CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1248

Heard at Montreal, Tuesday, June 12, 1984

Concerning

QUEBEC NORTH SHORE & LABRADOR RAILWAY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Union objection to operation of Loram Rail Grinder without a pilot and of Sperry Rail Testing Car without a pilot and a flagman.

JOINT STATEMENT OF ISSUE:

The Union grieves that the Sperry Rail Testing Car and Loram Rail Grinder are being handled over the Railway without conductor/pilot and flagman.

The Railway contends that the Sperry Testing Car and Loram Rail Grinder are operated as heavy track units under Order R-18073, Regulations for the Protection of Track Units and Maintenance Work; complying with the Uniform Code of Operating Rules and not in violation of the Collective Agreement.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) JACQUES ROY	(SGD.) ROGER L. BEAULIEU
GENERAL CHAIRMAN	MANAGER LABOUR RELATIONS

There appeared on behalf of the Company:

M. Gauthier	– Counsel, Sept Iles
R. L. Beaulieu	– Manager, Labour Relations, Sept Iles
M. Tardif	– Assistant, Labour Relations, Sept Iles
J. Sirois	– Trainmaster, Sept Iles

And on behalf of the Union:

R. Cleary	– Counsel
J-M St. Pierre	– Vice-Chairman, Sept Iles
R. Bennett	– General Chairman, Toronto
R. J. Proulx	– Vice-President, Ottawa

AWARD OF THE ARBITRATOR

The issue raised herein is whether the Company's use of the Loram Rail Grinder and the Sperry Rail Testing Car require a "train" crew as spelled out under article 45.01(a) of the collective agreement:

> 45.01 a) All trains other than ore service trains, will have at least one (1) conductor and two (2) brakemen. Passenger trains will have at least one (1) conductor and three (3) brakemen if required to handle mail, baggage and express.

For the purposes of clarity it is important to point out that the Trade Union claims that the Company is required to use a conductor on the Loram Rail Grinder and both a conductor and "flagman" on the Sperry Rail Testing Car.

In past CROA cases dealing with this specific problem the issue has been resolved on the basis of the manner the vehicle in question has been applied. So long as the vehicle is used "for the purpose for which it was designed", then the complainant Union's claim that the train crew should be used to man the vehicle has been rejected. However, where the vehicle is used for purposes consistent with a "train's" use then the requirements of the crew consist provision of the collective agreement applied. Thus in **CROA 1094** the Arbitrator wrote:

> When these definitions are read together, as I think they must be, it is apparent that what must be determined, in order to decide whether or not the crew consist provisions of the collective agreement apply, is the nature of the service in which any particular equipment is being used at any time. With respect to the Speno Rail Grinding Machine, I have set out my finding that it is, when in service for the purpose for which it was designed (that is, when in rail-grinding operations), one unit of self-propelled equipment. Article 11 of the collective agreement does not apply with respect to its use in such operations, and to that extent, the Company's position is correct.
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> In the instant case, however, this equipment was dispatched from one point to another as a "work extra", and was, in this particular instance (as far as appears from the material before me), in work train service. In such a case, the provisions of article 11.4 apply. While the crew for such a movement may be "reducible", it does not appear that the notice contemplated by article 11.8 was given. Thus, a conductor and two brakemen were required in this case. accordingly this particular grievance is allowed.

Notwithstanding the persuasive argument advanced by Counsel for the Trade Union, I have not been convinced that the facts as adduced in the situation described herein have altered the wisdom of the past CROA precedents with respect to the application of article 45.01 (a) to the two vehicles here in issue. The provisions of the collective agreement relating to a guaranteed work week (i.e. article 39.01) and the Letters of Understanding relating to meal breaks and switching only apply to a "train" crew if the said members of the bargaining unit are entitled to the work. The past practice referred to at the hearing where train crewmen were entitled to these benefits under the collective agreement is premised on their entitlement to the work pursuant to article 45.01 (a) of the collective agreement. But so long as the Employer can demonstrate that the vehicle in question is used "for the purpose for which it was designed" then the vehicle cannot be viewed as a "train" for which a train crew would be relevant. In this case, of course, both the Loram and Sperry vehicles must be seen, for the Trade Union's claim to succeed, to be used for purposes other than "grinders" and maintenance rail detectors respectively.

What the Employer has done in this case, however, is to blur the task of distinguishing between the uses to which the Loram Rail Grinder and the Sperry Rail Testing Car have been made. The Company has conceded that so long as Form "C" clearance governs the movement of the two vehicles on the tracks then their use is consistent with the operation of a "train". Accordingly the Employer has acknowledged its requirement in that circumstance both under the collective agreement and the UCOR Rules (83D) to use a "train" crew. However, so long as the Company operates the Loram and Sperry vehicles under Track Occupancy Permit (T.O.P.) Regulations, it maintains that the management of those vehicles irrespective of use, may be performed by the supervisor of the work crew assigned to perform the maintenance work. Accordingly, effective February 14, 1983, the Company has ceased the practice of securing Form "C" clearances and has operated the two vehicles through the T.O.P. regulation. As a result the work formerly performed by the conductor and other pertinent train crewmen have been displaced by members of the maintenance crew, particularly the supervisor.

It is my view that so long as the maintenance crew and the supervisor are involved in work for which the Loram and Sperry vehicles are designed, there can be no violation of article 45.01 (a) in operating under the T.O.P.

regulations. The difficulty I have encountered in confirming the legitimacy of the Company's action is in distinguishing between the vehicles' movement from one point to another on a particular piece of track and the vehicles use for the purpose for which they were designed. In this regard, the Company's position is that at all material times the vehicles are used for work purposes covered by the protected area of the T.O.P. permit. Or, more succinctly, each successive permit issued by the dispatcher represents, piecemeal, a parcel of space for which work has been allocated in accordance with T.O.P. regulations and thereby exempt from the provisions of article 45.01 (a).

The fallacy in the Company's position lies in the erroneous notion that clearance by T.O.P. regulation necessarily governs work covered in the protected area. Surely, whether the vehicles in question are operating under Form C clearance or T.O.P. regulation, it is movement on the track in which maintenance work is being performed that is regulated. The clearances that are obtained do not apply solely to the benefit of the Loram and Sperry vehicles but to all vehicular traffic making use of the track area. The only differences between the Form "C" clearance and the T.O.P. regulation pertain to rules regulating speed, switching and the nature of the access to a specific area of track. In short, the type of permit governing movement on a specific track area cannot be allowed to dictate acquired rights under the collective agreement. The contradiction of that approach was demonstrated in this case. At the mere whim of the Employer, rights may be extinguished by reason of the type of clearance permit that is secured from the Company's dispatcher.

To repeat, the uses to which the Loram and Sperry vehicle are put governs the entitlement of the members of the complainant Trade Union to crewmen's work. And, as pointed out by the Trade Union' counsel the Company cannot be permitted to determine those entitlements by an arbitrary selection of the dispatcher's clearances under Form "C" or the T.O.P. regulations. Or, to allow this approach to prevail as the ultimate test would clearly render the acquired rights under article 45.1 (a) "illusory". Accordingly the extent to which the Company has used the Loram and Sperry vehicles "for purposes other than for which they were designed" it may very well have acted in violation of article 45.1 (a) of the collective agreement. Or, more precisely, to the extent those vehicles have been used in a manner consistent with the operation of a train, namely the transport of persons or things from one point to another, the Company was required to use conductors and/or other train crewmen.

Before leaving this aspect of the case I wish to address the *expressio unius exclusio alterius* argument made by the Company's counsel. Simply put, it was submitted that since article 40.01 of the collective agreement dealt with the use of "conductors" in the operation of locomotive cranes, the Company was thereby free of any further restriction in the use of whomever it preferred in the operation of its other heavy equipment vehicles. Article 40.01 provides that when locomotive cranes are required to work under dispatcher's orders or Form "C" clearance, a conductor will be placed in charge. The fallacy in the Company's position in its use of the *expressio unius* argument is reflected by its own concession. That is to say, whenever any heavy maintenance vehicle is used pursuant to a Form "C" clearance, the Company has recognized that compliance must be made with the UCOR Rules requiring the use of a conductor. In other words, article 40.01 is mere surplusage that does not lend any assistance to the determination of the parties' rights and obligations under article 45.01 (a) of the collective agreement.

In sum, I am of the view that the Company's use of non bargaining unit personnel in the operation of the Loram and Sperry vehicles should be restricted to the uses for which those vehicles were designed even when operating under the T.O.P. regulations. However, to the extent those vehicles have been used for purposes that are consistent with the operation of a "train", the Company is obliged to use conductors or other bargaining unit personnel. The Company's concession that the two vehicles in question while operating under Form "C" clearances operated as "trains" has convinced me that a portion of the time these same vehicles were used after February 14, 1983, they were used as "trains" even when operating under T.O.P. regulation. The onus of distinguishing the uses to which those vehicles have been made since February 14, 1983 rests with the Company. As a result I shall remain seized of all outstanding issues inclusive of compensation in the event of difficulty in the implementation of this decision.

(signed) DAVID H. KATES
ARBITRATOR