CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2644

Heard in Montreal, Thursday, 15 June 1995

concerning

CANADIAN PACIFIC RAILWAY LIMITED

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

EX PARTE

DISPUTE:

The interpretation and application of the settlement agreement, dated April 30, 1993 (file #HLG27334).

COUNCIL'S STATEMENT OF ISSUE:

A grievance was advanced under the terms of article 39, clause (b), disputing the Company's interpretation and application of article 42, rule 6, clause (n) of the UTU/CP collective agreement.

On April 30, 1993 a letter of agreement was signed by both parties to establish full and final settlement of the grievance. The letter of resolve provided for the payment of outstanding wage claims and in addition a commitment by the Corporation to reissue instructions governing the application of article 42, rule 6, clause (n).

On May 20, 1993 notice no. 201 was posted providing instruction for the filling of Yard Foremen's vacancies. The instructions contained in the bulletin were the same as the directives which led to the original grievance.

A new grievance was initiated by the Union contesting the way the employer was carrying out the terms of the settlement agreement.

It is the Union's position that the original grievance was resolved on the merits of the arguments advanced by the Union. That this position is supported by the Company's payment of the outstanding wage claims and a commitment to re-issue instruction providing the proper procedure for filling of temporary Yard Foremen's vacancies.

The Union requested that the Company re-issue instructions directing crew calling personnel to apply article 42, rule 6, clause (n)(1). This would include calling employees assigned to the Yard Foremen's spareboard (Ten-day Board) in advance of promoting a helper on the assignment. Further, that all wage claims submitted by available spare Yard Foremen on the 10 day board be paid as presented.

FOR THE COUNCIL:

(SGD.) V. H. HAMILTON
FOR: GENERAL CHAIRPERSON

There appeared on behalf of the Company:
H. B. Butterworth – Labour Relations Officer, Toronto

And on behalf of the Council:
D. A. Warren – General Chairperson, Toronto
R. Gallop – Local Chairperson, Toronto

AWARD OF THE ARBITRATOR

It is common ground that in June of 1979 the Company established yard foremen's spare boards in Montreal and Toronto by an amendment of article 42, rule 6 of the collective agreement. Subsequently rule 6 was amended to allow for the establishment of a yard foremen's ten-day board. Accordingly, when an employee has accumulated ten relief shifts within a two-week period, he or she is placed on the yard foremen's ten-day board. The dispute at hand relates to the proper calling practice to be followed as it applies to employees on the ten-day board at Toronto. It appears to be common ground that a special agreement has been in place with respect of the practice in Montreal, and that no dispute arises in that location.

It is not disputed that by past practice, when the yard foremen's spare board was depleted, the Company would then go to the ten-day board, calling spare yard foremen from that board, and compensating them at time and a half for the work performed. It is not disputed that the Company can, of course, avoid the payment of overtime by regulating the number of the employees on the yard foremen's spare board.

The instant grievance arises as a result of the Company departing from the practice, which appears to have existed for some ten years, until February 22, 1992. On that date Relief Yard Foreman B.T. Barr was not called when he stood first out on the yard foremen's ten-day spare board, and he grieved when the Company called a qualified person other then a spare yard foremen to perform the work in question. It appears that the Company temporarily promoted Yard Helper J. Peddagrew from the yard helpers' spare board. The grievance in respect of some four claims filed by Mr. Barr was resolved by settlement prior to arbitration. It appears that the penalty claims of Mr. Barr were paid. In addition to the payment of the grievor's full claims, the settlement included the following statement:

> In addition to the payment the Company will reissue instructions in the form of a bulletin advising the filling of temporary vacancies or extra yard shifts for Yard Foremen positions will be governed by article 42, rule (n) of the UTU collective agreement.

The instant grievance arises because the Council submits that the Company immediately disregarded the above settlement by reverting to the practice which gave rise to Mr. Barr's grievance in the first place. The Company submits that it has not violated the settlement, or the terms of the collective agreement. Its representative relies on the provisions of article 42, rule 6, which it submits govern the calling of employees to yard foremen's work in vacancies of less than five days. That provision is as follows:

> **Article 42 Rule 6:**
> (n) A temporary vacancy on a Yard Foreman's position of less than 5 days, including extra yard shifts shall be filled in the following manner:
>
> (1) The first man out on the Yard Foreman's spare board.
>
> (2) When not filled under (1) above, the senior qualified Yard Foreman working as a Helper filled the assignment on which the vacancy exists.
>
> (3) When not filled under (1) or (2) above, any qualified Yard Foreman working as a Helper on the assignment on which the vacancy exists.
>
> (4) When not filled under (1), (2) or (3) above, the first out available qualified Yard Foreman on the Yardman's or common spare board.
>
> (5) When not filled under (1), (2), (3) or (4) above, the junior qualified Yard Foreman working as a Helper on another assignment starting at the same time as the assignment on which the vacancy exists.
>
> (6) When not filled under (1), (2), (3), (4) or (5) above, the vacancy shall be filled by the junior available qualified Yard Foreman working as a Helper in the yard where the vacancy exists.

In the resolution of this grievance regard must also be had to the terms of article 42, rule 2(g) which provides, in part, as follows:

> (g) Any shift in yard service in excess of 10 straight time shifts worked by a spare yardman in a bi-weekly pay period will be paid for at time and one-half rate. It is recognized that the Company is entitled to have a spare yardman work 10 straight time shifts in yard service in a bi-weekly pay period. **A spare yardman who has worked 10 straight time shifts in yard service in a bi-**

> **weekly pay period will remain on the extra board, but will not be used in yard service during the remainder of that period if other spare men are available.** (emphasis added)

Further, the Company relies on the language of article 42 rule 2(i) which provides:

> (i) **Nothing in this Agreement shall obligate the Company to work a spare yardman at overtime rate when there is a spare yardman who could work at pro rata rate.**(emphasis added)

Upon a review of these provisions the Arbitrator is compelled to conclude that the Council's position is correct. As is clear from the provisions reproduced above, the first obligation of the Company in filling a vacancy in a yard foreman's position of less than five days is to assign the work to the first person out on the yard foreman's spareboard. While the concept of a ten-day board exists notionally, there is no reference to it within the collective agreement, and for the purposes of the agreement there is only one spare board for yard foremen. There is, of course, a restriction in respect of the calling of spare yard foremen who have worked ten straight time shifts in a bi-weekly pay period, as reflected in article 42, rule 6(g). As is evident from the language of article 42, rule 2(i) the Company is not obligated to assign work to a spare yardman who is on the "ten-day board" where another spare yardman can be assigned to do the work at non-overtime rates. The Company's position, however, pushes the matter further, and effectively asserts that it is entitled to take the view that it is not obligated to work a spare yardman at overtime rates when there is any employee, spare or assigned, available who could do the work at non-overtime rates. It would seem to the Arbitrator relatively evident that if the parties intended that the Company should be free to avoid the assignment of overtime work to spare yardmen when any qualified employee is available to do the work at regular rates, they could have simply said so in the drafting of article 42, rule 2(i). The wording of that provision, however, plainly contemplates a different limitation, as it speaks only of available **spare** yardmen. It is not surprising, therefore, that the practice of some ten years reflected in the material before the Arbitrator was consistent with the interpretation of these provisions being asserted by the Council.

In the Arbitrator's view the terms of article 42, rule 6(n) can be reasonably rationalized with the qualifications reflected in article 42, rules 2(g) and 2(i) of the collective agreement. Those provisions clearly speak to the Company having recourse to the use of other "spare men" and another "spare yardman" to avoid the payment of overtime to a spare yardman who has ten days worked. In the result, the appropriate administration of the collective agreement would require the Company to first apply sub-paragraph (1) of article 42, rule 6(n), and should there be no available yard foreman on the spareboard, save persons who would qualify for the ten-day board, the Company must next look to sub-paragraph (4), for qualified individuals on the yardmen's or common spareboard. Such persons would clearly qualify as "other spare men" within the meaning of article 42, rule 2(g). However, should there be no spare employees available at that point, the Company cannot revert to the application of paragraphs (2), (3), (5) and (6) of article 42, rule 6(n) if there are yard foremen available on the ten-day board. In that circumstances, as reflected in the clear language of the collective agreement reviewed above, the Company is under the obligation to assign the work to those spare yard foremen, even if it must do so at overtime rates. It should be stressed that in analyzing the above provisions the Arbitrator accepts the submission of the Company that although article 42, rule 2(g) and (i) speak to the assignment of spare yardmen, they do apply in respect of the assignment of spare yard foremen. That, moreover, appears to have been the practice between the parties, for some ten years, as reflected above.

For all of the foregoing reasons the grievance must be allowed. The Arbitrator finds and declares that the crew calling procedures advanced by the Council in the instant grievance are correct. The Company is directed to henceforth call employees assigned to the yard foremen's spare board, including the ten-day board, for work at overtime rates before applying rules 6, clauses (n)(2), (3), (5) and (6). As noted above, however, the Company may avoid the assignment of overtime to a yard foreman on the ten-day board by making an assignment pursuant to rule (6), clause (n)(4). The Arbitrator does not find it necessary to direct that all wage claims submitted by available spare yard foremen on the ten-day board, in circumstances which fall within the above interpretation, be paid as presented, as it can be presumed that the Company will respect the interpretation of the collective agreement contained in this award..

June 16, 1995

(signed) MICHEL G. PICHER
ARBITRATOR