

ARBITRATION

BETWEEN:

CANADIAN NATIONAL RAILWAY
(the "Employer" or the "Company")

- and -

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION
AND GENERAL WORKERS OF CANADA (CAW-CANADA), LOCAL 100**
(the "Union")

With respect to a Union grievance dated December 15, 1999 about the abolishment of six lead hand car mechanic positions at the Walker Yard in Edmonton

AWARD

ARBITRATOR

D. P. Jones, Q.C. Sole Arbitrator

REPRESENTATIVES OF THE UNION

Brian McDonagh CAW National Representative
John Burns V.P., CAW Local 100

REPRESENTATIVES OF THE COMPANY

Patricia Payne LRM, Edmonton
Ross Bateman Senior LRM, Toronto

HEARD at Edmonton, Alberta on October 24, 2005.

AWARD ISSUED at Edmonton, Alberta on October 31, 2005.

I. JOINT STATEMENT OF ISSUE

The Parties have submitted the following joint statement of the issue involved in this arbitration:

DISPUTE:

The abolishment of six Yard Lead Hand Car Mechanic positions at Walker Yard, Edmonton, Alberta, effective November 12, 1999.

JOINT STATEMENT OF ISSUE:

On November 19, 1999, the Company issued written notice under Article 8.1(b) to the Union that six Yard Lead Hand Car Mechanics would be abolished and concurrently six Car Mechanic positions would be established. During the grievance process, the Company contended that prior to the written notice, verbal discussions concerning this change had taken place with the Local Union Officer and as a result, this change was implemented on November 12, 1999.

On July 22, 2002 the Company and the Union settled the initial grievance concerning issuance of an appropriate Article 8 notice. The Company agreed to pay "Maintenance of Rates" to the six employees in question for the appropriate period of time.

On December 15, 1999, the Union filed a second grievance contending that the Company is using Supervisors, Car Mechanics and Clerical personnel to perform the work normally and traditionally preformed [sic] by the Yard Lead Hand Car Mechanics and is in violation of Rules 52.1, 52.2, 12.1, 14.2, and 24.1.

The Union also raised the issue of Estoppel in its March 28, 2000 Step II appeal.

The Union requests that the affected employees named in the notice dated November 19, 1999 be returned to their former classification and wage rate and reimbursed for any lost wages and benefits as a result of the Company's action in this matter.

The Company disagrees and has declined the Union's request.

The parties agree that lead hand car mechanic positions were created 25 or more years ago, and that these positions currently continue to exist at a number of other locations.

This arbitration deals with the second grievance, which relates to whether the Company was entitled to abolish the six lead hand car mechanic positions at the Walker Yard in 1999. (The parties have settled the first grievance, which related to appropriate notice to the affected employees and red-circling of their wages.)

II. RELEVANT PROVISIONS FROM THE COLLECTIVE AGREEMENT

The relevant provisions of the collective agreement read as follows:

RULE 12

Working Supervisor

- 12.1 A Supervisor shall not be allowed to do mechanics' work when mechanics are working on a reduced hourly basis and are available. Supervisors will not perform bargaining unit work except in instances of emergencies. This is not intended to restrict the use of a working supervisor in accordance with established practice at small points.

RULE 14

Promotion to Position of Leading Hand

- 14.1 When vacancies occur in positions, such as a leading hand supervising the work of a gang, employees from the craft will be promoted and the Committee shall be consulted before any appointment is made.

Duties and Responsibilities of Leading Hands

- 14.2 Mechanics, having necessary qualifications and experience in their trade, to be able to direct and supervise the work of a group of employees under the supervision of a recognized supervisor. Notwithstanding the foregoing sentence a coach cleaner shall not be restricted from being awarded a vacancy as a leading hand coach cleaner in charge of coach cleaners only.

The duties of lead hands will not be as a supervisory officer in charge of a department, nor will lead hands have a role in the application of discipline.

- 14.3 Employees released from permanent official or excepted positions will not be permitted to bid on any assignment of lead hand until one year after they have returned into the unionized ranks.

RULE 24

Assignment of Work

- 24.1 Mechanics or Apprentices regularly employed as such shall do mechanics' work as per special rules of the trade, or as otherwise provided for in the Trades Modernization Agreement (Appendix X), or Appendix XIV.

RULE 52

Trade Classifications and Special Rules

52.1 (a) **Car Mechanic**

Car Mechanics work shall consist of inspection, maintenance and repair of freight and passenger cars and performance of all other work, including wrecking service, that is generally recognized as Car Mechanic's work. It is understood that Car Mechanics will perform all electric or any oxy acetylene welding required in the performance of the work.

(b) **Heavy Duty Mechanic**

Heavy Duty Mechanics work shall consist of inspection, maintenance and repair of motive power units and performance of all other work that is generally recognized as Heavy Duty Mechanic's work including facility maintenance. It is understood that Heavy [Duty] Mechanics will perform all electric or any oxy acetylene welding required in the performance of the work.

(c) **Electricians**

Electricians work shall consist of inspection, maintenance and repair of electrical and electronic high or low voltage circuitry systems on motive power and rolling stock and all other work generally recognized as Electrician's work including facility maintenance. It is understood that Electricians will perform all electric or any oxy acetylene welding required in the performance of the work.

Note: Where provincial regulations require that the employees performing these tasks be licensed, the Company will assist the employees in accordance with the Education Financial Assistance Plan and pay costs to obtain the required certificates.

Note: It is understood that throughout this agreement the term "Mechanic" will refer to the above three trades.

RULE 52.2

52.2 The three trades identified in Rule 52.1 shall perform their work independently and exclusively except as otherwise provided for in Appendix X and Appendix XIV.

[Emphasis added.]

III. SUBMISSIONS FOR THE UNION

The Union says that bargaining unit work which was performed by the six lead hand car mechanics at the Walker Yard immediately before their positions were abolished in 1999 was thereafter improperly done by supervisory personnel, clerical staff or lower paid positions in the bargaining unit (such as car men who were not lead hands).

The Union refers to the following provisions of the collective agreement:

- Rule 12, which prevents supervisors from doing bargaining unit work except in emergencies.
- Rule 14, which contemplates that lead hands will be promoted from their appropriate trade.
- Rule 52.1, which identifies "car mechanics" as one of the three types of mechanics, and specifies that car mechanic's work consists of "inspection, maintenance and repair of freight and passenger cars and performance of all other work ... that is generally recognized as Car Mechanic's work" (emphasis added).

- Rule 52.2, which indicates that each of the three mechanics trades generally have exclusive work.

The Union presented evidence from Zane Moorhouse and Wayne Solberg, who were lead hands in 1999 whose positions were abolished, about what their duties were in 1999, which of those duties continued to be performed immediately after the abolishment, as well as which of those duties continue to be performed today at the Walker Yard and by whom. The Union also presented evidence from Rob Martin, who is the current local chair for Edmonton, who had conducted a survey of car men in the yard to ascertain which of the 1999 lead hand duties they were doing. In addition, the Union presented evidence from Bruce Snow, who is a lead hand car man and local chair at the Thornton Yard in Vancouver, who described how his current duties as lead hand compared to the lead hand's duties at the Walker Yard in 1999.

The Union submits that collective agreement makes it plain that because the work was done by bargaining unit members prior to 1999, and the Union has exclusive jurisdiction over this work, this work cannot be done by anyone else. Accordingly, the Union seeks to have the six lead hand car mechanic positions re-established, and to have the six affected employees compensated for lost wages (including overtime and interest) as a result of the improper abolishment of these positions.

Alternatively, the Union submits that even if its interpretation of the collective agreement is incorrect, the Company is estopped from relying on its interpretation of the collective agreement because the lead hand positions have existed for many years; the Company has never raised the matter of lead hands at any of the intervening rounds of collective bargaining (including the one which occurred after the filing of this grievance). The Union says that the estoppel preventing the abolishment of the lead hand car mechanic positions lasts until the

current collective agreement expires, so that this issue can be raised as part of the negotiations for the next collective agreement.

Further, the Union submits that the Company's actions in effect amounts to a demotion of the six employees in question, without just cause, because they have lost their premiums and status as lead hands

IV. SUBMISSIONS FOR THE EMPLOYER

The Company says that there was insufficient work to justify the existence of full-time yard lead hand car mechanic positions at the Walker Yard. Many of the previous duties no longer exist. The duties which continue to exist and were duties of car mechanics have been re-assigned to car mechanics within the bargaining unit. The duties which continue to exist and were duties which the lead hands previously shared with supervisors were never within the exclusive jurisdiction of the Agreement 12 bargaining unit, and have been re-assigned to supervisors. The duties which continue to exist which have been re-assigned to members of the clerical bargaining unit were not the exclusive duties of members of this bargaining unit, and in any event are minuscule in extent.

The Company explained that the parties had engaged in a lengthy analysis at several joint meetings about the previous 59 duties of lead hand car mechanics, which of those duties continue to be performed, and who is performing them.

With respect to duties which are now being performed by car mechanics, the Company reviewed the history of Rule 14.2, referring to wording from the 1980 version of the collective agreement which makes it clear that lead hand car mechanics could be and were assigned

regular car mechanic work, in addition to being an assistant to the Supervisor in performing a multitude of administrative and leadership tasks. While Rule 14.1 makes it clear that lead hand car mechanics must be drawn from the car mechanic trade, there is no separate trade classification for lead hand car mechanics; and Rule 52.1 does not prevent bargaining unit work which was previously performed by lead hand car mechanics from being re-allocated to car mechanics. Of the 59 lead hand car mechanic duties identified by the parties, 5 remain as tasks which were previously either shared between the lead hand car mechanic and a car mechanic, and 8 remain tasks that were always recognized as car mechanic's work. According to one of the Company's witnesses (Ken Langstaff, currently Assistant Superintendent Mechanical for the Alberta Zone),¹ these 8 tasks would on average take 1 hour and 11 minutes per shift to perform.

With respect to duties which were previously performed by lead hand car mechanics and are now performed by Supervisors, the Company identified 11 tasks, all of which it says were previously tasks which were shared between Supervisors and the lead hands, none of which is mechanic's work, and which it estimated would take on average 1 hour and 19 minutes per shift. Because these duties are not mechanic's work, there is no breach of Rule 12.1 (which prevents supervisors from doing bargaining unit work).

With respect to duties which were previously performed by lead hand car mechanics but are now performed by members of the clerical bargaining unit (which was given notice of this arbitration), the Company identified 5 tasks (dealing with pick up and delivery of mail,

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1. In rebuttal, the Union led evidence from Wayne Solberg about his estimates of the average time required to do the duties which were previously done by lead hand car mechanics.

The Company also presented evidence from Ian Campbell, who was the Mechanical Supervisor in charge of the Walker Yard when the lead hand car mechanic positions were abolished, and who now is the Assistant Supervisor Mechanical at the Thornton Yard in Surrey, B.C.

maintaining fax machines and printers, being the contact person for vending machines, maintaining bulletin boards, and supplying various benefit forms) which it estimated might take on average 17 minutes per shift. The Company submitted that none of this work was generally recognized as being "car mechanic's work" and in any event the amount of this work was minimal and would not justify the creation or maintenance of a lead hand's position.

Finally, the Company says that 30 of the 59 duties which were previously performed by lead hand car mechanics are no longer performed, which on average would have taken approximately 7 hours and 42 minutes (or 75%) of a 12-hour shift.

In light of all of these facts, the Company submits that it has not breached the collective agreement by abolishing the 6 lead hand car mechanic positions at the Walker Yard.

With respect to the Union's assertion that the Company is estopped from relying on its interpretation of the collective agreement, the Company submitted that there is no evidence that there has been any representation whatever by the Company that it would not abolish the lead hand car mechanic positions at any given yard. Nor was there any discussion of this issue at the bargaining table (where the Union obviously could have raised the issue, particularly in light of the outstanding grievance).

Accordingly, the Company submitted that the grievance should be dismissed.

V. DECISION

After carefully considering the evidence, submissions and authorities referred to by the parties at the hearing, I have come to the conclusion that the Company's interpretation of the collective agreement is correct and that this grievance must be dismissed for the following reasons.

This collective agreement does not require the Company to have lead hand car mechanic positions, either in general or at any particular location. Rule 14.1 makes it clear that *if* there are lead hand positions, they are to be filled from the respective trade. There is nothing in the collective agreement which specifies that the duties of a lead hand car mechanic (on the one hand) and the duties of a car mechanic (on the other) are mutually exclusive. Indeed, it is clear that lead hand car mechanics can and historically did perform duties which were also performed by car mechanics—that is, bargaining unit work. Accordingly, there is nothing in the collective agreement which prohibits the Company from re-allocating car mechanic duties from lead hand car mechanics to car mechanics.

Secondly, Rule 52.1 makes it clear that car mechanic's work will consist of the "inspection, maintenance and repair of freight and passenger cars and performance of all other work ... that is generally recognized as Car Mechanic's work".² The purpose of Rule 52.1 is to distinguish between car mechanic's work, heavy duty mechanic's work, and electrician's work. It is intended to identify the work which *car mechanics* do in maintaining and repairing freight and passenger cars. It is not intended to protect or provide exclusive jurisdiction for every duty or task which any particular car mechanic (or any lead hand car mechanic) might do, regardless

2. This is fortified by Rule 24.1, which states that "[m]echanics ... regularly employed as such shall do *mechanics' work* as per special rules of the trade, or as otherwise provided for in the Trades Modernization Agreement (Appendix X), or Appendix XIV".

of the nature of that task or duty. To the extent that lead hand car mechanics previously assisted supervisors in performing administrative and organizing duties, that work was not “car mechanic work”—it was not the “inspection, maintenance and repair of freight and passenger cars”. In my view, there is nothing in the collective agreement that requires these administrative and organizing duties to be done by lead hands, and nothing which prevents the Company from re-allocating those duties to supervisors (or others). Because these administrative and organizing tasks are not “bargaining unit work”, the prohibition in Rule 12.1 against supervisors doing “bargaining unit work” has no application.

The same analysis applies to the clerical duties which lead hand car mechanics previously did, but which is now being done by members of the clerical bargaining unit. That work was not the “inspection, maintenance and repair of freight and passenger cars”, and was not “car mechanic’s work”.

Accordingly, in my view, the Company’s abolition of the 6 lead hand car mechanic positions at the Walker Yard does not breach the terms of the collective agreement.

I also reject the Union’s submission that the Company is estopped from abolishing these 6 (or any other) lead hand car mechanic positions for three reasons:

- First, there is no evidence in front of me that the Company has ever made any representation to this effect, so there is no evidentiary basis to support a finding that it would be inequitable for the Company to resile from such a representation.
- Secondly, while arbitrators have sometimes found that the existence of a previous longstanding practice may form the basis for an estoppel, that does not mean that every past practice can do so, or that the Company is estopped from making any changes to

any of its past practices. There must be some evidentiary basis for concluding that the parties jointly did not contemplate that there would be any change to the past practice in question, so that the adversely affected party did not raise this matter in negotiations. There is no evidence in front of me to support such a conclusion.

- Thirdly, an estoppel will normally be terminated as soon as one party asserts its view of its rights contrary to the prior practice (in this case, in 1999 when the Company took the action of abolishing these 6 lead hand positions). However, because it may be inequitable to permit that party to end an estoppel immediately, arbitrators have often contemplated that the prior practice must continue on until the end of the then-current collective agreement, so as to give the parties the opportunity to address the issue explicitly in the next set of negotiations. In the present case, that would take the estoppel to the end of the negotiations for the 2001 version of the collective agreement, during which the Union clearly had the opportunity to attempt to negotiate a change to achieve its view of what the collective agreement ought to provide. However, it did not raise the issue at that time.

In the absence of a specific agreement between the parties to the contrary (and there is no evidence of any such agreement before me), the mere fact that a grievance had previously been filed but not yet resolved would not by itself continue an existing past practice estoppel beyond the end of the negotiations for the immediately following version of the collective agreement (*i.e.*, the 2001 collective agreement). Accordingly, there is no basis for the Union's suggestion that the Company is estopped from relying on its interpretation of the collective agreement until the end of some later collective agreement in effect when the grievance is ultimately decided by an arbitrator.

Accordingly, even if I had found there to be an estoppel in the present case, that estoppel would have ended when the previous collective agreement ended. This has two consequences: First, because the 6 lead hands were red circled, they suffered no financial loss up to the end of the previous collective agreement. Secondly, it would not be possible to grant the Union's requested remedy of reinstating them to their lead hand positions as of the date of this award.

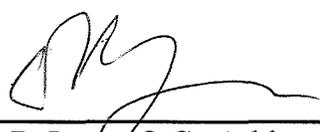
Accordingly, the Union's claim about estoppel cannot succeed in the present case.

Finally, the Union's submission that Company's actions constituted a demotion which required just cause cannot succeed. There is no evidence whatever that the abolishment of these 6 lead hand positions had any disciplinary tinge whatever about it. Nothing in this collective agreement prevents the Company from organizing and managing its work force, including deciding which positions to abolish (subject, of course, to those provisions in the collective agreement relating to notice, seniority and bumping, which are not at issue in this arbitration).

VI. AWARD

The grievance is dismissed.

SIGNED, DATED AND ISSUED at Edmonton, Alberta on October 31, 2005 by:



D. P. Jones, Q.C., Arbitrator