accompanied by a Joint Statement of Issue. A request for arbitration of a dispute of the nature referred to in Section (b) of Clause 4 shall be accompanied by such documents as are specifically required to be submitted by the terms of the collective agreement which governs the respective dispute. On the second Tuesday in each month, the Arbitrator shall hear such disputes as have been filed in his office, in accordance with the procedure set forth in this Clause 5. No hearing shall be held in the month from time to time appointed for the purposes of vacation for the Arbitrator, nor shall a hearing be held in any other month unless there are awaiting such hearing at least two requests for arbitration that were filed by the eighth day of the preceding month, except that the hearing of a dispute shall not be delayed for the latter reason only for more than one month.

It will be seen that that provision contemplates that in the normal course, the parties will agree upon a Joint Statement of Issue for submission to this office. The Memorandum provides that where no such Joint Statement is agreed to, the party seeking arbitration may, upon 48 hours' notice to the other party, file an "Ex Parte" statement with the Office. The effect of this is simply to move the matter on so that it may be docketed for hearing. It may be noted that the matter must still be referred within the applicable time limits.

Hearings, of course, are not "Ex Parte" and the failure of the parties to agree on a Joint Statement does not prevent them from presenting their cases fully at the hearing. In the instant case the issue and certain basic facts are clear and not disputed, and a Joint Statement could surely have been produced without substantial difficulty. The Company's policy, it would appear, is simply not to answer requests for a Joint Statement, and in any event not to join in them. This is, in my view, contrary to the procedure contemplated by Clause 5 of the Memorandum, although there is of course no requirement of agreement in every case, or in any particular case. Even if the Company's systematic refusal be considered as contrary to the Memorandum, however, I am not asked to make any specific finding at this time, nor to grant any specific relief. There may well be some question as to my jurisdiction to do so. The foregoing comments are simply made in response to the representations addressed to me.

(signed) J. F. W. WEATHERILL
ARBITRATOR