IN THE MATTER OF AN ARBITRATION

BETWEEN:

BC RAIL

(hereinafter referred to as the "Railway")

AND:

CANADIAN UNION OF TRANSPOTATION EMPLOYEES, LOCAL #1

(hereinafter referred to as the "Union")

(Squamish Shoptracks Arbitration)

Dispute:

Claim(s) of Locomotive Engineer L. Preuss for October 31, November 28 & November 30, 2000.

Joint Statement of Issue:

It has been reported that on the above dates, the shop staff were observed "performing switching operations" on the shop tracks in Squamish.

The Union contends that such work is an exclusive entitlement of their members and that shop staff are neither qualified nor licensed to perform this work.

The Union also contends that the shop staff in these instances was performing "yard service" which is a violation of Rule 10(a) of the collective agreement.

The Company contends that there has been no violation of the collective agreement and has declined payment of the claim(s).

For the Union:

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

For the Railway:

D.A. Lypka
General Manager
Field Operations

Arbitrator: H. Allan Hope, Q.C.

Counsel for the Employer: Michael Keiran

Counsel for the Union: Robert Samson

Place of Hearing: Vancouver, B.C.

Date of Hearing: September 24, 2001

Dispute

In this dispute the Union position is that it is a breach of the collective agreement for the Railway to assign excluded supervisors (shop staff) to "perform switching operations" on shop tracks at Squamish. In terms of the facts, the Union filed the following letter from Local 170:

> RE: Hostlers – BC Rail
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> In response to your letter/questions on the above topic, I can confirm the following information.
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> 1) The employees performing the hostlers' positions on the shop tracks at BC Rail are supervisory personnel and are not union members.
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> 2) Historically, these positions have been occupied by ex 170 labourers and the "relief" of these positions is still performed by our members "set up" in a supervisory capacity on a temporary as and when required basis. While performing "relief" hostler duties, our member are working outside the collective agreement.

The Union also relied on a letter from the Provincial Government with respect to the application of regulations governing operations of the Railway. The letter was from Susana Katz, the chief inspecting engineer for the Boiler, Gas & Railway Safety Branch of the Ministry of Municipal Affairs. The letter reads as follows:

> Thank you for your letter of April 23, 2001 regarding an interpretation of Section 142(6). This regulation permits a "qualified employee" (a person other than a motive power operator) to operate/move equipment on designated shop tracks. The only equipment that can be moved by a "qualified employee" is equipment moved for servicing or repair. In a motive power repair ship this means motive power. This is not intended to mean that supply cars, ballast cars, fuel cars, freight or passenger cars can be switched by shop staff. The most recent change to this rule allowed a person other than a shop foreman to move motive power in and out of the shop. The term "qualified" is used to indicate that the employee moving the equipment must have training in order to safely move the equipment under those specific conditions found on the designated shop track. Certification as a Motive Power Operator (hostler) is not required. It should be noted that non motive power equipment on car shop and MOW shop tracks is moved by Certified Motive Power Operators. (emphasis added)

The submission of the Union was that the work in which the supervisor was engaged on the days in question was switching, not merely the movement of engines for repair. To place the grievance in perspective it is useful to set it out. It reads in substance as follows:

> On three separate occasions (Oct. 31, Nov. 28, Nov. 30) the shops were observed using BC Rail Locomotives to switch cars from one track to another on the shop tracks. C.U.T.E. 1 Locomotive Engineers are under contract through our collective agreement to operate locomotives for the purpose of

> SWITCHING and movement of TRAINS. We are also licensed by the Ministry to operate BC Rail Locomotives for the purpose of SWITCHING and movement of TRAINS. Shop staff are not trained to do such work and are not licensed to do such work. They also are not qualified in the operating rules that we as Locomotive Engineers have to abide by. With these employees doing "yard service", which is what they are doing by switching cars around on the shops, this violates Rule 10(a) of our collective agreement. There are enough Yard Crews in Squamish to facilitate the shops in their needs for a switch. When the Shop Foreman was approached by Mr. Preuss as to why they were switching, the Foreman told him that he had called the coordinator for a switch but the coordinator did not assign the work and he got tired of waiting. Perhaps in the future the Yard Coordinators could plan out their work to accommodate the shops in their switching needs. (emphasis added)

The position of the Railway as set out in its submission is as follows:

> If the car can be moved expeditiously by the yard crew, that is the end of the matter. Unfortunately, as recognized in the union's Step I grievance this does not always result, and the car sometimes remains at the shop door. In the present matter it is acknowledged that the Shop Foreman first applied to the coordinator to have the required moves made by the assigned yard crew, and it was only when this request was not acted upon did the shop foreman undertake the movement on his own. Of course, when the incoming track is blocked, so are other movements in and out of the shop and the entire facility can become idled. It is in these rare instances that

> shop staff will simply remove the car to an adjacent track in order to get the facility into production once more. As to the union's alternate position, that the supervisory personnel performing the shop track movements are neither qualified nor certified, the Company respectfully submits that this is a matter that is outside the collective agreement and so outside your jurisdiction. If there are outstanding issues that need to be resolved, it is more appropriate that the Company address those issues directly with resources within the Ministry who approves training and provides the necessary and required certification, and not in today's arbitration forum … (emphasis added)

I pause to note that I agree with the submission of the Railway with respect to the Union's alternate position. That is, the fact that the disputed movements may or may not have been in breach of Ministry regulations is irrelevant to the issue of whether those movements were in breach of the collective agreement. That is, if the movements, viewed independent from the regulatory issue, were not in breach of the collective agreement, the fact that they may have been in breach of the regulations would not constitute a breach of the collective agreement. In short, the question is limited to whether assigning the movements to non-bargaining employees was a breach of the collective agreement. Turning to that essential question, the Union based its grievance upon Rule 10(a) which reads as follows:

> Article 4, Rule 10(a)
>
> Where reference is made in this Article to the term "yard service", it shall be

> understood to have meaning to service performed by employees governed by yard rules and conditions.

The Railway's position was that the provision did not vest exclusive jurisdiction in the operation of a yard engine in the Union. As stated, its position with respect to the Union's alternative submission was that it was irrelevant to the essential issue of whether the Union could claim exclusive jurisdiction over the disputed movements. In its submission the Railway wrote:

> The Company submits that CUTE 1 cannot claim exclusive entitlement to switching moves on the Squamish shop tracks on Oct. 31, Nov. 28 or Nov. 30, 2000. <u>They do not have the exclusive entitlement to this work, either by collective agreement or by practice</u>. The Company further submits that any discussion of the certification and qualification of railway personnel by the Ministry is properly a matter between the Ministry and the Railway. These matters are outside the collective agreement and outside the scope of the arbitrators authority. Lacking a defined delineation of the Locomotive Engineer's duties, the Company submits that it is free to assign work as best suits the needs of the operation, <u>especially when such work is of such a minor and infrequent nature as that under review today</u>. The Company emphasizes that the integrity of the bargaining unit is in no way impacted by its actions, and that <u>the Company will continue to assign this incidental work when assigned yard crew are available to perform the tasks, and it does not interfere in their other chores</u>. The Company especially should not be required to call out a yard and engine crew from forty miles away, at

> considerable expense to simply move a car from one shop track to another; a chore that should be completed in fifteen minutes or less. (emphasis added)

The question raised in this dispute is whether the Railway was free to assign the movements to management employees. That issue has been addressed extensively in the arbitral authorities. Where there is no express limitation on assigning bargaining unit work to management employees, the only restriction is one arising by implication. That interpretive principle is reviewed by the authors in Brown & Beatty, Canadian Labour Arbitration, (2001) para: 5:1400, pp. 5-22 to 26.1.

There the authors cited the decision in Re Orenda Ltd. and International Association of Machinists, Lodge 1922, (1973) 1 L.A.C. (2d) 72 (Lysyk) for the following proposition:

> [Arbitrators] have implied, form the seniority, classification, recognition and wage clauses, a fetter on management's discretion to make such assignments. As was stated in one award [Re Orenda Ltd.]:
>
>> … unless the contract forbids foremen doing the jobs ordinarily done by production workers in the bargaining unit, they are free to do the work provided the doing of the work was not of such an extent as to bring the person doing it within the bargaining unit.
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> Indeed, some arbitrators have taken the view:
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>> … that performance of bargaining unit work by a foreman was

> permissible only when an existing practice of performance of work by a foreman was shown, and that only then would the board look further to see if, even given such a practice, bargaining unit work was being performed "to such an extent" as to bring the foreman within the unit.

It can be seen from that extract that the presence or absence of an established practice will affect the arbitral review of a disputed work assignment. The apparent consensus is that while the presence of an established practice will favour the conclusion that the work in dispute does not represent work belonging exclusively to the particular bargaining unit, the converse does not apply. That is, the absence of a practice will not necessarily support the conclusion that the assignment of work outside of the bargaining unit is in breach of the collective agreement.

Decision

Where there is an established practice, the practice, coupled with a collective agreement in which there is no restriction, will support a continuation of the practice. The absence of a practice will leave work assignments subject to the Re Orenda Ltd. test. In defining the test, Arbitrator Lysyk wrote as follows on pp. 77-8:

> In brief, on the question of proportion of time that must be spent by a non-unit employee on bargaining unit work to warrant the conclusion that such employee has been

> brought within the scope of the unit, the precedents do not appear to have established a precise formula; moreover, it is not always clear what significance, if any, has been placed upon past practice. Indeed, it may well be that this is an area in which very precise rules are neither possible nor desirable. For purposes of the present award, it will suffice to determine whether any of the non-bargaining unit employees has been shown to spend the greater portion of his time on the work of an SPC.

In the application of that reasoning in this dispute, the assignments in question fell within an established practice whereby employees outside the bargaining unit did operate locomotives for various purposes. That practice served to defeat the Union's claim. In any event, here the evidence does not meet the test of disclosing that the work in question, even if it were considered to be bargaining unit work, was assigned in such a manner as to bring the supervisory staff within the bargaining unit.

It should be noted by way of caution that the arbitral reasoning reflected in Canadian Labour Arbitration contemplates that the principle outlined by Arbitrator Lysyk must be adapted to the particular collective agreement and the particular facts. The absence of a specific jurisdictional provision does not relieve an employer of all restrictions on the assignment of work unless that conclusion is consistent with the manner in which the collective agreement has been administered between the parties. However, in this case, the disputed work assignments were not sufficient to bring the supervisors to whom they were assigned within the unit, and, in any event, were consistent

with existing practice. In the result, the grievance is dismissed.

DATED at the City of Prince George, in the Province of British Columbia, this 9th day of November, 2001.

"H. Allan Hope, Q.C."
H. ALLAN HOPE, Q.C. – Arbitrator