CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2939

Heard in Montreal, Thursday, 12 March 1998

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Lay-off notice given to Prairie Ballast Gang.

EX PARTE STATEMENT OF ISSUE:

On August 16, 1993, the Prairie Ballast Gang was given notice that they would be laid off on August 19, 1993.

The Brotherhood contends that: **1.)** The gang was entitled to 30 days lay-off notice in accordance with the terms of the letter of understanding dated March 22, 1993. **2.)** The employees involved were unjustly dealt with in violation of article 18.6 of agreement no. 41.

The Brotherhood requests that the gang members be made whole for all losses incurred and, likewise, that all other affected employees be compensated for all wages lost.

The Company denies the Brotherhood's contentions and declines the Brotherhood's requests.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

E. J. MacIsaac	– Labour Relations Officer, Calgary
R. M. Andrews	– Manager, Labour Relations, Calgary
J. Dragani	– Labour Relations Officer, Calgary
L. Kohlman	– Field Specialist

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. Brown	– Sr. Counsel, Ottawa

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, on the balance of probabilities, that the layoff of the Prairie Ballast Gang on August 19, 1993 was necessitated by unforeseen budget constraints. Tabled in evidence are figures which disclose that as of August, freight revenues were some $23.5 million below expectations, some $16.8 million being attributable to the month of August alone. Reductions were principally occasioned by a shortfall in grain shipments, although the same was true of automobiles, intermodal traffic and import/export container traffic. The Brotherhood relies upon the content of a letter of understanding dated March 22, 1992 which reads, in part, as follows:

> No later than 30 calendar days prior to any plans the Company has that involve any seasonal staff reductions, the Company will advise the Union and employees concerned of when the reduction will occur, the number of employees who are affected and their geographical location.

It is common ground that the above letter was negotiated in substitution of the previous requirement for a semi-annual plan, a provision which issued from an earlier interest arbitration of Arbitrator Dalton Larson, the implementation of which occasioned some difficulty. The Company's representatives submits that the letter of understanding is not mandatory, but only directory, and that the failure to provide notice in accordance with it should occasion no damages or compensation.

The Arbitrator has some difficulty with that submission. To accept the employer's interpretation would reduce the letter to a virtual nullity or, at best, a statement of good intentions. The parties to this collective agreement, who are sophisticated in the ways of collective bargaining, must, I think, be presumed to have intended the letter of understanding to have some meaning. I am satisfied that the letter, whose language is unequivocal, must be viewed as imposing a mandatory requirement upon the Company. That said, however, I am also satisfied that it refers to planned staff reductions, of the type which typically affect seasonal employees. That is precisely the kind of reduction which was anticipated in the predecessor provisions of the semi-annual plan. The article does not deal with unforeseen layoffs, caused by a short term decline in business. I cannot accept the suggestion of the Brotherhood that a thirty calendar day notice was intended to apply to such layoffs of employees, including persons assigned on seasonal gangs. That appears evident from the agreed continuation within the collective agreement of article 6.3 of wage agreement no. 42, which provides as follows:

> **6.3** Employees will be given not less than 4 working days' advance notice when regularly assigned positions are to be abolished, except in the event of a strike or a work stoppage by employees in the Railway industry in which case shorter notice may be given.

The foregoing provision, which applies to extra gang labourers, plainly indicates that the parties anticipate that in some circumstances the Company may implement layoffs for reasons which may be unforeseeable, and which preclude an extensive prior notice.

That is what occurred in the case at hand. At the arbitration hearing the Company adduced compelling evidence that it found itself surprised in August of 1993 by a severe decline in revenues, necessitating across the board budgetary restraint. It is on that basis that the Prairie Steel/Ballast Gang was laid off. The layoff was therefore in conformity with the collective agreement, being necessitated by a short term decline in revenues. The situation then at hand did not fall within the contemplation of the letter of understanding of March 22, 1992, which deals with planned seasonal layoffs. For these reasons, the grievance cannot succeed on the basis of an alleged violation of the letter of understanding.

The Brotherhood also argues the violation of article 18.6 of the collective agreement. The Company responds that the Brotherhood's alternative claim, that the failure of notice to the employees resulted in the employees being "unjustly dealt with", in violation of article 18.6 of the collective agreement raises an issue which is not arbitrable. During the course of the hearing the Brotherhood's representatives made no response, either in their brief or verbally, to that aspect of the Company's submission.

Article 18.6 of the collective agreement reads, in part, as follows:

> **18.6** A **grievance** concerning the interpretation or alleged violation of this agreement, **or an appeal by an employee who believes he has been unjustly dealt with** shall be handled in the following manner. (emphasis added)

As can be seen from the language of the foregoing, the article deals with two kinds of complaint: a grievance in respect of the interpretation or alleged violation of the collective agreement and, separately, an appeal by an employee claiming to have been dealt with unjustly. On its face, the latter form of complaint does not require that there be a violation of any substantive right or benefit articulated within a provision of the collective agreement. Significantly, however, only one type of complaint, namely a "grievance", which concerns the interpretation or alleged violation of the collective agreement, can be progressed to arbitration. That is reflected in the language of article 19.1 which reads as follows:

> **19.1** A **grievance** which is not settled at the last step of the grievance procedure may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work.
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> (emphasis added)

For decades within the railway industry these provisions, and others similar to them, have been interpreted to mean that employees are afforded the right to register complaints about anything, including matters which may not be covered by the collective agreement, in the interest of good relations. Such complaints can constructively be dealt with at the various steps of the pre-arbitration grievance procedure, in an effort to resolve them. If, for example, an employee complains of the state of his or her locker, or the availability of a parking facility, matters which are not dealt with within the terms of the collective agreement, such issues can be raised as an "appeal" within the terms of article 18.6, as distinguished from a grievance. They are, thereafter, to be dealt with solely within the steps of the grievance procedure, and do not proceed beyond that point to arbitration, a process of greater cost and formality and remedial consequences which is expressly reserved to disputes concerning the application, interpretation or administration of specific provisions of the collective agreement.

This issue has been much commented upon in the decisions of this Office, and recently by the Courts. Traditionally boards of arbitration, and the Courts, have recognized the distinction between substantive rights granted under the terms of a collective agreement, and procedural rights, including the right found in a number of collective agreements in Canada, for a union to progress general complaints that employees have been treated unjustly or unfairly, without reference to any term or provision of a collective agreement. Such disputes have, for decades, been recognized as limited to discussion during the course of the grievance procedure, and not subject to arbitration, as reflected in the language of the collective agreements in which they appear. An extensive review of the legal and arbitral jurisprudence is to be found in **CROA 2363**, and need not be repeated here.

The issue raised in the instant dispute, relating to the arbitrability of the Brotherhood's allegation that the employees were "unjustly dealt with" was placed into its historical context by the decision of this Office in **CROA 2768**. That case concerned a dispute between these same parties in which the Brotherhood sought to rely on the application of article 18.6 as granting a substantive right, and was met with the argument of the Company that the matter was not arbitrable. In that case the arbitrator reasoned and ruled as follows:

> As a preliminary matter the Company argues that the instant case is inarbitrable. It submits that the Brotherhood's allegation, which is entirely based on the claim that the grievor has been unjustly dealt with contrary to article 18.6 of the collective agreement, is a claim which cannot be progressed to arbitration, as distinct from a grievance in respect of the interpretation or alleged violation of a term of the collective agreement, as contemplated under article 18.6. The Brotherhood submits that this Office is bound by a determination of the Quebec Superior Court, quashing a prior award of this Office, that any claim by any employee that he or she has been unjustly dealt with, for whatever reason, including reasons entirely unrelated to any specific provision of the collective agreement, is fully arbitrable.
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> The issue of the distinction between the grievance of a substantive right in respect of the interpretation, application or administration of the specific terms of a collective agreement, on the one hand, as compared with a more general claim or appeal by an employee that he or she has been "unjustly dealt with", as reflected in the terms of collective agreements in Canada, has been much discussed by boards of arbitration, including this Office. Historically, both in the railway industry

and in other industries in Canada, employers and unions have made a distinction between the procedural rights which attach to grievances against violations of specific terms of a collective agreement, as compared with general claims or appeals by employees that they have been unjustly dealt with in a manner which may be entirely unrelated to any right, duty or obligation to be found under the terms of a collective agreement. In many collective agreements, for obvious reasons of promoting industrial relations peace, parties have provided that even though an employee's allegation that he or she has in some manner been dealt with unjustly is in respect of some matter which is not dealt with under the collective agreement, the employee and the union may have that claim or appeal dealt with up to and including the final step of the parties' own internal grievance procedure. As a general rule, however, such appeals do not proceed further, and are not contemplated to be subject to final and binding arbitration, which is reserved, both by the **Canada Labour Code**, and by the intention of the parties, to the resolution of disputes with respect to the meaning and application of the specific terms of a collective agreement which, by law, must be reduced to writing. (*See Canada Labour Code, RSC 1985, c. L-2, s. 3(1).*)

The distinction between substantive rights conferred by a collective agreement and procedural rights in respect of the consideration of both grievances and claims that an employee has been unjustly dealt with have long been recognized by boards of arbitration, not only in this Office, but in other industries in Canada as well. In **CN Telecommunications and Telegraph Workers, Local 43** (1976) 11 L.A.C. 2(d), 152 (Rayner), the board of arbitration found that the right of an employee to file a grievance if he or she felt "unjustly dealt with" conferred a procedural right to the benefit of the parties' internal grievance process, but that protection from being unjustly dealt with in any matter, including matters not dealt with under the collective agreement, was not intended to be a substantive right which could be grieved to arbitration. The board there found that the intention of the collective agreement was that claims of an employee to have been unjustly dealt with, without reference to any specific provision of the collective agreement, were to be limited in their consideration to the various steps of the grievance procedure, and could not proceed to arbitration as they did not relate to any alleged substantive violation of a term of a collective agreement. Similarly, in **Canada Post Corporation and the Canadian Union of Postal Workers**, an unreported award of Arbitrator Innis Christie dated August 10, 1988, the board of arbitration concluded that the provisions of the collective agreement there under consideration, which permitted a union representative to present a grievance alleging that an employee had been "treated in an unjust and unfair manner" was not, by the language of the collective agreement, intended to confer substantive rights which could be pursued to arbitration. In that case the Union sought to use the "unjustly dealt with" provision to reverse the termination of a probationary employee who did not have just cause protection under the terms of the collective agreement.

As noted by Arbitrator Christie, and reflected in prior decisions of this Office, it is obviously problematic for boards of arbitration to be adjudicating concepts of justice "at large", without reference of any provisions within the terms of a collective agreement, absent clear and unequivocal language reflecting the intention of the parties that they should do so. There are, moreover, substantial reasons with respect to labour relations stability as well as the clarity and finality of rights and obligations in a collective bargaining relationship, which caution against such unlimited jurisdiction. That includes the open-ended burden on a union which may find itself charged with violating the duty of fair representation if it should fail to take any employee's allegation of unjust treatment, whatever its basis, to a full arbitration hearing. As a result, the awards of this Office have for many years found that provisions in collective agreements allowing for complaints by employees that they have been unjustly dealt with are, absent contrary language in the collective agreement, generally not intended to be taken to arbitration unless they can also qualify as a grievance in respect of the interpretation, application or alleged violation of a specific provision of a collective agreement. That is reflected in **CROA 924, 2157** and **2235**.

However, in a decision dated January 22, 1993, in evocation of an award of this Office, Tessier, J. of the Quebec Superior Court ruled otherwise, as regards the provisions of the collective agreement between the parties to the instant dispute. The Court declined to find any distinction

> between "a grievance concerning the interpretation or alleged violation of this agreement" appearing in article 18.6 and the concept of "an appeal by an employee who believes he has been unjustly dealt with" within the same article, as regards to right to proceed beyond the three steps of the grievance procedure, to arbitration. In effect, the Court, which at p. 8 of its decision referred to the second concept as "grievance appeal for unjust treatment" concluded, in effect, that article 18.6 confers upon all employees who fall under the collective agreement the right to seek redress at arbitration for all matters, including matters entirely outside the collective agreement, in respect of which they believe they have been unjustly dealt with. In other words, contrary to all prior Canadian arbitral jurisprudence, the Quebec Superior Court has found that the second part of article 18.6 was intended to confer a substantive right, and not merely a procedural right, on all employees who fall under the collective agreement, and that they are at liberty to process all claims of unjust treatment, however based, to arbitration. It follows, as a practical consequence, that the duty of fair representation may compel the Brotherhood to process many such claims to arbitration, regardless of the uncertainty, cost or time involved.
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> The industrial relations consequences of such an interpretation have been exhaustively analyzed and commented upon in prior awards of this Office, most recently in **CROA 2363**, where this Office rejected a claim by another union, in respect of another railway, seeking to arbitrate an employee's claim that he had been "unjustly dealt with". (*See also* **CROA 2235**.) There is, therefore, little purpose in reiterating the industrial relations policies which have, for many years, caused employers and unions alike to prefer that general claims of injustice, unrelated to the alleged violation of any specific provision of a collective agreement, not be arbitrable. Nor is there much to add to the reasoning of boards of arbitration, reflected in decades of jurisprudence, that the distinction between substantive rights and procedural rights under collective agreements must be understood and respected, and that absent clear and unequivocal language to the contrary, arbitration under the **Canada Labour Code** is reserved to resolving disputes with respect to the interpretation and application of the substantive provisions of a collective agreement.
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> For the time being, the Quebec Superior Court has ruled otherwise. Although these matters are presently under appeal, this Office is bound to respect the most recent judicial ruling. It is so bound, both in respect of this agreement, and of another agreement governing the same union and the Canadian National Railway Company following a similar decision of Piché, J. of the Quebec Superior Court, issued on February 13, 1992. On that basis, therefore, the initial objection taken by the Company, namely that the grievance is not arbitrable to the extent that is seeks to vindicate a general claim of unjust treatment, not based on any particular provision of the collective agreement, must be rejected.

Since the award in **CROA 2768**, which issued on September 14, 1996, there has been a significant new judicial development in relation to this issue. As noted within the text of **CROA 2768**, the initial decision of the Quebec Superior Court was made in relation to the arbitrability of a claim that an employee was "unjustly dealt with", in an earlier award between the Brotherhood and the Canadian National Railway Company, **CROA 2187**, an award quashed by Piché, J. of the Quebec Superior Court on February 13, 1992. Subsequently, the decision of this Office in **CROA 2284**, which involved the Brotherhood and CP Rail, was quashed by the same Court. The Arbitrator's finding that the Brotherhood's claim that employees had been "unjustly dealt with" was not arbitrable was struck down by the decision of Tessier, J. Significantly, the learned judge in that decision reasoned, in part, as follows:

> Our Court made a ruling on exceeding one's jurisdiction in a similar dispute which raised an identical issue under clause 18.6 on February 13, 1992, the Honourable Ginette Piché ordered a case to be sent back to the same Respondent Arbitrator for him to interpret Clause 18.6 of the collective agreement and decide whether the employees were unjustly dealt with. This judgement is currently before the Court of Appeal.
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> The Court, in exercising its power of supervision is making the same decision.

The original decision of Piché J., appears to have been the first decision of a Court in Canada which would have allowed an employee to proceed to the arbitration a complaint alleging no violation of any provision of a collective agreement, but merely that he or she was "unjustly dealt with". Significantly, however, that decision has now been

reversed by the decision of the Quebec Court of Appeal (Deschamps J.C.A., Nuss J.C.A. and Robert J.C.A.) dated February 5, 1997. Thereafter, the Brotherhood's request for leave to appeal that decision to the Supreme Court of Canada was denied on October 16, 1997 (L'Heureux-Dubé, J., Sopinka J. and Jacobucci, J.).

In the result, the meaning of the equivalent of article 8.16 as found in the CNR/BMWE collective agreement (an issue never raised by the Brotherhood in the original argument at arbitration of **CROA 2187**, not pleaded by the Brotherhood in its *ex parte* statement of issue and not argued in either parties' brief, and therefore not dealt with by the Arbitrator is his award) is now returned to square one. The question which first arises for the purpose of this grievance, therefore, is the authority, if any, which can attach to the decision of Tessier J. dated January 22, 1993. After a careful review of that decision, and of the text of the decision of the Court of Appeal of Quebec, the Arbitrator is satisfied that the decision of Tessier J. should no longer be considered to be binding authority. It is clear from the text of the learned judge's decision that he relied, in substantial part, on the prior decision of Piché J., and was fully aware that her decision was proceeding before the Court of Appeal. Moreover, the reasoning of the Court of Appeal appears to implicitly accept that the Arbitrator proceeded properly to interpret and apply the substantive terms of the collective agreement, and that the contrary analysis of Piché J. was in error. I am therefore satisfied that the decision of Tessier J., which followed the *ratio* of Piché J., has accordingly been annulled. It now falls to this Office to interpret article 8.16 and rule on the arbitrability of the Brotherhood's claim that the employees of the Prairie Ballast Gang were "unjustly dealt with" by the notice of layoff given to them.

In approaching this issue, certain fundamental principles must be kept in mind. Trade unions and employers are required by Canadian labour relations legislation to bargain in good faith and reduce to writing the terms and conditions of employment of employees lawfully represented by the union. The resulting contract, the collective agreement, governs the relationship between the parties, and the rights and obligations of the employees who are covered by it. By both statute law and the terms of collective agreements in Canada, unions and employers are compelled to submit unresolved disputes concerning any aspect of the interpretation, application or administration of their collective agreement to arbitration, for final and binding determination.

It is not surprising, therefore, that unions and employers are careful to control the language and provisions of their collective agreement. They do not confer upon arbitrators a free hand to resolve disputes in accordance with the arbitrator's personal sense of what would be a fair or appropriate outcome. On the contrary, very understandably, they invariably takes pains to restrict the jurisdiction of arbitrators to the terms of their collective agreement. For example, the parties to the instant grievance are signatories of the memorandum of agreement establishing the Canadian Railway Office of Arbitration. Article 12 of their memorandum provides, in part:

> The decision of the Arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.

The above stipulation ensures that the parties are not to be subjected to "management by arbitration", and that the terms of their agreement are protected against being given such meaning as an arbitrator might personally prefer or consider appropriate on the basis of personal whim or predilection. The rationale for such a limitation is understandable, going as it does to the root of the parties' own sovereignty and control over their contractual relationship.

It is, therefore, counter-intuitive for a board of arbitration to lightly conclude that parties to a collective agreement would, absent clear and unequivocal language in their collective agreement, agree to turn the world upside down, and allow arbitrators to hear and resolve disputes which do not involve any substantive term of their collective agreement, and to do so on the basis of the arbitrator's personal sense of what is just and equitable. Arbitration can be a costly and complex process. No reported arbitral decision in Canada and, with the exception of the two decisions of the Superior Court of Quebec recorded by Piché J. and Tessier J., no judicial authority in Canada has ever interpreted a collective agreement in such a way as to allow access to arbitration, with its attached costs and binding consequences, for complaints of employees which are unrelated to any substantive terms of the collective agreement, based on the bare allegation that employees believe that they have been unjustly or unfairly dealt with by their employer. That, however is precisely what the Brotherhood asserts in the statement of issue in the case at hand, by seeking arbitration of such a claim, as part of its alternative position. Indeed, it would arguably go further, pleading implicitly that the "unjustly dealt with" standard trumps the express provisions of the collective agreement and the letter of understanding of March 22, 1992.

This Office has, for decades, recognized and applied the well accepted understanding of the general limitation of the arbitration process fashioned by the parties signatory to the memorandum of agreement establishing the Canadian Railway Office of Arbitration. In doing so, it has followed the unanimous direction of prior and current Canadian arbitral jurisprudence. As noted in **CROA 2363**, it has long been held within this Office that, absent clear and unequivocal language to the contrary, claims by employees that they have been "unjustly dealt with" are not arbitrable, although they may well be discussed constructively at the earlier stages of the grievance procedure. In a case as early as **CROA 924**, heard in March 1982, Arbitrator Weatherill was compelled to deal with a claim on behalf of an employee that she had been "unjustly dealt with" by the failure to provide her a locker, as a result of which she suffered theft of her personal property. The collective agreement contained no article for providing lockers and Arbitrator Weatherill found the grievance to be not arbitrable, commenting, in part, as follows:

> While the Collective Agreement provides that a grievance may be filed where employees claim that they have been "unjustly dealt with", that phrase is to be understood in the context of the grievance procedure under the Collective Agreement. What is contemplated are claims relating to rights or obligations under the Collective Agreement. What was said by the Arbitrator in the **CN Telecommunications Case**, 11 L.A.C. (2d) 152 (Rayner) with respect to the phrase "unfair treatment" in a similar Collective Agreement provision, applies equally here.
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> In any event, even if were open to the employee to grieve in this respect, such a grievance may not proceed to arbitration. By Article 25.2, grievances "concerning the interpretation or alleged violation of this agreement or an appeal by an employee that he has been unjustly disciplined or discharged" may be referred to Arbitration. This is not such a case.

Further, in **CROA 2363**, this arbitrator commented:

> In subsequent cases, including **CROA 2157** and **2235**, which also involved the Corporation and the Brotherhood, the reasoning in **CROA 924** was followed, and it was concluded that grievances founded on the bare allegation that an employee was "unjustly dealt with" can be processed through the grievance procedure, but cannot be taken to arbitration. Significantly, notwithstanding the settled interpretation of articles 21 and 25 of their collective agreement issuing from this Office, the parties have made no material change to the language of those provisions in subsequent renegotiations of the collective agreement. They must, therefore, be taken to have accepted that interpretation as part of their current collective agreement.

There is, needless to say, a substantial collective bargaining policy consideration which underlies the dispute as to the arbitrability of claims that an employees may have been "unjustly dealt with". The requirements of the **Canada Labour Code** envision a certain degree of certainty between an employer and union regarding terms and conditions of employment. Section 3(1) of the **Code** defines collective agreement at follows:

> **"collective agreement"** means an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters;

The requirement that a collective agreement be a written document obviously speaks to the desire for a degree of certainty and clarity in the delineation of the mutual rights and obligations of employers and employees represented by trade unions. It is, of course, open to parties to a collective agreement to write a document which states that employees are to be afforded such justice and fairness as an arbitrator may deem appropriate. It is difficult to imagine such a document, however, much less the interminable arbitration procedures which would be occasioned by disputes as to its interpretation and application. Most significantly, I am satisfied that parties to collective agreements in the railway industry, and specifically the parties to the instant grievance, have not agreed to such an arrangement. To conclude otherwise could visit substantial mischief on the values of stability and predictability so essential to a sound collective bargaining system. As was noted by this Office in **CROA 2235**:

> As is apparent from the foregoing, it is only a grievance concerning the interpretation or alleged violation of the collective agreement, or against an alleged unjust measure of discipline or discharge which may be referred to this Office for arbitration. The more general complaint of an employee that he or she has been "unjustly dealt with" in a manner unrelated to the collective agreement is, in accordance with Article 24.21 of the collective agreement, limited to being heard

> through the first three steps of the grievance procedure, and may not, by the agreement of the parties, proceed to arbitration.
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> This is a long recognized practice in the industry. Needless to say any contrary interpretation would open the arbitration process to each and every complaint of an employee who might feel unjustly dealt with in a myriad of ways entirely unrelated to the rights and obligations circumscribed by the collective agreement. For obvious reasons, grounded in the rational administration of the grievance procedure and arbitration system, an interest vital to unions and employers alike, no such right has ever been established either by statute or by contract in the realm of reported industrial relations in Canada. Before finding that the parties intended that employees should have unlimited access to arbitration over issues unrelated to their collective agreement, such as the location of their lockers, the size of their parking space or the height of their chair, on the basis that they have been "unjustly dealt with", an arbitrator must find clear and unequivocal language to support such an extraordinary result.

It is against the foregoing context, and the overwhelming practice of decades within the railway industry, and indeed in other Canadian industries as well, that the language of articles 18.6 and 19.1 of the collective agreement must be read together. They provide as follows:

> **18.6** A grievance concerning the interpretation or alleged violation of this agreement, or an appeal by an employee who believes he has been unjustly dealt with shall be handled in the following manner.
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> **19.1** A grievance which is not settled at the last step of the grievance procedure may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work.

It is, in my view, significant that article 18.6 makes the distinction between a **grievance** concerning the interpretation or alleged violation of the collective agreement on the one hand and, an **appeal** by an employee who believes that he or she has been unjustly dealt with, on the other hand. Understandably, the latter form of appeal may be treated as a "grievance" for the limited purposes of being dealt with within the steps of the collective agreement grievance procedure provided within article 18. However, in light of the root distinction between "grievances" relating to the interpretation or alleged violation of the collective agreement and "appeals" of alleged unjust treatment differentiated in article 18.6, it is clear that article 19, which governs access to arbitration, is intended for those matters identified from the outset as a "grievance". Consequently a grievance, for the purposes of arbitration, is a matter which, in accordance with the language of article 18.6, concerns the interpretation or alleged violation of a substantive provision of the collective agreement. In the Arbitrator's view, the language of article 19.1, read together with article 18.6 should not, absent clear and unequivocal elaboration, be interpreted to involve so radical a departure from the long established understanding governing parties in the railway industry, including the parties to the instant grievance, namely that disputes as to whether an employee may or may not have been justly dealt, which do not involve the interpretation or application of a substantive provision of the collective agreement, are not arbitrable. Article 18.6 establishes a procedural right of employees to process a complaint which falls beyond the terms of the collective agreement. It does not create a substantive right which can be arbitrated.

For the reasons touched upon above, the contrary interpretation reflected in the decision of Piché J. and Tessier J. in the Superior Court of Quebec must now be viewed as vacated by the decision of the Quebec Court of Appeal of February 5, 1997. It is therefore appropriate for this Office to reaffirm the long standing approach to this issue reflected in such prior awards as **CROA 844, 883, 924, 2157, 2227, 2235** and **2363**, and the general approach of other Canadian arbitrators, as reflected in the **CN Telecommunications** and **Canada Post** awards, reviewed above. The language of articles 18.6 and 19.1 of the collective agreement, provisions negotiated against the background of much of the prior jurisprudence, does not sustain the position of the Brotherhood as to the arbitrability of an "appeal by an employee who believes he has been unjustly dealt with", when those articles' provisions are read carefully together.

For the foregoing reasons the Arbitrator sustains the position of the Company that the instant grievance is not arbitrable, to the extent that it alleges a violation of article 18.6 of the collective agreement, a provision which confers a procedural right to complain through the initial steps of the grievance procedure, but which does not confer a substantive right which can be arbitrated.

For the foregoing reasons the grievance is dismissed.

April 3, 1998

(signed) MICHEL G. PICHER
ARBITRATOR