# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 3337

Heard in Montreal, Wednesday, 14 May 2003

concerning

## CANADIAN NATIONAL TRANSPORTATION LIMITED

and

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

## EX PARTE

**DISPUTE:**

The alleged violation of article 12.5 of the collective agreement when the Company changed the methods of calculating the monies due and payable to owner-operators.

**UNION'S STATEMENT OF ISSUE:**

In May of 2002 the Company changed the methods of calculating monies due and payable to owner-operators which resulted in reductions in the amounts of compensation received by these individuals. It is the Union's contention that the Company cannot unilaterally change the rates of pay or methods of calculating the monies due. The Union request in resolution of this matter that the Company be directed to continue to calculate the monies due to employees consistent with what was in effect prior to the change in May of 2002 and that all employees be made whole for any and all losses.

It is the Company's contention that they are entitled to make the changes in question.

**FOR THE UNION:**

**(SGD.) .R JOHNSTON**
**PRESIDENT – COUNCIL 4000**

There appeared on behalf of the Company:

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| D. Fisher | – Director, Labour Relations, Montreal |
| M. Peterson | – Manager Road Operations |
| C. Joanis | – Manager, Labour Relations, Montreal |

And on behalf of the Union:

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| J. Moore-Gough | – National Representative, Chatham |
| M. Panjehali | – Shop Union Representative |

## AWARD OF THE ARBITRATOR

The Union alleges that in May of 2002 the Company changed the method of calculating the remuneration of owner-operators. It asserts that the Company improperly introduced the requirement that owner-operators are to receive payments for intra-zone moves made at the direction of a customer only if the owner-operator is compelled to proceed to another facility of the customer over one kilometre distant, on a public road. The Union maintains that the Company's new policy violates the provisions of the collective agreement and the standard contracts of the owner-operators, whose terms it maintains are enforceable through the grievance and arbitration provisions of the collective agreement.

The Company raises an initial objection as to arbitrability. Its representative submits that the compensation of the owner-operators is governed entirely by the terms of the individual owner-operator contracts and the schedules attached thereto. It is common ground that Schedule B to those contracts includes a negotiated grid determining the amounts payable for pick-ups and deliveries made in some eighteen zones established within the Toronto area. The Company takes the position that there is nothing within the collective agreement which permits the enforcement of the terms of the standard contract, stressing that the contract itself states on its cover page: "not to form part of the collective agreement".

The Arbitrator cannot sustain the issue of arbitrability so raised. Article 12 of the collective agreement plainly deals with the issue here in dispute. Entitled "payment for services and equipment" the article makes a number of provisions with respect to the setting of rates of compensation on a terminal basis. Specifically, article 12.5 provides as follows:

> **12.5** The Company shall calculate, from trip sheets, logs, mileage and other operating records of the Company, the monies due and payable to the owner-operator and remit such monies to the owner-operator less any deductions as provided for in the standard contract between the owner-operator and the Company. Monies due and payable shall be calculated twice each calendar month, for the period covering the first to the fifteenth day, inclusive, and for the period covering the sixteenth to the last day, inclusive, of the month. Remittance will be made within ten days of the end of each such period.

In the Arbitrator's view the foregoing provision is clear. It represents a contractual collective agreement obligation on the part of the Company to "… remit such monies to the owner-operator … as provided for in the standard contract between the owner-operator and the Company." It is precisely that obligation which is alleged to be violated by the instant grievance. The proper calculation and timely payment of monetary remittances was clearly intended by the parties to be a collective agreement obligation, and it must deemed to be enforceable through the grievance and arbitration provisions of the collective agreement. For these reasons the Company's preliminary objection as to arbitrability must be dismissed.

I turn to consider the merits of the grievance. On this issue the Arbitrator has substantially more difficulty with the case pleaded by the Union. It must be borne in mind that in this grievance, as in any non-disciplinary matter, the Union bears the burden of proof. It must establish, among other things, that under the collective agreement, and by incorporation under the provisions of the owner-operators' contracts, the Company has undertaken an obligation to pay to owner-operators the intra-zone payments established within the grid attached to Schedule B of the owner-operators' contract when a customer initiates a move for delivery or pickup. It is not disputed that the grid provides for intra-zone payments where the delivery or pick-up within a single zone is directed by the Company's own dispatcher. The issue at hand, however, concerns the separate circumstance of where an owner-operator is dispatched by the Company to make a delivery or pick-up within a given zone at the location of a customer, whereupon the customer directs the driver to another location of the customer within the same zone.

The Union has referred the Arbitrator to no provision of the collective agreement, or of the individual owner-operator contracts, which addresses the situation so described. Shop Union Representative Masoud Panjehali related at the hearing that he recalled a conversation between himself and former Manager Road Operations Mark Odrowski in June of 2000 which he characterized as resulting in a verbal agreement between the Union and the Company, made locally, whereby Mr. Odrowski undertook that the intra-zone payments would be made where owner-operators are directed by a customer to proceed to another location and are thereby required to travel on or across a public road. Regrettably, the Arbitrator has substantial doubt as to the reliability of that evidence. Firstly, it does not appear disputed that Mr. Odrowski left the service of the employer early in the year 2000. There is filed in evidence a letter

of Mr. Odrowski addressed to all drivers purporting to deal with what he describes as "… some confusion on double drops, drop yards, etc." On the basis of a meeting apparently held on May 20, 1999, his letter dated May 21, 1999 establishes that certain locations are to be considered as a single move. Among those locations named in his letter is Christie's Lakeshore, a location which apparently does involve travel over a public highway to access separate parts of that customer's facility.

The Company action which is the subject of this grievance emerged in a memo to all owner-operators issued by current Manager Road Operations Martyn Peterson. It deals with a number of identified problem areas and includes the following with respect to the payment of intra-zone moves:

> **INTRA-ZONE MOVES TO ALTERNATE CUSTOMER FACILITIES**
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> For those customers that re-direct you to an alternate facility over one kilometre away on a public road, Dispatch will add an additional intra-zone move for the driver to pay for the small roundtrip there and back if required. This only applies to customers that have been authorized for such moves by the Manager Road Operations and published to all Owner Operators.
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> If a driver encounters a customer that is not on the authorized alternate yard lists they must present details to the Manager Road Operations. If it is determined to be payable work the customer will be added to the list and an updated list will be distributed to the drivers and Dispatch. If it is not determined to be payable the submitting driver will be notified.
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> Below is the current list of locations where an Intra zone move will be paid if the driver is re-directed to an alternate yard by the customer:
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> **Rubbermaid** – from 2562 Standfield Road to 1 Caterpillar
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> **Pepsi** – 5900 Falbourne when re-directed to drive around the block and park on the street
>
> **IKO** – when required to scale the load, an Intra-Zone move for each scaling
>
> **Niagara Distribution** – Niagara Falls when re-directed to the alternate yard to facilitate unloading
>
> The following customers will also be paid an intra zone move:
>
> **Apps Cartage** – 6495 Van Deemter when picking up a load that Apps has moved to their alternate yard.
>
> **Goodfellow** – Campbellville when re-directed to the alternate yard.
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> Customer locations where intra zone moves are paid will be reviewed should there be a change in the Customers process that initially resulted in the additional intra zone move.

Upon a careful review of the evidence and material before me, I am satisfied that the characterization of Mr. Peterson's letter advanced by the Company's representative is correct. The better view appears to be that there was simply no basis in contract, whether in the terms of the collective agreement or in the owner-operator contracts, whereby the parties addressed the issue of the payment of an owner-operator who might be compelled by a customer to re-direct a delivery or pickup to an alternate facility. What the letter of Mr. Peterson does is to effectively describe a gratuitous arrangement whereby the Company does undertake to compensate drivers in those situations, on condition that the customer-directed move be to a location one kilometre distant, and that the movement in question be over a public road. For the reasons touched upon above, the Arbitrator is not persuaded that any contrary local arrangement has been properly proven as having previously existed, whether through negotiation with Mr. Odrowski or otherwise.

In that regard it is useful to review the definition of "collective agreement" found within Part I of the **Canada Labour Code**, which governs the bargaining relationship between these parties. That definition is as 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;
>
> (emphasis added)

It is precisely to avoid uncertainty and the mischief of self-serving recollection, whether by an employer or by a union, that Parliament has required that a collective agreement be a document in writing. While there may well be occasions when verbal arrangements may come to bear for the purposes of estoppel or past practice, boards of arbitration can reasonably expect that matters as essential as the condition for the payment of wages for particular services will be evidenced in writing. Regrettably, in the case at hand there is no such evidence, nor sufficient evidence of a verbal arrangement which can be relied on.

In the result, the Arbitrator must sustain the position of the Company with respect to the merits of the grievance. Neither the collective agreement nor the individual contracts of employment of the owner-operators contains any provision which governs the circumstance of intra-zone pickups or deliveries directed by a customer. In that circumstance there is nothing to prevent the Company from having instituted a system of intra-zone payments for such moves in the terms of the memorandum issued by Mr. Peterson on July 10, 2002.

For these reasons the grievance must be dismissed.

May 16, 2003

**(signed) MICHEL G. PICHER**
**ARBITRATOR**