CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2522

Heard in Montreal, Wednesday, 14 September 1994

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

The matter involves a claim for all lost wages by CanPar Transport employees D. Morley, D. Collins, M. Idris and K. Templeton due to the Company failure to comply with Articles 5.3.6 and 5.3.8.

UNION'S STATEMENT OF ISSUE:

The Union has argued during the grievance procedure that our claim should be honoured given the current language in the collective agreement.

The Union contends that similar matter was settled on behalf of the employees in CROA Case Nos. 1792 and 1793 and asserts that the awards carry the stipulation that the arbitrator "retains jurisdiction in the event of any dispute between the parties …".

The Union requests the arbitrator impose a monetary settlement to the CanPar employees named in the grievance during the period of January 5th, 1994 onward because the Company failed to comply with the past awards and the collective agreement.

The Company has denied our request.

FOR THE UNION:

(SGD.) D. E. GRAHAM
for: EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Director, Terminal, Toronto
D. Dobson	– Area Supervisor, Vancouver

And on behalf of the Union :

D. Wray	– Counsel, Toronto
D. Graham	– Division Vice-President, Regina
A. Kane	– Local Protective Chairman, Vancouver

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that on January 4, 1994 the Company issued lay off notices to persons employed in a classification of dockman in its Burnaby, B.C. Terminal. Its action appears to be consistent with practice in years prior, in light of the decline in freight volumes which normally occurs in the post-Christmas season.

The staff at the terminal are classified as Dockpersons and Warehousepersons A and B. Dockpersons occupy full-time bulletined positions, Warehouse A positions are not full-time, but are bulletined, while Warehouse B positions are part-time, casual and relief positions. It is common ground that the rate of pay for Dockpersons is substantially greater than that for Warehousepersons. Dockpersons are normally assigned to the pre-load function, generally scheduled between 8:00 p.m. and 4:30 a.m., which involves the systematic loading of vans for the coming day's deliveries. Warehousepersons are typically assigned to what is referred to as "the Hub", between the hours of 3:00 p.m. and 8:00 p.m. That work generally involves the less refined work of stripping and loading trailers.

The grievors are dockpersons. They allege that what the Company effectively did was to lay off all employees, including warehousepersons, making them subject to being called to work on an "as needed" basis. In that respect the Union alleges that in fact warehousepersons have been recalled to greater hours of work than were made available to dockpersons, in violation of the layoff and recall provisions of the collective agreement. It submits that the Company is under an obligation to observe the terms of article 5.3.8 in respect of recalling laid off employees, or alternatively, the bulletining requirements of article 5.2.12. Those provisions are as follows:

> **5.2.12** When the hours of a permanent position are changed and affect the starting or ending time by more that one hour and/or the assigned rest days are altered, the position will be rebulletined promptly, but only to the Local Seniority Group concerned.
>
> **5.3.8** Laid off employees will be recalled in seniority order. A recalled employee shall be notified by the Company by registered letter or by hand when required (copy to Local Protective Chairman and General Chairman). An employee who fails to report for duty or give satisfactory reason within 3 calendar days from date of notification shall forfeit his seniority and his name shall be removed form the seniority list.

Bearing in mind that the Union has the burden of proof in this matter, there is no evidence that warehousepersons were made the subject of a layoff in January of 1994, as alleged by the Union. In this regard the Arbitrator accepts the representations of the Company that only dockpersons were laid off, when written layoff notices were distributed to each of them. The layoff took the form of the following notice provided to the persons occupying the classification of Dockperson:

> Due to present business conditions, it is necessary to have a period of layoff as per Article 5.3.6 of the collective agreement. Your attention is also drawn to Article 5.3.1 in the event you are able to displace a junior employee.
>
> Some work may occur on a day to day basis, and you will be called in when it is available. This occasional work does not constitute a recall.
>
> Until such time as you are required back to work on a permanent basis, please consider yourself on layoff, effective …

The material before the Arbitrator confirms that in respect of each of the dockpersons who were notified of the layoff the Company established a work schedule for times when work would be available to them on an individual basis between December 24, 1993 and January 8, 1994. The nub of the grievance is the objection taken by the grievors that the partial assignments of work made to them during the course of the layoff involved, in some cases, fewer hours of work than were made available to some warehousepersons who continued to work in the Hub. They effectively maintain that it is a violation of the collective agreement for employees working on the Hub shift to work more hours, during the layoff of the dockpersons, than the dockpersons worked while performing casual work in their pre-load assignments during the layoff.

The Arbitrator cannot sustain the position advanced by the Union. The evidence before me establishes, on the balance of probabilities, that the only employees laid off were dockpersons who held full-time bulletined positions in the pre-load. At the time of their layoff the notice provided by the Company indicated to the pre-load employees

that they could exercise their seniority to displace into a warehouseperson's positions if they chose to do so. In the circumstances, I do not see how the Union can argue that the Company has violated the layoff and recall provisions, or the seniority provisions of the collective agreement. Clearly the grievors where placed in a position which allowed them to utilize their seniority so as to maximize their working hours and capacity for earnings. Moreover, in those cases where warehousepersons worked longer hours than dockpersons, it appears that they may have been assigned to perform relief work, or in one case to perform computer functions for which they held special qualifications.

Canadian arbitral jurisprudence reflects the preponderant view that a reduction in the hours of work of employees can constitute a layoff. The governing principles were touched upon in an award of Arbitrator Swann in **Re E.S.&A. Robinson (Canada) Ltd. and Printing Specialties and Paper Products Union, Local 466** (1976), 11 L.A.C. (2d) 408 where, at pp. 414 - 416 the Arbitrator commented on the jurisprudence and principles to be respected stating, in part:

> Article 12.2, on the other hand, makes special demands on the company in any exercise of its managerial prerogatives. "Generally", job security must increase in proportion to length of service. In our view such a requirement strengthens an implied limitation on management rights which has been identified by many arbitations: in order for a shortening of the work-week to be within the agreement, it must not be a device to cloak a lay-off without regard to seniority; it thus must not be discriminatory or fall unequally on members of the bargaining unit. If employees are to be treated in any way that distinguishes among them, then the distinction made must be on the basis of the seniority protection in the agreement: **Re United Electrical, Radio and Machine Workers and Canadian Westinghouse Ltd., supra; re United Electrical, Radio and Machine Workers, Local 514 and Amalgamated Electric Corp. Ltd.** (1950), 2 L.A.C. 489 (Cross); **Re U.A.W. and Kysor of Ridgetown Ltd**. (1967), 18 L.A.C. 382 (Weiler); **Re Canadian Brass Ltd. and U.S.W., Local 4125** (1973), 3 L.A.C. (2d) 389 (Weatherill).

Can it be said in the case at hand that the Company has effectively implemented a layoff without regard to the seniority provisions of the collective agreement? I think not. Firstly, employees occupying warehousepersons' positions were not laid off or recalled. There is nothing within the provisions of the collective agreement which would inhibit the prerogative of the employer to continue to utilize their services, even though dockpersons were made the subject of a layoff. As long as the Company acknowledges the right of dockpersons to utilize their seniority to maximize their work opportunities, including the possibility of displacing warehousepersons, the Union cannot assert a violation of the layoff and recall provisions of the collective agreement. On that basis the Arbitrator cannot find that there has been a violation of article 5.3.6 of the collective agreement.

Nor, in my view, can it be said that the Company implemented changes in the hours of any permanent position, so as to invoke the obligation to rebulletin positions within the contemplation of article 5.2.12 of the collective agreement. At most, what the Company did, in respect of dockpersons, was to establish casual hours of work, which were apparently assigned on the basis of seniority, to mitigate the impact of the layoff on the dockpersons who chose not to exercise their seniority during the period of the layoff. The Union has directed the Arbitrator to no provision of the collective agreement which would prohibit the Company from pursuing that practice. Most importantly, the Company followed the course of action which it took while fully respecting the layoff and displacement provisions of the collective agreement.

The Arbitrator is aware that the conclusions drawn in the case at hand differ from those in **CROA 1792** and **1793**, where the facts were essentially similar. In those cases, however, the parties did not plead the full impact of the classification system within the terminal, nor the impact of Appendix C to the collective agreement which governs the employment of warehousepersons. Upon the fuller consideration of all of the factors raised in the instant case, I am satisfied that the Company is correct in its position that the collective agreement was not violated in the way the layoff of December 1993 – January 1994 was implemented.

For the foregoing reasons the grievance must be dismissed.

September 16, 1994

(signed) MICHEL G. PICHER
ARBITRATOR