

IN THE MATTER OF AN ARBITRATION

BETWEEN:

BC RAIL

(hereinafter referred to as the "Railway")

AND:

CANADIAN UNION OF TRANSPORTATION EMPLOYEES, LOCAL #1

(hereinafter referred to as the "Union")

(Accommodations Arbitration)

Dispute:

The Company's refusal to provide accommodations to employees who exercise their seniority to locations outside of their Home Stations.

Joint Statement of Issue:

The Company's obligation to provide accommodations to employees who work away from their home station is found at Article 35.1:

"35.1 Locomotive Engineers who are required to work away from their home station will be provided accommodation when:

- (1) Assigned to vacancies as prescribed by clauses 33.3(2), 33.5(9) and 33.5(10).
- (2) Required by the Railway to work at a station outside of the zone where he normally resides and works for a major portion of the year".

The Union contends that Article 35.1 is in effect for employees who exercise their seniority to work at locations outside the zone where they normally reside and work for a major portion of the year. The Union relies upon past practice in support of their position.

The Company contends that Article 35.1 speaks specifically to situations in which the Company requires employees to work at locations outside of their zone and in the voluntary exercise of seniority, the Company is relieved of the obligation to provide accommodation.

The Company further submits that present circumstances are different from those of the past and so past practice cannot be relied upon.

For the Union:

Robert Samson
General Chairperson
C.U.T.E. Local 1

For the Company:

D.A. Lypka
General Manager
Operations

Arbitrator:

H. Allan Hope, Q.C.

Counsel for the Railway:

Michael Keiran

Counsel for the Union:

Wayne Benedict

Place of Hearing:

Vancouver, B.C.

Date of Hearing:

November 26, 2001

I - Dispute

This dispute, as indicated in the joint statement of issue, involves the interpretation of Article 35.1 of the collective agreement and its application to the particular facts. That issue of application relates to whether an engineer who is unable to hold a position in his zone, and who then exercises his seniority "outside of the zone where he normally resides and works for a major portion of the year", falls within the perimeters of Article 35.1. That issue turns largely, if not exclusively, on the meaning to be given to the phrase, "required by the Railway", as it appears in Article 35.1(2). Article 35.1 reads:

35.1 Locomotive Engineers who are required to work away from their home station will be provided accommodation when

- (1) Assigned to vacancies as prescribed by clauses 33.3(2), 33.5(9) and 33.5(10).
- (2) Required by the Railway to work at a station outside of the zone where he normally resides and works for a major portion of the year. (emphasis added)

The position of the Union was that an engineer who is "required" to exercise his seniority outside of his zone in order to avoid layoff must be seen as entitled to accommodation under Article 35.1(2). The position of the Railway is that the language of Article 35.1(2) is clear and does not support the interpretation urged by the Union. Accommodation, said the

Railway, is only available to engineers who are "assigned" or "required by the Railway" to occupy positions outside of their zone, not engineers who exercise their seniority to claim positions in other zones.

I pause to note that the preamble to Article 35.1 uses the term, "work away from their home station", whereas Article 35.1(2) uses the term, "zone where [they] normally reside and work for a major portion of the year". The term, "home station" is defined by reference in Article 33.2. The term "zone" appears to be a term of art between the parties but is not defined. Other terms used in the collective agreement include, "away from home terminals" (Article 25.8); "home" (Article 25.10); "terminal" (Article 24.14); and "zone" (Article 33.10). Some terms appear in more than one provision.

However, it is neither necessary nor advisable to consider the significance of the differing terms. It is sufficient in the context of this dispute to say that, "home station", in the disputed language can be treated as synonymous with "zone". One of the fundamental rules of interpretation is that the meaning of disputed language must be sought in the context of the collective agreement read as whole. In the context of this dispute, the use of multiple terms to designate work locations does not imply an intention in the parties to distinguish their meaning in their application to the language in dispute. The issue is whether engineers who exercise their seniority against positions away from their home station in order to avoid layoff are entitled to be provided accommodation under the terms of Article 35.1(2).

II - Analysis

It is convenient in assessing the positions of the parties to observe that the principles governing the interpretation of collective agreement language in collective agreements falling within the provisions of the Labour Relations Code of B.C. are governed by the decision of the Board in University of British Columbia and Canadian Union of Public Employees, Local 116, [1977] 1 C.L.R.B.R. 13 (Weiler). That decision reflects the fact that the arbitral regime in British Columbia has an unusual and perhaps unique feature in the sense that the Board has the exclusive jurisdiction to pronounce on the industrial relations principles of the Code which will govern arbitrators.

In the exercise of that jurisdiction, decisions issued by the Board are binding upon arbitrators. Of significance in terms of the application of those principles in this dispute is the Board's consideration of when language in a collective agreement will be seen as ambiguous. In UBC and CUPE, the Board was careful to distinguish between the approach to ambiguity taken in the Courts (and in some other arbitral jurisdictions), and the approach taken in this province. In the Courts and in other arbitral jurisdictions the test of whether language is ambiguous is applied to the language itself and it is only when there is a finding of a latent ambiguity or an ambiguity on the face of the language that extrinsic evidence of the bargaining history of the language, or the manner in which the language has been applied by the parties, becomes admissible.

In UBC and CUPE the Board defined a different approach for British Columbia. In particular, the question of when language will be seen as ambiguous is to be addressed in the context of the language read in conjunction with any extrinsic evidence which will serve to indicate whether there is a doubt as to the meaning intended by the parties for the language in dispute. That same principle was extended specifically to evidence of practice in the companion decision of the Board in The Corporation of the District of Burnaby and Canadian Union of Public Employees, Local 23, [1978] 2 C.L.R.B.R. 99 (Weiler).

In applying those principles to the facts in this dispute, the first question is whether there is a doubt as to the meaning intended by the parties with respect to the use of the term, "required by the Railway". The position of the Union, in effect, was that the provision is not ambiguous and extends to engineers who are "required" to exercise their seniority outside of their home terminal in order to avoid layoff. Its alternative position, as I understand it, is that if the language is ambiguous, its meaning becomes clear when account is taken of the practice of the parties with respect to engineers who, to avoid layoff, are "required" to exercise their seniority elsewhere on the system.

The position of the Railway is that the language provides an express limitation on the right of engineers to claim accommodation. In particular, said the Railway, the right only extends to engineers who are assigned to vacancies under Article 35.1(1) or who are "required" under Article 35.1(2) to "work at a station outside of the zone where she or he normally resides and

works for a major portion of the year". Engineers who exercise their seniority voluntarily do not fall within the terms of that express language, said the Railway. Its position with respect to the past practice argument advanced by the Union is that any provision of accommodation outside of the terms of Article 35.1 was ex gratia and was not in response to the language of the collective agreement. In any event, said the Railway, economic times in the recent past have compelled it to pursue operating efficiencies which will assist it in returning to profitable operations, including the elimination of ex gratia benefits.

III - Extrinsic Evidence

(i) - Bargaining History

There was no evidence with respect to the introduction of the language into the collective agreement. However, there was an exchange between the Railway and the Running Trades Sector, (CUTE 1 and UTU), during collective bargaining with respect to various aspects of the collective agreement involving what the Railway described as "practices" that it proposed to discontinue. That exchange was contained in a letter sent by the Railway to the general chairpersons of the two unions on November 10, 2000. The letter reads in part as follows:

Accommodation

BC Rail will discontinue the past practice of providing accommodation (hotels/motels, etc.) to employees at various locations on the Railway in regard to Article 119 (UTU) and 35.1 (CUTE 1) of the respective running

trades agreements. Essentially the issue begins with the fact that a new employee either from within the company from another union, or hired-off the street, cannot be allowed to establish their place of residence simply because they may have lived at, say, Prince George or Vancouver before entering train or engine service. The location where a new UTU or CUTE 1 employee is permitted to establish their place of residence for purposes of Articles 119 or 35.1 will be dependent on their seniority on the Trainmen or Enginemen's seniority roster on the dates that they become either qualified Trainmen or Locomotive Engineers, and locations where their services are required. To be clear, Trainmen, for example, will not be permitted to establish their residence at locations where they cannot hold work, for example, Prince George or Vancouver, unless expressly approved beforehand by the Manager of Crew Services. In the case of Enginemen, accommodations per Article 35.1 will be dependent upon the Engineer selecting a home station where it is reasonable to expect that he/she will be able to hold work. (emphasis added)

The Union responded to the Railway's letter in a letter dated December 11, 2000 in which it advised that it considered the accommodation question to "be a collective agreement issue and a violation of the seniority issues herein". In any event, said the Union, the Railway, having given notice of an intention to change its practice, did not change it until recently, when the change triggered the filing of the policy grievance giving rise to these proceedings.

In the context of this dispute, it was apparent that the Union, in its response in bargaining, was putting the Railway on

notice that it considered that the right to accommodation by engineers who were forced to exercise their seniority outside of their home station to be secured under the existing provisions of the collective agreement. In short, the position of the Union was that the right in question could not be terminated unilaterally by the Railway as opposed to seeking to amend the language of the agreement in collective bargaining.

(ii) - Past Practice

The position of the Union was that the long-standing practice between the parties supported its assertion that engineers facing layoff in their home stations were entitled to receive accommodation when exercising their seniority against positions elsewhere on the system. In its submission in these proceedings, the Union commented as follows on its December 11, 2000 response to the Railway's notice of an intended change in practice:

The Railway did not respond, [to the Union's reply], but there was no change in practice. The railway continued to provide accommodation for all engineers unable to hold a position at their Home Station. This remained the case until approximately three months ago. The United Transportation Union (UTU), representing the trainmen, raised [the] same issue with the Railway. The Railway has recently settled with the UTU by agreeing to provide accommodation for trainmen working away from their home stations.

In that context, the Union filed a copy of a protocol introduced by the Railway with respect to when trainmen would receive accommodation expense under the provisions of the UTU collective agreement. That protocol reads in part as follows:

In the event that an employee is unable to hold a position at his home terminal:

- 1) The Employee shall have the right to place at any terminal on the system where there is a position held by a junior employee who he is entitled to displace
 - a) In such a case, the employee is temporarily working away from his home terminal and the accommodation provisions of Art 119 are applicable. These provisions will continue to apply until such a time as the employee is no longer temporarily working away from home (ie) passes up an opportunity to work at his home terminal or bids a permanent position in a terminal other than his home terminal.
(emphasis added)

The response of the Railway was that the difference in practice between trainmen and engineers was dictated by the difference in their collective agreements. Whereas Article 35.1(2) of the CUTE 1 agreement provided for accommodation expense to be paid when engineers were "assigned to vacancies" or "required by the Railway to work at a station outside (their) zone"; the UTU agreement provided in Article 119 that "a trainman who is temporarily working at a terminal which is not the terminal

where his residence is established will be provided accommodation within the limits of existing facilities".

It was that difference in language, said the Railway, that dictated the difference in practice which has emerged and the protocol entered into with the UTU relating to the provision of accommodation. In illustrating the difference in approach, the Railway also filed in evidence a copy of a draft protocol prepared for CUTE 1. The section of the protocol dealing with accommodations equivalent to the UTU protocol reads as follows:

In the event that a Locomotive Engineer is not entitled to a run or job at his Home or Auxiliary station:

- 1) He shall have the privilege of moving to any station on the system where there is a run or job manned by a junior locomotive engineer. In such case the locomotive engineer is exercising his own seniority and, as such, will be responsible for his own accommodations.
- 2) The Railway may assign him to work away from his home station. Locomotive engineers who are required by the Railway to work away from their home station will be provided accommodation. (emphasis added)

It can be seen from a comparison of protocols that the difference in practice adopted by the Railway creates what may be described as an industrial relations anomaly in which a train crew made up of one or more members who are working assignments away from their home station in order to avoid layoff are receiving accommodation while the engineer who is also working away from her

or his home station for the same reason is denied accommodation. The position taken by the Railway in defence of its practice included the following:

You will also hear testimony that employees have in the past been provided with accommodation even when exercising their seniority to other locations. The Company does not dispute that this has happened on a case by case basis and for compassionate reasons. The Company retains the option to provide accommodations, especially in cases of extreme hardship, and on an interim basis until such time as the relocating employee can secure accommodation of his own. What you will not hear is any evidence, written or verbal, that the Company at any time has abandoned its rights to deny accommodation to other than employees forced away from home stations and to apply Article 35.1(2) as written. Nor will you hear of those employees who have exercised their seniority to other locations without asking for, or being provided with Company supplied accommodations. At one point in time the Company maintained bunkhouses at many locations and it was a relatively simple matter to permit employees to stay at these facilities. The cost of maintenance was relatively the same whether it was occupied or not. Whether there was an obligation to provide this accommodation or not was still governed by Article 35.1(2), but when there was room available, the Company did not deny employees this consideration. Since that time, the Company has increasingly gone away from the bunkhouse business and now contracts the services of hotel and motel businesses in the various communities served. To continue to provide this consideration, when there is no contractual requirement to do so, would constitute an undue hardship on the Company.

In expanding upon that submission in these proceedings, the Railway argued, in effect, that providing accommodation expense to engineers who were forced to exercise their seniority away from their home terminal was ex gratia during more favourable economic times and that current economic conditions mitigated against continuing that expense. In terms of its past practice, it can be seen that the Railway urged that the facts support a finding that payment of accommodation expense (as opposed to bunkhouse facilities) to engineers who were not compelled by the Railway to take assignments away from their home station was done on a case by case basis.

However, the facts adduced by the Union in the proceedings included written question and answer and narrative statements made by 24 engineers relating to the practice of the Railway with respect to providing accommodation to engineers who exercised their seniority elsewhere on the system when they couldn't hold a position at their home terminal. The statements were not challenged by the Railway. Its position, in effect, was that the facts recorded in the statement simply reflected a different perspective with respect to the basis upon which accommodation was being provided to engineers who exercised their seniority away from their home station in order to avoid layoff.

The years of service of the engineers ranged between 14 months and 35 years. The junior engineer, Guy Bouillon, wrote that he was provided with accommodation when he exercised his seniority away from his home station between April 3, 2001 and May 4, 2001. There was no indication in his statement that his was a special case or that he was required to apply for accommodation in

advance. His statement supports the conclusion that the practice relied on by the Union continued in force as late as May of this year.

Two extracts from the statements illustrate the practice as it was understood by individual engineers. Contained in a statement from Phil Spring, an engineer with three years of service, was the following extract:

Q. Have you ever been provided accommodations (free of charge) when working away from your home station by choice? That is you exercised your seniority. The Company didn't assign you?

A. Any time I could not hold my home zone, the Company would tell me at what location [and] what jobs I could hold by number and I would decide where I wanted to go and they would arrange the accommodations.

The experience of Mr. Spring was similar to the experience of all of the engineers in the questionnaires filed in these proceedings. There was no indication in any of the statements that entitlement to accommodations for engineers who exercise their seniority to avoid layoff was done on a case by case basis. The general experience, which was the provision of accommodation as a routine matter, was reinforced by the following extract from a questionnaire filed by Todd Wallace, an engineer with eight years experience:

My whole premise for fighting with Revenue Canada for away from home claims was based on Dave Klitch telling me that, and "we require [engineers] to work wherever there is work available when they cannot hold their zone". Revenue Canada based their denials on the idea that we were exercising seniority, I successfully counteracted that argument based on the above quoted policy coupled with the fact that the railway would not lay-off [engineers].

The implication in all of the questionnaires was that accommodation was made available routinely to engineers who were required to exercise their seniority away from their home station in order to hold a position.

IV - Decision

It is important to note that raised in issue in this dispute is an interpretation by the Railway that would impact adversely on the seniority rights of engineers. That is, engineers have system-wide seniority that gives them the right to claim positions in locations other than their home stations. The right to exercise that seniority to avoid layoff must be seen as a valuable right. Making its exercise subject to the obligation to bear the expense of accommodation falls within the interpretive principle outlined in Tungsof of Canada, (1964) 15 L.A.C. 161 (Reville). On p. 162 Arbitrator Reville wrote as follows:

[A]n employee's seniority should only be affected by very clear language in the collective agreement concerned and that

arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

That principle applies to the facts raised in this dispute. With that principle in mind, I turn to the interpretation of the disputed language. I first conclude on the facts presented in these proceedings that a consistent practice developed between the parties over the course of several collective agreements in which no distinction was made between engineers under the CUTE 1 collective agreement and trainmen under the UTU collective agreement with respect to providing accommodation to employees who were required to exercise their seniority away from their home stations in order to avoid layoff. The consistent practice was for the Railway to provide accommodation routinely to engineers in those circumstances. The position of the Railway in these proceedings, in effect, turns on an assertion that its provision of accommodation in those circumstances was *ex gratia* and could be terminated at any time.

There is a well-established line of arbitral authority in which the question of when certain benefits will be seen as *ex gratia* and subject to cancellation and when an employer will be required to maintain a benefit, either on the basis that provision of it is secured under an implied term of a collective agreement or on the basis of an application of the doctrine of estoppel. Those decisions were addressed by the authors in

Brown & Beatty, Canadian Labour Arbitration, (2001) para. 2:2220, pp. 2-77 to 84.

The question of when a practice with respect to providing accommodation to employees will bind an employer was discussed in Re Cassiar Mining Corp. and United Steelworkers, Locals 6536 & 8440, (1986) 24 L.A.C. (3d) 257. There is a discussion in that case about when a practice of providing accommodation will support an application of the doctrine of estoppel. There the language of the collective agreement did not provide for accommodation.

The Union relied on a long-standing practice to support two alternative assertions. The first was that the fact that accommodation rates were provided for in the collective agreement supported the interpretation that provision of accommodation was an implied term of the agreement. The alternative was that the practice supported an application of the doctrine of estoppel so as to require the Employer to continue providing accommodation until the expiration of the current collective agreement. Both claims were rejected on the basis that extrinsic evidence of bargaining history disclosed an exchange between the parties in which the employer had made it clear that the language of the agreement did not incorporate a commitment to continue providing accommodation and, in effect, that its provision was ex gratia on the part of the employer.

The two positions taken by the union in that case are typical of the positions advised in similar disputes. The authors in Canadian Labour Arbitration noted that in the typical

dispute, a party seeking to rely on a practice to support an interpretation of disputed language will do so on two alternative grounds. The first is an assertion that the practice supports the finding of an implied term of the collective agreement. The second is an application of the doctrine of estoppel requiring that the practice be continued until it can be addressed in collective bargaining. That subject was addressed in Canadian Labour Arbitration on p. 2-70 as follows:

One of the forms of conduct most frequently asserted as the foundation for the application of an "estoppel" is the existence of a practice which deviates from the terms of a collective agreement. In considering past practice in this regard, however, a distinction must be made between creating an estoppel and using it as an aid to the interpretation of the collective agreement. In the latter context, evidence of a past practice is admitted to assist the arbitrator in selecting the correct interpretation of a term in a collective agreement which permits more than one possible interpretation. Such evidence is available, however, only if the agreement is ambiguous or capable of more than one meaning. That restriction, however, has no application to the admittance of such evidence for the purpose of establishing the requirements of the doctrine of estoppel. Nevertheless, arbitrators have been cautious in applying the doctrine of estoppel where the basis of the representation has been an established work practice.

In the context of that analysis it is important to repeat that the question of when language will be seen as

ambiguous is approached differently in British Columbia on the basis of the binding decisions made by the Labour Relations Board in UBC and CUPE with respect to extrinsic evidence of bargaining history and Corporation of Burnaby with respect to extrinsic evidence of practice. In particular, the Board concluded that the industrial relations principles implicit in the Labour Relations Code dictated against examining the question of whether language was ambiguous in a vacuum.

Rather, the instruction to arbitrators is to examine the language in the context of any extrinsic evidence to determine whether it is ambiguous in the sense of creating a doubt as to the mutual intention of the parties in its selection and whether the extrinsic evidence assists in giving it meaning. That approach was dictated in the following two extracts from p. 18 of UBC and CUPE:

Accordingly, in any case in which there is a bona fide doubt about the proper meaning of the language in agreement - and the experience of arbitrators is that such cases are quite common - arbitrators must have available to them a broad range of evidence about the meaning which was mutually intended by the negotiators. In our judgment, it is not consistent with s. 92 of the Code for arbitrators to be prevented by artificial legal blinkers from looking at material which is real-life is clearly relevant to an accurate reading of disputed contract language.

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[T]he arbitrator, when he begins the task of interpretation, will be able to do so with a full appreciation of the relevant exchanges which eventually culminated in the formal

document. With that material before him, the arbitrator can decide whether he entertains any doubt about the meaning intended for the provision in question and, if so, whether the negotiation history is helpful in resolving that doubt. (emphasis added)

In this dispute the evidence of bargaining history, to the extent it exists, supports the interpretation advanced by the Union. That is, when the question of whether Article 35.1 served to deny engineers access to accommodation when they were required to exercise their seniority away from their home terminal in order to avoid a layoff was addressed in the form of the notice of a change in practice given by the Railway, the response of the Union was to assert that entitlement to accommodation in those circumstances was secured in the collective agreement. The implication of the Union's letter was that any change in the existing practice should be negotiated between the parties. The Railway did not pursue the issue in collective bargaining and is not now in a position to rely on the plain meaning of the language interpreted without reference to past practice.

Turning then to the evidence of past practice, it supports the interpretation of the Union in that the facts reveal a consistent practice relating to engineers who were required to exercise their seniority away from their home station in order to avoid layoff. The significance of the practice is to be weighed in the context of the following comments on p. 102 of District of Burnaby:

If the board is going to draw inferences, in our view it should have the background and the basis on which the parties were in fact operating. All this means is that we should have a complete understanding of the way in which the parties carried out their bargain if we are to "have regard to the substance of the matters in dispute". (emphasis added)

On the facts presented in this hearing, "the way in which the parties carried out their bargain" in the context of this dispute was that engineers required to exercise their seniority away from their home terminal in order to avoid layoff were given accommodation. In addition, two other factors emerged to support the Union's interpretation. The first arises by implication in a questionnaire used by the Railway with new employees. It is entitled, "The Working Conditions Engine Service Trainees" form. The form's preamble provides that trainees must:

[R]eview the working conditions outlined ... and write your response ... it is important that you are aware of and willing to comply with these conditions.

One of the questions, which relates to accommodation, reads as follows:

After you have qualified in Engine Service you may be required to work away from home. If work is reduced at your terminal you will be required to exercise your seniority at other terminals. Are you prepared to do this? (emphasis added)

The significance put on that question by the Railway was that if it was intended that accommodation would be provided to engineers who were required to exercise their seniority away from their home terminal in order to avoid layoff, the question would have incorporated that guarantee. However, the question is at least equally consistent with the interpretation advanced by the Union in the sense that it provides that engineers "will be required to exercise [their] seniority at other terminals" with no caution that in meeting that requirement they would have to provide their own accommodation.

In the context of Article 35.1(2), the term, "you will be required to exercise ... seniority at other terminals", must be read as relating to a circumstance other than those in which the Railway assigns engineers to vacancies under Article 35.1(1). In the three circumstances recited in that provision, it is the junior engineer who is compelled to accept the assignment. The "exercise of seniority" does not arise. Presumably the phrase, "will be required ... to exercise seniority" used in the question falls within the language of Article 35.1(2). If the question is given a liberal reading, it is consistent with the conclusion that the expectation that engineers who cannot hold a position in their home station will exercise their seniority to a location where they can hold, brings them within the concept of engineers "required by the Railway" to work at another station within the meaning of Article 35.1(2).

In short, the "requirement" to exercise seniority which is built into the question reflects a policy in which, to paraphrase the question, "if work is reduced in an engineer's

home terminal, the Railway will require the engineer to exercise seniority at another terminal". The existence of that policy is not inconsistent with the evidence of practice given by the engineers who filed statements. In any event, I conclude on the facts that the extract from the questionnaire relied on by the Railway is at least consistent with the interpretation advanced by the Union.

The second factor supporting the Union's interpretation arises from the structure of the collective agreement read as whole. That interpretive principle is addressed in Canadian Labour Arbitration in para. 4:2100 on p. 4-36 as follows:

The context in which words are found is also a prima source of their meaning. Thus, it is said that the words under consideration should be read in the context of the sentence, section and agreement as a whole.

In the application of that principle in this dispute there arises what is sometimes referred as a latent ambiguity. That concept was defined in Leitch Gold Mines Ltd. et al. v. Texas Gulf Sulphur Co. (Inc.) et al. (1968) 3 D.L.R. (3d) 161, [1969] 1 O.R. 469 (Ont. C.A.). On p. 216 the Court said:

[W]here the language is equivocal, or if unequivocal but its application to the facts is uncertain or difficult, a latent ambiguity is said to be present. The term "latent ambiguity" seems now to be applied generally to all cases of doubtful meaning or application.

In particular, the facts did not disclose the circumstances in which the term "required by the Railway" in Article 35.1(2) would be applied as distinct from "assigned to vacancies" in Article 35.1(1). It is clear in context that "assigned to vacancies" involves an assignment made under either of the three articles specifically cited. In each case, those articles contemplate a right in the Railway to compel a junior engineer to accept an assignment that has not been filled by bid. Article 33.3(2) deals with "a permanent vacancy or a new assignment". Article 33.5(9) applies to a temporary position; and Article 33.5(10) provides the Railway with the discretion to assign the vacancy to a junior engineer working the spareboard if there is no auxiliary spareboard in the subdivision affected.

The contextual question arising from that structure relates to what meaning is to be assigned to the term "required by the Railway to work at a station outside of the zone where he normally resides and works for the major portion of the year". That is, what other provision of the collective agreement gives the Railway the discretionary right to "require" an engineer to work at a station other than her or his home station? If that phrase has application to assignments made under Article 35.1(1), it would be a redundancy, a result which is inconsistent with the governing principles of interpretation.

A further question arising from an examination of the collective agreement relates to Article 33.5(14) in which the same language appearing in Article 35.1 appears in the context of temporary vacancies. Once again, the question arises with respect to what the parties can be taken to have meant in

Article 35.1, which is a provision of general application, and which, giving the language its ordinary meaning, would appear to have application in all circumstances, including temporary assignments. The title to Article 35, which is restricted to Article 35.1(1) and (2), is, "Accommodation Away From Home". That language would appear to encompass any assignment away from home including temporary assignments.

When the disputed language is read in the context of the collective agreement, the least that can be said is that the term, "required by the Railway" is ambiguous. The only basis the Railway was able to advance in support of its interpretation was the phrase itself. However, the phrase must be interpreted in the context of the extrinsic evidence of bargaining history and practice. When read in that context, a doubt arises with respect to the meaning intended by the parties in the sense contemplated in UBC and CUPE. The phrase, "required by the Railway", in the absence of the extrinsic evidence, could be seen as supporting the Railway's interpretation. However, when it is read in the context of the extrinsic evidence, the Union's interpretation is to be preferred. The remedy available to the Railway is the one identified in UBC and CUPE. It is to raise the issue in the next round of collective bargaining and seek to have the provision amended.

In the result, the grievance is granted. Engineers are entitled to accommodation under Article 35.1(2) in circumstances where they are forced to exercise their seniority away from their home terminal in order to avoid layoff. Engineers who have been denied accommodation in those

circumstances are entitled to be compensated for expenses they have incurred. I will retain jurisdiction to assist the parties in applying this award if that becomes necessary.

DATED at the City of Prince George, in the Province of British Columbia, this 4th day of December, 2001.

"H. Allan Hope, Q.C."

H. ALLAN HOPE, Q.C. - Arbitrator