CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3196

Heard in Calgary, Thursday, 10 May 2001
and in Montreal, Tuesday, 10 July, 2001

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

EX PARTE

DISPUTE:

The use of non-bargaining unit personnel to transport crews at Kamloops.

UNION'S STATEMENT OF ISSUE:

In CROA 3113, heard in May 2000, the arbitrator ordered that the Company cease and desist from contracting out the work of chauffeuring train crews in Kamloops Yard and return said work to the 5.1 bargaining unit.

On or about June 1, 2000, the Company issued instructions to its traffic coordinators at Kamloops outlining new procedures whereby train crews were to be transported. These procedures involved the use of employees of CN not belonging to the 5.1 bargaining unit.

On June 24, 2000, the Union filed a grievance alleging that these instructions, and indeed the practice of the Company, were in violation of article 2.2 of the collective agreement. The Company denied the grievance, stating that "5.1 bargaining unit employees do not have work ownership of transporting crews within Kamloops terminal."

The Union contends that the Company's policy and practice violates article 2.2 and requests a declaration in that respect, as well as an order that the Company rescind its policy and cease and desist from its violation. The Union further requests that all adversely affected employees be made whole.

FOR THE UNION:

(SGD.) A. ROSNER
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:

R. Reny	– Human Resources Associate, Vancouver
S. Zeimer	– Human Resources Associate
S. Blackmore	– Labour Relations Associate, Edmonton
S. Michaud	– Business Partner – Human Resources, Vancouver
D. S. Fisher	– Director, Labour Relations, Montreal

And on behalf of the Union:

A. Rosner	– National Representative, Montreal
B. Kennedy	– Regional Representative, Council 4000, Edmonton
S. Tash	– President, Local 4001

PRELIMINARY AWARD OF THE ARBITRATOR

This award is solely in relation to the preliminary issue of arbitrability. The Union alleges that a policy promulgated by the Company concerning the transportation of train crews at Kamloops, on or about June 1, 2000, violates article 2.2 of the collective agreement, which prohibit the performance of work currently and traditionally performed by members of the bargaining unit by supervisors, non-scheduled employees or employees in other bargaining units. The Company takes the position that the matter was not properly progressed by the Union, and is therefore not properly before the Arbitrator pursuant to the provisions of clause 8 of the memorandum of agreement establishing the Canadian Railway Office of Arbitration. Specifically, it maintains that the Union failed to give the Company forty-eight hours' notice in advance at the time of the filing of its *ex parte* statement of issue.

Paragraph 8 of the memorandum of agreement establishing the CROA reads as follows:

> **8.** The joint Statement of Issue referred to in Clause 5 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 had 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 in writing 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 common ground that the Union did err in the timing of the notice to the Company. Its *ex parte* statement was faxed apparently to this Office at 11:25 hours on April 6, 2001. The Union had previously faxed the notice to the Company at 16:50 on April 4, 2001, giving notice to the employer of their intent to proceed by way of a separate statement of issue. The position of the Company is that the grievance should not be deemed arbitrable as the Union's communication to this Office did not await the expiry of the full forty-eight hours after notice to the employer, as contemplated within paragraph 8 of the memorandum of agreement. It argues that because this Office received the Union's separate statement of issue some four hours too soon, its grievance should be dismissed as inarbitrable. In that regard the Company relies, in part, on a prior decision of this Office, issued in 1969, in **CROA 149**. Secondly, the Company submits that the grievance is not receivable at arbitration as the Union also failed to comply with paragraph 7 of the memorandum of agreement in that it did not exhaust the last step of the grievance procedure prior to filing with this Office.

The grievance was filed on June 24, 2000 at Step 1, by the Union's local chairperson, Mr. Carlo Salituro. No reply to the grievance was provided by the Company. The matter was re-filed by Mr. Salituro at Step 2 by letter dated July 11, 2000. The Company replied by way of letter from Superintendent of Operations J.P. Newton dated July 18, 2000. The Union's regional representative, Mr. Barry Kennedy, next progressed the matter at Step 3 by way of a letter dated August 17, 2000. It also does not appear disputed that the grievance was discussed at joint conference at North Delta on October 2, 2000. As noted above, the Union then moved to file its separate statement of issue with this Office on April 6, 2001, not having received any reply to its Step 3 communication from the Company. It appears that the Company did provide a Step 3 response on April 9, 2001.

The Arbitrator deals with the second objection first. Paragraph 7 of the memorandum of agreement establishing the Canadian Railway Office of Arbitration reads as follows:

> **7.** No dispute of the nature set forth in Section (A) of Clause 4 may be referred to the Arbitrator until it has first been processed through the last step of the Grievance Procedure provided for in the applicable collective agreement. Failing final disposition under the said procedure a request for arbitration may be made but only in the manner and within the period provided for that purpose in the applicable collective agreement in effect from time to time or, if no such period is fixed in the applicable collective agreement in respect to disputes of the nature set forth in Section (A) of Clause 4, within the period of 60 days from the date decision was rendered in the last step of the Grievance Procedure.
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> No dispute of the nature set forth in Section (B) of Clause 4 may be referred to the Arbitrator until it has first been processed through such prior steps as are specified in the applicable collective agreement.

It does not appear disputed that the instant case concerns a dispute of a type contemplated by section (A) of clause 4 of the memorandum.

As is apparent from the foregoing, reference must be had to the parties' own collective agreement to determine whether the grievance has been processed through the steps contemplated within it, as required by clause 7 of the memorandum. In the instant case article 24 of the collective agreement governs the grievance procedure established by the parties. Step 3 of that procedure contemplates an appeal being made by the designated National Representative of the Union. Article 24.5 further provides, in part:

> **24.5**… A decision will be rendered within forty-five (45) calendar days of receiving appeal. The appeal shall include a written statement of the grievance and where it concerns the interpretation or alleged violation of the collective agreement, the statement shall identify the article and paragraph of the article involved.

Article 24.8 of the collective agreement deals with the consequences of there being no timely reply by the Company. It provides, in part, as follows:

> **24.8**Where a grievance other than one based on a claim for unpaid wages is not progressed by the Union within the prescribed time limits the grievance will be considered to have been dropped. Where a decision with respect to such a grievance is not rendered by the appropriate officer of the Company within the prescribed time limits the grievance shall be progressed to the next step in the grievance procedure.

The record before the Arbitrator discloses that the instant grievance was forwarded to the Company at Step 3 by the Union's national representative by letter dated August 17, 2000. No reply to that step was filed by the Company in a timely fashion, as the reply was only provided on April 9, 2001.

The Company's position with respect to the second issue appears to be based on the belief that the Union could not proceed to arbitration until such time as the Company provided its reply to the Step 3 grievance. That is obviously not the intention of the collective agreement, nor could it be. It is counterintuitive to believe that the parties would have intended that the party which is the subject of a complaint or grievance can ultimately control the progressing of the grievance by failing to provide any reply, or being deleterious in doing so. As is clear from article 24.8 of the collective agreement it was open to the Union to proceed on its own after the expiry of the forty-five day time limit which attaches to Step 3. Thereafter it was open to the Union to proceed to arbitration under article 25.2 of the collective agreement which provides as follows:

> **25.2**A grievance concerning the interpretation or alleged violation of this agreement or appeals by employees that they have been unjustly disciplined or discharged and which are not settled at Step 3 may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work in accordance with the regulations of that Office.

Viewed in light of the provisions examined above, the suggestion of the Company that in this case there has not been an exhaustion of the steps of the grievance procedure prior to filing for arbitration is entirely without foundation.

I turn to consider the first issue, relating to the failure of the Union to await the full forty-eight hours following notice to the Company prior to filing its separate statement of issue with this Office. Firstly, it should be noted that the memorandum of agreement governing the Office was amended in 1971, after the decision in **CROA 149**. The records of this Office indicate that the arbitrator has, when faced with an objection concerning the timeliness of a separate statement of issue, ruled at the hearing that the statement in question could nevertheless be received by leave of the Arbitrator (see **CROA 409**). Perhaps most significantly, recent amendments to the **Canada Labour Code** give to the Arbitrator a discretion to extend time limits in relation to the processing of grievances, particularly where to do so results in no prejudice to the opposite party. I am at a loss to understand on what basis the Company can be said to be prejudiced by a four hour difference in the period of notice provided to this Office, following the notice initially provided to the employer of the Union's intention to proceed by way of a separate statement of issue. It is difficult to conceive of a more purely technical objection, without any meaningful adverse consequence to the Company. The courts have long directed boards of arbitration to deal with the real substance of disputes, and not frustrate the industrial relations process by resorting to excessively technical rulings (**Re Blouin Drywall Contractors Ltd. And United Brotherhood of Carpenters and Joiners of America, Local 2486** (1975), 57 D.L.R. (3d) 199 (Ont. C.A.)). In the instant case I have no hesitation to use my discretion to rule that the technical failure of the time limit in the filing of the Union's separate statement of issue with this Office is properly to be

relieved against. Alternatively, were it necessary to do so, in keeping with **CROA 409** I would grant the Union's separate request, made at the hearing, for the filing at the hearing of its separate statement of issue.

On the basis of the foregoing the Company's preliminary objections with respect to arbitrability are rejected.

May 22, 2001 **(signed) MICHEL G. PICHER**
ARBITRATOR

On Tuesday, 10 July, 2001, there appeared on behalf of the Company:
S. A. MacDougald – Manager, Labour Relations, Montreal
D. S. Fisher – Director, Labour Relations, Montreal
R. Reny – Human Resources Associate, Vancouver

And on behalf of the Union:
A. Rosner – National Representative, Montreal
R. Johnston – President, Council 4000, Montreal
R. Massé – Representative, Council 4000, Montreal

AWARD OF THE ARBITRATOR

At issue in this grievance is the Union's allegation that article 2.2 of the collective agreement is violated by the initiative of the Company, concerning the transportation of running crews within Kamloops Yard effective May 30, 2000. The Company's new policy, which is the subject of this grievance, is reflected in the notice posted on that date which reads, in part, as follows:

> Effective immediately, crew transportation within Kamloops Yard will be handled as follows:
>
> - Train crews will be required to utilize the Company vehicle to arrange for transportation to/from their trains as per the Traffic Coordinators (T/C) instructions. The T/C may advise a crew to proceed to a change-off or start location and advise the crew to leave the vehicle at that location. In these instances, arrangements must be made as soon as practical by the T/C for pick up of the vehicle and return to the yard office. This could include the T/C requesting the Motive Power staff to make arrangements for vehicle pickup/drop-off or other driving duties as LMU workload permits.
> - If Light Duties employees available (any craft), these employees will also be utilized for driving, not withstanding the above, or other arrangements that may be made as required by the T/C.
> - T/C will utilize Motive Power Staff (LMUs) when practical for the movement of crews. This would include having LMUs pick up vehicle that may have been dropped at a pick up/drop off location, movement of crews, etc.
> - When no transportation, Motive Power, or light duties personnel available, crew transportation duties will be assigned by the T/C to the Equipment Lead Hand:
>   - Equipment Lead-Hand will designate an equipment employee to deliver and or pick up crews as necessary.
>   - If there are no equipment employees available, the lead hand will be responsible to utilize the vehicle and transport crews.
> - Motive Power stall will be responsible to ensure the crew transport vehicle is fuelled daily.
>
> Any arrangements made by the Traffic Coordinator for delivery/pick up of crews must be done without undue delay. As noted above, unless a transportation crew or light duties personnel available, the Equipment Lead Hand will be responsible to ensure all transportation is done in an expedient manner.

The Union alleges that the foregoing arrangement violates the newly negotiated provisions of article 2.2 of the collective agreement which read as follows:

> **2.2** Supervisors, non-scheduled employees, or employees in other bargaining units shall not engage, normally, in work currently and traditionally performed by members of this bargaining unit.

The background to this dispute is to some extent reflected in the decision of this Office in **CROA 3113**. That award found that the Company had violated the contracting out provisions of article 35.1 of the collective agreement by giving to an outside taxi service the work of ferrying running crews between the yard office and their trains within the yard at Kamloops. The award concluded that the driving of crews in that circumstance was "work presently and normally performed" by bargaining unit employees, in respect of which the Company was contractually prohibited from contracting out. As reflected in **CROA 3113**, historically the driving of running crews had been performed by bargaining unit members, apparently on a full time basis, within what was once the classification of "chauffeur". More recently the work had come to be generally assigned to train movement clerks, although it was also done on occasion by employees from other bargaining units on light duty assignments by reason of physical disabilities, or by supervisors in emergent situations. As found in **CROA 3113**, the task of driving running crews to and from their trains is said to now involve approximately three hours of work per day.

The Union's representative stresses that this is the first time in any dispute between these parties that the language of article 2.2 has been invoked to protect work of the bargaining unit. Its representative does not assert that the language in question grants exclusive work ownership to bargaining unit members. It does, he submits, protect bargaining unit members against the assignment of work "…. currently and traditionally performed" by them to other employees of the Company outside the bargaining unit, or to supervisors, as a normal means of operation. Implicitly, the Union does not assert that such work cannot be assigned outside the bargaining unit on an exceptional basis, a conclusion that would flow from the use of the word "normally" appearing within the language of the article. In other words, the Union's representative maintains that the Company cannot take work which can fairly be characterized as currently and traditionally performed by members of the bargaining unit and make it the normal assignment of supervisors, non-scheduled employees or employees in other bargaining units. No exception would be taken by the Union, for example, if it could be shown that no bargaining unit members were available to perform the work and that urgency required that a supervisor, a non-scheduled employee or an employee from another bargaining unit be pressed into service in the circumstances.

The Company's representative submits that the language of article 2.2 does not confer the protections which the Union claims. He directs the Arbitrator to similar, although not identical, language found within the collective agreement between VIA Rail Inc. and the CAW, Collective Agreement No. 1, first negotiated in 1987-88. Article 2.4 of that agreement provided as follows:

> **2.4** The Corporation also accepts that the main function of supervisors is to direct the work force. Supervisors and employees outside this bargaining unit should not engage, normally, in work currently or traditionally performed by employees in this bargaining unit.

The Company's representative stresses that notwithstanding the language of article 2.4, several decisions of this Office denied work protection claims filed by the predecessor CBRT&GW. In that regard reference is made to **CROA 2237, 2399, 2541,** and **2711**.

With respect to the merits of the dispute the Company's representative makes a number of assertions. Firstly, he submits that crews driving themselves to and from their trains are not being chauffeured by anyone, and consequently there can be no complaint with respect to the reassignment of bargaining unit work. It is submitted that that situation is analogous to that of running trades employees who, elsewhere and in other circumstances, do drive themselves to and from their trains. Further, the Company submits that the adjustment so implemented falls within the concept of the operational change of which notice was served to the Union on May 18, 1999 in relation to the abolishment of a number of clerical positions.

Secondly the Company maintains that crews have historically been chauffeured by employees from other bargaining units who are injured or disabled and who are so utilized on a modified duties basis. As to the third step in the sequence of assignment, the Company's representative stresses that there can be no issue, as the LMU is a bargaining unit employee.

Although the notice contains steps beyond the LMU, in the event that no such individual is available, the Union's representative indicated that should the effort at assignment first be directed to LMUs, there would be no dispute, to the extent that such a priority would recognize that the work in question is first to be assigned to

bargaining unit employees on a normal basis, and to others only exceptionally when bargaining unit members cannot presumably respond to the need.

This case properly occasions a review of the protection of work jurisdiction under the provisions of collective agreement 5.1, under both the current Union and the predecessor CBRT&GW. It appears that in the 1960s concerns arose with respect to supervisors performing work normally done by bargaining unit employees in the non-operating unions. That resulted in the drafting of what came to be referred to as the "McMillan" letter dated July 14, 1967. That letter, signed by the then president of the Company, Mr. N.J. McMillan, came to be Appendix IV of the collective agreement which read, in part:

> This will re-affirm the opinion expressed by Mr. McMillan that the main function of such supervisors should be to direct to work force and not engage, normally, in work currently or traditionally performed by employees of the bargaining unit. It is understood, of course, there may be instances where, for various reasons, supervisors will find it necessary to become so engaged for brief periods. However, such instances should be kept to a minimum.

As is obvious, certain of the language now found in article 2.4 appears to stem from the McMillan letter, albeit within the original context of placing limitations only upon the normal functions of supervisors.

There followed a series of cases in which it was consistently found that subject to the limited protections of the McMillan letter, the language of collective agreement 5.1 did not provide exclusive work ownership protection to the bargaining unit. In **CROA 322** Arbitrator Weatherill affirmed that the collective agreement as it then stood did not prevent the performance of bargaining unit work by supervisors or other non-bargaining unit employees. Indeed, he concluded at that time that the McMillan letter did not form part of the agreement, something which was obviously changed afterward. In that award he stated, in part, the following:

> By article 2.1 of the collective agreement the union is recognized as the sole collective bargaining agent for the employees coming within the classifications listed in article 10, subject to certain exceptions. The work in question here is of a sort normally performed by an employee coming within article 10.2. In this sense, the work was "bargaining unit" work.
>
> The collective agreement does not contain any provisions prohibiting supervisors or other non-bargaining unit employees from performing "bargaining unit" work. The provisions on which the union relies simply describe the unit of employees for whom the union is entitled to bargain, and who are covered by the collective agreement. These provisions do not have the effect of prohibiting the company from having the work of such persons performed by others. Of course, where an individual regularly and substantially performs the functions of a particular job classification, then it is not unreasonable to conclude that such is, as a matter of fact, his classification. For an example of case where such a conclusion was reached, see the **Fittings Ltd**. case, 20 LAC 249. Here, however, it is not suggested that the persons who performed the work in question were bargaining unit employees; the complaint is rather that, being supervisors, they ought not to have performed work coming within the scope of a classification covered by the agreement. As I have indicated, this does not constitute a violation of any provision of the agreement. The matter has been decided in a number of cases, of which reference may be made particularly to **Cases No. 243** and **216**.

(See also **CROA 117, 118, 246, 322, 381, 379, 527, 693, 1160** and **2006**.) As was said by Arbitrator Weatherill in **CROA 381**:

> … Nothing in Agreement 5.1 prevents the assignment to persons in other bargaining units, or outside of any bargaining unit, of tasks which might well be performed by employees in the unit, provided that assignment does not in itself bring the person concerned within the bargaining unit: …

Finally, in **CROA 527**, Arbitrator Weatherill commented:

> I was not referred to any provision in the collective agreement (and there appears to be none) which would require the Company to continue to assign particular work to employees in the bargaining unit, or which would prevent it from "contracting-out" certain work, or from assigning it to employees in another area, or in another bargaining unit, or to employees not coming within any bargaining unit.

It may also be noted that as late as 1983, even after it was appended within the collective agreement, the weight of the McMillan letter was arbitrally questioned by Arbitrator Kates in **CROA 1160**, with emphasis on the phrase indicating that the performance of bargaining unit work by supervisors "*should* be kept to a minimum".

During the course of his submission the Union's representative argued that the decisions of this Office involving VIA Rail and the CAW which the Company seeks to rely on as precedents are not useful in that regard. He notes that in none of those cases did the Union's representative specifically quote or argue the meaning of article 2.4 of the VIA–CAW Collective Agreement No. 1. Rather, the cases appear to have been argued and disposed of on the alternative basis of the **Fittings** case principle relating to whether an individual who performs little other than the tasks of a position classified under the collective agreement in fact falls within the bargaining unit.

Upon a close examination of the cases cited the Arbitrator is compelled to agree with that submission of the Union's representative. In those cases the briefs and the awards in question contain no meaningful argument or analysis as to the scope and application of article 2.4 of Collective Agreement No. 1. Moreover, considerable care should be taken, in any event, in drawing conclusions from awards in cases which were argued by other parties, or in respect of other bargaining units, albeit represented by the same union. That may be particularly so where there are some differences in the language, as is the case upon a comparison of article 2.2 of the instant collective agreement and article 2.4 of VIA–CAW Collective Agreement No. 1.

After careful reflection, the Arbitrator retains a fundamental concern with respect to the submission of the Union as to the meaning and operation of article 2.2 of the collective agreement. The Union's submission asserts that article 2.2 was intended, in the context of a national collective agreement, to give a degree of work jurisdiction protection. Its representative stresses that the protection so sought is not in the nature of exclusive work jurisdiction, an argument that appears to recognize that the work might be performed exceptionally by persons other than bargaining unit employees. In essence what is asserted is a right of bargaining unit employees to have the first opportunity to perform work which is currently and traditionally theirs. In that context, it is argued, it should not be "normal" for a supervisor or a member of another bargaining unit to perform the work or, to put it differently, for the work to be assigned to them as part of their normal duties on a relatively permanent basis.

The difficulty with the submission so advanced is that it seeks to treat each location, in this case the Kamloops Yard, as a discrete jurisdictional location for the purposes of interpreting and applying article 2.2. Such an approach is, however, at odds with the jurisprudence of this Office over many years, in relation to a number of collective agreements as regards work jurisdiction protection. This Office has acknowledged that local practices may form the basis of a Union's protections against contracting out in that particular location. In a contracting out dispute the inquiry is whether the Company has justified the assignment of work to a contractor which is done presently and normally by bargaining unit employees. In that circumstance the issue becomes whether the work contracted is work so described at the location where the contract occurs. In that context this Office has sustained contracting out grievances based on local practices, rather than by reference to practice on a national basis. For example, in **CROA 1966** snow removal at Canadian Pacific's St. Luc and Outremont yards in Montreal was found to be work of the Brotherhood of Maintenance of Way Employees which could not properly be contracted out, although snow removal work of that type may have been performed by other employees or contractors at other locations. To the same effect in **CROA 2145** it was found that the contracting out of the painting of track machinery and equipment in the West Toronto work equipment repair shop was improper. Obviously, in cases of that kind the language of the contracting out provisions of the collective agreement requires an examination of the availability of managerial and labour skills, employees, equipment, facilities and other resources at the location in question, among other things. More immediately, in **CROA 3113** this Office rejected the shared jurisdiction argument of the Company to justify the contracting out of crew chauffeuring in Kamloops Yard to taxis. Not surprisingly, there the jurisprudence argued by the Company was entirely based on cases involving the sharing of work within the employer's own operations, and not on cases which concerned contracting out, a practice expressly prohibited by the collective agreement since shortly after **CROA 526**.

Different considerations arise when a board of arbitration is compelled to interpret and apply language fashioned to protect work jurisdiction on a national basis. I am satisfied that that is plainly the scope and intention of article 2.2 of the collective agreement. It is well settled in the jurisprudence of this Office that collective agreement language conferring jurisdictional protection in respect of work cannot, as a general rule, be asserted on the basis of local practice where in fact under the terms of a provision intended to operate nationally, the work in question is one of shared jurisdiction, performed variously by members of different bargaining units, non-scheduled employees or supervisors at different locations system wide. (See, e.g., **CROA 1655, 1803, 2026** and **2825**.) The principles which

govern work jurisdiction provisions in a national collective agreement and the distinction between those provisions and protections in respect of contracting out were clearly noted in the following passage from **CROA 2026**, where shared jurisdiction was found in respect of hy-rail equipment repairs in a work jurisdiction claim by the Brotherhood of Maintenance of Way Employees:

> The instant grievance is filed under Article 34.3 of the Collective Agreement which provides, in part, as follows:
>
> > **34.3** Except in cases of emergency or temporary urgency, employees outside of the maintenance of way service shall not be assigned to do work which properly belongs to the maintenance of way department, ...
>
> The issue in the instant grievance is whether the Hy-Rail maintenance work at Transcona can be said to be "… work which properly belongs to the maintenance of way department …".
>
> In the Arbitrator's view it is significant that the foregoing provision is contained within the terms of Collective Agreement 10.1, which is national, and not merely regional, in scope. While the parties have negotiated separate agreements which govern such factors as job posting procedures in different regions, they have not made separate or distinct provisions in respect of rates of pay or job classifications as among employees in various locations in Canada who are in the Work Equipment Department. This, in my view, is consistent with an intention to establish a relatively consistent system of work assignments and job descriptions from region to region.
>
> Article 34.3 of the Collective Agreement speaks in the broadest terms, in so far as it is situated in a provision of the Collective Agreement which is of general application across all regions of the Company's operations and speaks in terms of work belonging "to the maintenance of way department". The Brotherhood has not referred the Arbitrator to any case which directly supports its submission that work ownership is to be assessed on a regional or local basis for the purposes of the application of Article 34.3 of the Collective Agreement. Its Counsel cites **CROA 1966**, relating to a dispute involving CP Rail concerning snow removal in two Montreal yards. However, that decision concerns the application of a different kind of provision in respect of a prohibition against contracting out. It does not speak to an issue comparable to the application of Article 34.3 of the Collective Agreement.
>
> Article 34.3 addresses a particular situation, namely the assignment of work to employees of the Company who are outside the maintenance of way service. It is well established in the prior decisions of this Office that where both Maintenance of Way employees and employees within another bargaining unit both perform a particular type of work assignment, work which falls under such a shared jurisdiction cannot be said to belong to Maintenance of Way Employees within the meaning of Article 34.3 of the Collective Agreement (*see, e.g.,* ***CROA 1316***). Moreover, there is no indication in the awards of which I am aware that the concept of work belonging to the Maintenance of Way Department is to be assessed on the basis of the practice in specific shops, yards or regions. The tenor of the Collective Agreement, as noted above, is to the contrary. Moreover, a number of prior awards dealing with Article 34.3, as well as its analogue within the Brotherhood's Collective Agreement with Canadian Pacific Ltd., appear to have been argued and decided on the basis of national practice, rather than regional distinctions (*see, e.g.,* ***CROA 1655, 1803***).

In the Arbitrator's view it would require clear and unequivocal language to sustain the suggestion, implicit in the submission of the Union in the instant case, that protective jurisdictional language of the type found in article 2.2 of the collective agreement was, notwithstanding the jurisprudence, intended to be interpreted and applied on a location by location basis. In that regard it is significant to note that at the initial hearing of this matter the Company's representation, which went undisputed by the Union, was that in many locations in Canada other than Kamloops the transportation of running trades employees within yards and terminals has been performed on a regular and normal basis by supervisors and employees other than members of the bargaining unit. In that context, therefore, and bearing in mind that the Union bears the burden of proof, the Arbitrator cannot conclude that the work which is the subject of the instant grievance can be said to be "currently and traditionally performed" by members of the bargaining unit in the sense contemplated by the language of article 2.2 of the collective agreement.

Nor can the Arbitrator accept the suggestion of the Union's representative that certain comments made with respect to the McMillan letter in **CROA 2264** are particularly instructive for the purposes of this case. At issue there was the meaning of specific language fashioned originally to deal with the concerns of a number of unions relating to placing certain limitations on the performance of bargaining unit work by supervisors. That case did not, as does the instant case, involve a broader and more thorough review of the evolution of jurisdictional protections within the collective agreement of the non-operating unions. That fact is reflected, in part, in the erroneous comment found within **CROA 2264** suggesting that the language of the McMillan letter took its genesis in the contracting out provisions handed down in 1974 by the Honourable Emmet M. Hall. As noted above, in fact the McMillan letter preceded Mr. Justice Hall's landmark award in respect of contracting out.

Does the foregoing analysis suggest that the Union gained nothing by the addition of article 2.4 to the collective agreement in 1998? I think not. In the light of that provision the early observations of Arbitrator Weatherill with respect to the lack of any jurisdictional protection within the collective agreement, confirmed in **CROA 2006**, are plainly no longer operative. While the precise meaning of these provisions must await proper elaboration through case by case interpretation, it would appear that article 2.2, the substance of which is addressed for the first time in this award, does provide to the Union a degree of jurisdictional protection not previously available within the collective agreement. That protection is, however, nevertheless subject to the general principles with respect to the interpretation and application of work jurisdiction provisions which have evolved in this Office, and elsewhere within Canadian arbitral jurisprudence. Most significantly for the purposes of this case, I can see no basis upon which to conclude that the parties intended that article 2.2 was to be interpreted and applied on the basis of work practices within a single region, location, shop or yard.

For all of the foregoing reasons the grievance must be dismissed.

July 13, 2001

(signed) MICHEL G. PICHER
ARBITRATOR