CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3325

Heard in Montreal, Tuesday, 11 March 2003

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION
&
BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE – COMPANY:

The requirement for an increase in the working hours from ten (10) to twelve (12) hours on the Winnipeg/Fort Frances extended run corridor, consistent with the provisions found in paragraph 35.10(b) of article 35 and Addendum 65 of collective agreement 4.3 and in paragraph 28.5(a) of article 28, paragraph 60.14(1) of article 60 and Addendum 79 of collective agreement 1.2.

COMPANY'S STATEMENT OF ISSUE:

The provisions of article 35, paragraph 35.10(b) and Addendum 65 of collective agreement 4.3, and the provisions of article 28, paragraph 28.5(a), article 60, paragraph 60.14(a) and Addendum 79 of collective agreement 1.2, provide for an increase in hours of work over the Winnipeg/Fort Frances extended run corridor up to a maximum of 12 hours consistent with the principles of extended runs.

The Company, the Union and the Brotherhood have concluded the process of consultation and agreement contemplated in addendum 65 of collective agreement 4.3 and addendum 79 of collective agreement 1.2. The Union and the Brotherhood have withheld their consent to an increase in the hours of work over the corridor. The Company remains frustrated in its inability to resolve problems associated with the Winnipeg Fort/Frances extended run corridor which, consistent with the principles of extended runs, requires an adjustment to the rest rule hours form 10 to 12.

The Company maintains that the Union and the Brotherhood are unreasonably withholding their consent to the required adjustment in rest rule hours over this corridor.

The Company maintains that his dispute is now properly before the Arbitrator.

DISPUTE – BROTHERHOOD:

The requirement for an increase in the working hours from ten (10) to twelve (12) hours on the Winnipeg / Fort Frances extended run corridor, consistent with the provisions found in paragraph 28.5(1) of Article 28, Paragraph 60.14(1) of Article 60 and Addendum 79 of Collective Agreement 1.2.

BROTHERHOOD'S STATEMENT OF ISSUE:

On May 10, 2002, the Company notified the Brotherhood that the hours of work identified in Article 60, paragraph 60.14(a) of Collective Agreement 1.2 would be increased from the present ten (10) hours to twelve (12) hours. As a result of this unilateral action, locomotive engineers were required to work an additional two hours prior to having the right to book rest under the provisions of Article 28, paragraph 28.5.

The Company implemented the above noted changes. The Brotherhood grieved the Company's decision, actions and interpretation of the collective agreement provisions in question. The Company would not change its position. Accordingly, the Brotherhood referred the grievance to the Arbitrator of the CROA for a ruling on a number of issues including the following.

The Brotherhood argued that any adjustment in the booking rest en route standards relates to the hours of extended runs, and such could only be implemented by the Company by agreement with the Brotherhood through mutual agreement of the Regional Steering Committee. The Brotherhood argued that the Company could not make any changes in the listed hours of extended runs as reflected in Articles 28.5 and 60.14 of Agreement 1.2 –without the consent of the Brotherhood.

The Brotherhood advanced a position that the implementation and maintaining of Extended Runs is administered jointly under the direction of the Regional Steering Committee and that any requests, from either party, relative to an increase or decrease in hours of work on any extended run must follow the nine (9) principles outlined in Addendum No. 79 of Collective Agreement 1.2.

The Brotherhood contended that the Company had not followed the principles of extended runs nor did it take into consideration the recommendations of the Regional Steering Committee (BLE) that would effectively enhance the operation in that particular corridor to facilitate an acceptable level of success.

The Brotherhood further contends that the principles of extended runs are essential in the implementation and continued monitoring of extended runs and the Company is prohibited from acting outside the Addendum No. 79 process.

By a decision dated July 12, 2002 (*CROA Case No. 3275*) The Arbitrator ruled in favour of the Brotherhood in respect to the preliminary/threshold issues referred to above. The Company was found to have violated the collective agreement. The Company was directed to cease and desist from said violation. Since the above-noted decision the Company has attempted to obtain the Brotherhood's consent to increase the hours of the extended runs in question. These attempts included additional violations of the collective agreement, unfair labour practices and all sorts of other improper conduct on behalf of the Company. However, since the Company still will not honour the collective agreement (including the principles of extended runs), take into consideration the recommendations of the Steering Committee or propose any acceptable alternative solutions the Brotherhood cannot and will not consent to change the express agreement earlier reached between the parties vis-à-vis working hours (10 hours) relative to the Winnipeg Fort Frances extended run corridor.

The Brotherhood also contends: **(1.)** The Company has not made a case that the increase in hours is required. **(2.)** The data, which the Company has provided, reflects a significant improvement in the success rate on this corridor. **(3.)** The Brotherhood holds to the position that if the Company were to live up to its obligation under the Collective Agreement with respect to the "Ready Train Concept", this particular extended run would have a success rate closely approaching 100%. **(4.)** The Union considers the Company's request for an increase to 12 hours on a run which has a "running time" of four (4) hours, to be patently unreasonable and unjustifiable.

The Union submits that it is not obliged to consent to the request nor can the Arbitrator require such in the circumstances; the Arbitrator has no jurisdiction to extend the hours of work in this case; on the threshold issue *res judicata*/issue estoppel applies; the Company has not complied with the collective agreement; the Company is estopped from requesting an extension to the hours of work in this case; the Company has created any problems (if such exist) and that the Union's position is not unreasonable in the circumstances.

The Brotherhood submits that the Company has not met the onus upon it in this case.

The Brotherhood has declined the Company's request. The Brotherhood requests the Arbitrator to dismiss the Company's request at this time.

DISPUTE – UNION:

The requirement for an increase in the working hours from ten (10) to twelve (12) hours on the Winnipeg / Fort Frances extended run corridor, consistent with the provisions found in paragraph 35.10(b) of Article 35, and Addendum 65 of Collective Agreement 4.3.

UNION'S STATEMENT OF ISSUE:

On May 10, 2002, the Company notified the Union that the hours of work identified in Article 35, paragraph 35.10(b) of Collective Agreement 4.3 would be increased from the present ten (10) hours to twelve (12) hours. This unilateral action imposed a requirement for Conductors and Assistant Conductors to work an additional two (2) hours before having the right to book rest under the provisions of Paragraph 35.10(b), Article 35 of Collective Agreement 4.3.

The Company implemented the above noted changes. The Union grieved the Company's decision, actions and interpretation of the collective agreement provisions in question. The Company would not change its position. Accordingly, the Union referred the grievance to the Arbitrator of the CROA for a ruling on a number of issues including the following.

The Union argued that any adjustment in the booking rest en route standards relates to the hours of extended runs, and such could only be implemented by the Company by agreement with the Union through mutual agreement of the Regional Steering Committee. The Union argued that the Company could not make any changes in the listed hours of extended runs as reflected in Article 35.10(b) of Agreement 4.3 – without the consent of the Union.

The Union forwarded their position that the implementation, monitoring and maintaining of extended runs is to be jointly administered by the Regional Steering Committee. Requests to change the hours on duty, be it an increase or a decrease, must be based on the principles set out in Appendix 65 of Agreement 4.3.

The Union contended that the Company had not followed the principles of extended runs nor did it take into consideration the recommendations of the Regional Steering Committee (UTU) that would effectively enhance the operation in that particular corridor to facilitate an acceptable level of success.

The principles of extended runs are vital to the implementation and ongoing monitoring of extended runs. It is the Union's contention that the Company cannot take action autonomous to Addendum 65.

By a decision dated July 12, 2002 (*CROA Case No. 3275*) The Arbitrator ruled in favour of the Union in respect to the preliminary/threshold issues referred to above. The Company was found to have violated the collective agreement. The Company was directed to cease and desist from said violation. Since the above-noted decision the Company has attempted to obtain the Union's consent to increase the hours of the extended runs in question. These attempts included additional violations of the collective agreement, unfair labour practices and all sorts of other improper conduct on behalf of the Company. However, since the Company still will not honour the collective agreement (including the principles of extended runs), take into consideration the recommendations of the Steering Committee or propose any acceptable alternative solutions the Union cannot and will not consent to change the express agreement earlier reached between the parties vis-à-vis working hours (10 hours) relative to the Winnipeg Fort Frances extended run corridor.

The Union also contends: **(1.)** The Company has not made a case that the increase in hours is required. **(2.)** The data, which the Company has provided, reflects a significant improvement in the success rate on this corridor. **(3.)** The Union holds to the position that if the Company were to live up to its obligation under the Collective Agreement with respect to the "Ready Train Concept", this particular extended run would have a success rate closely approaching 100%. **(4.)** The Union considers the Company's request for an increase to 12 hours on a run which has a "running time" of four (4) hours, to be patently unreasonable and unjustifiable.

The Union submits that it is not obliged to consent to the request nor can the Arbitrator require such in the circumstances; the Arbitrator has no jurisdiction to extend the hours of work in this case; on the threshold issue res judicata/issue estoppel applies; the Company has not complied with the collective agreement; the Company is estopped from requesting an extension to the hours of work in this case; the Company has created any problems (if such exist) and that the Union's position is not unreasonable in the circumstances.

The Union submits that the Company has not met the onus upon it in this case.

The Union has declined the Company's request. The Union requests the Arbitrator to dismiss the Company's request at this time.

FOR THE BROTHERHOOD:

(SGD.) D. E. BRUMMUND
FOR: GENERAL CHAIRMAN – BLE

FOR THE COMPANY:

(SGD.) D. VANCAUWENBURGH
FOR: VICE-PRESIDENT – PRAIRIE DIVISION

FOR THE UNION:

(SGD) B. R. BOECHLER
GENERAL CHAIRPERSON – UTU

There appeared on behalf of the Company:

J. Coleman	– Counsel, Montreal
D. VanCauwenburgh	– Human Resources Manager, Winnipeg

J. Vena – General Manager, Prairie Division, Winnipeg

And on behalf of the UTU and the BLE:

M. A. Church – Counsel, Toronto
B. R. Boechler – General Chairperson, UTU, Edmonton
D. E. Brummund – Sr. Vice-General Chairman, BLE, Edmonton
J. W. Armstrong – Vice-President, UTU, Edmonton
B. Willows – Vice-General Chairman, BLE, Winnipeg
R. Hackl – Vice-General Chairperson, Edmonton

PRELIMINARY AWARD OF THE ARBITRATOR

By a previous award of this Office (**CROA 3275**) it was found that the Company violated the provisions of Addendum 79 and Appendix 65 of collective agreements 1.2 and 4.2 respectively, by failing to consult and obtain the agreement of the Brotherhood and the Union through the membership of the Regional Steering Committee prior to departing form the agreed standard of ten hours for extended runs between Winnipeg and Fort Frances. The Company was directed to cease and desist from the continued implementation of the amended standard of twelve hours, or any standard beyond the ten hour limit established with article 35.10(b) of the collective agreement of the United Transportation Union and article 28.5 of the collective agreement of the Brotherhood of Locomotive Engineers. The final paragraph of the award, dated July 12, 2002, contains the following statement:

> Nothing in this award prevents the Company from properly instituting the process of consultation and agreement contemplated within both collective agreements should it wish to pursue the issue.

The grievance now before the Arbitrator is brought by the Company against both the UTU and the BLE (the "Unions"). It asserts that the Company has made all reasonable efforts to reach agreement on an increase in the standard of extended runs between Winnipeg and Fort Frances and that the Unions have unreasonably refused to make any agreement.

The Unions maintain that the Arbitrator is without jurisdiction to consider the grievance brought by the Company. Their counsel submits that the issue is effectively *res judicata* to the extent that this Office has already ruled that the Unions' agreement is necessary to any change in the standards, and that their decision with respect to agreeing to any change is not reviewable by a board of arbitration. Their counsel stresses that the award in **CROA 3275** found that two separate conditions must obtain before any change can be made in the standards governing hours of work before employees can book rest on extended runs as established under the respective collective agreements. The requirements are, firstly, that any adjustment must be in keeping with extended run principles and, secondly, must be made by agreement with the Unions through the Regional Steering Committee, a body comprised of two management members and two union representatives.

It was agreed at the hearing that the Arbitrator should issue a preliminary decision with respect to the issue of jurisdiction. Having carefully reviewed the materials and the oral submissions of the parties I am satisfied that this Office does have jurisdiction to entertain a grievance by the Company to the effect that the Unions have withheld their agreement to an adjustment in standards to the Winnipeg-Fort Frances run in a manner contrary to what is contemplated by the collective agreement.

Firstly, on their face the provisions here in issue expressly contemplate the adjustment, upwards or downwards, of the hours on runs. For example, the note to article 35.10(b) of collective agreement 4.3 of the United Transportation Union reads as follows:

> **Note:** The hours on runs identified in this article may be increased, to a maximum of 12 hours, or decreased based on the principles set out in Appendix 65 of this Memorandum.

An identical note is found in article 25.8(a) of collective agreement 1.2 of the Brotherhood of Locomotive Engineers.

In addition, as reflected in Appendix 65 and Addendum 79, the parties have agreed upon a relatively elaborate set of "principles of extended runs" the text of which was quoted in **CROA 3275**.

Finally, the memoranda include the following language which is critical to the issue at hand:

> Crew sequencing and booking rest en route standards will be adjusted from time to time in keeping with extended run principles through the agreement of the Regional Steering Committee.

It appears manifest to the Arbitrator that the foregoing language reflects the understanding of the parties that changes are to be made, from time to time, in the booking rest en route standards established under the extended run provisions of the collective agreements. As noted in **CROA 3275**, such changes must be in keeping with the parties' established extended run principles, and be by the agreement of the Regional Steering Committee.

This is not a case of *res judica*. **CROA 3275** concerned the right of the employer, successfully challenged by the Unions, to unilaterally implement a change. It did not involve an examination of the process of negotiation, the subject of this grievance.

The first and most forceful position advanced by the Unions is that they have an effective veto, and are under no obligation to agree to any adjustment in the booking rest enroute standards. The alternative position of the Unions is that even if that were not the case, they are not compelled to agree to any adjustment where it can be shown that what is proposed is not in keeping with extended run principles.

The Arbitrator has little difficulty with the second proposition advanced by the Unions. It would appear clear that any adjustment to booking rest en route standards established within the collective agreement must, by the language of these documents, be "in keeping with extended run principles", referring to the nine principles of extended runs found within Appendix 65 and Addendum 79. On that basis I would be compelled to sustain the position of the Unions that in the event that a proposal should significantly depart from the principles so expressed the Union members of the Regional Steering Committee would be under no obligation to give their agreement.

I am less persuaded, however, that the Unions can, for reasons of their own unfettered discretion, simply refuse outright to agree to an adjustment where it can be established that the proposed change in the booking rest en route standards is entirely in keeping with the principles of extended runs. I am satisfied that the process of discussion and the concept of agreement cannot be seen as standing so starkly in isolation from the application of the principles of extended runs which the parties took pains to elaborate within the text of Appendix 65 and Addendum 79. The flavour of these provisions is clearly that the parties contemplated that adjustments would, from time to time, be necessary and that they would be made by a process of reasonable agreement.

Boards of arbitration have had prior occasion to consider the interpretation of provisions of collective agreements whereby the parties contemplate a process which anticipates their reaching agreement on matters of substance during the term of their collective agreement. It is not unusual to find collective agreement language, for example, governing agreement by the parties on such matters as vacation schedules, hours of work and working schedules, and the right to contract out. In a number of awards arbitrators have found that such provisions are reviewable by boards of arbitration and that both parties must act reasonably to reach agreement as contemplated by their collective agreements (*see* ***Re United Automobile Workers and Office Professional Employees International Union, Local 343*** *(1978), 17 L.A.C. (2d) 348 (Shime);* ***Re Family and Children's Services of Renfrew County and City of Pembroke and Ontario Public Service Employees' Union, Local 459*** *(1985), 20 L.A.C. (3rd) 359 (Devlin);* ***Re Algoma Ore Division, Algoma Steel Corp. and United Steelworkers, Local 3933*** *(1986), 27 L.A.C. (3rd) 113 (Brunner);* ***Re United Nurses of Alberta, Local 33 and Capital Health Authority (Royal Alexandria Hospital) (Joseph Grievance)*** *(1998), A.G.A.A. No. 63 (Price);* ***Re East Isle Shipyard Ltd. and International Association of Machinists and Aerospace Workers, Lodge 1934*** *(1998), 74 L.A.C. (4th) 265 (Outhouse)*).

In my view the governing principles were well expressed by Arbitrator Devlin in the **Re Family and Children's Services of Renfrew County** case. In that award it appears that the employer purported to unilaterally revoke previously agreed vacation schedules when faced with an impending strike. Article 23.05 of the collective agreement there under consideration provided, in part: "Vacation leave shall be granted at a time agreeable to both parties." In allowing the grievance Arbitrator Devlin reasoned, in part, as follows:

> Although counsel for the employer stressed the obligations of the employer with regard to the provision of services and the fulfilment of its responsibilities under the **Child Welfare Act**, these were not disputed by the union. At the same time, the employer has certain obligations by virtue of the collective agreement. In this case, the employer's right to schedule vacations has been circumscribed by art. 23.04 and we find that there exists an obligation to be reasonable and not to act in a manner which is either arbitrary or discriminatory in endeavouring to agree upon the matter of vacation leave.

> In the absence of such a requirement, either party could simply refuse to endeavour to reach an agreement with respect to the scheduling of vacation and act in a manner which would effectively override the obligation set out in art. 23.04 of the collective agreement. This is not to say that there might not be legitimate differences between the parties with regard to the matter of vacation scheduling or that all employee requests will be accommodated. The obligation which exists, however, is that both parties act reasonably in striving to find a time which is agreeable for vacation leave.
>
> The conclusion which we have reached is also consistent with the finding of the arbitrator in **Re U.A.W. and Office & Professional Employees Int'l Union, Local 343** (1978), 17 L.A.C. (2d) 348 (Shime). There the arbitrator was called upon to consider a provision similar to that contained in art. 23.04 of the collective agreement before this board which provided that vacations were "to be taken annually at a time mutually agreed". The arbitrator agreed with the union that the employer could not reasonably fix a mandatory vacation period and found that, at the very least, the agreement contemplated that the parties would act reasonably in trying to arrive at a mutually agreeable time for vacation.

It should go without saying that boards of arbitration strive to interpret collective agreement language in a way which most constructively serves the processes which parties contemplate within their collective agreement. Where, as in the instant case, the parties expressly recognize that there may be circumstances which justify adjustments in booking rest standards established within their collective agreements, and expressly structure committees to deal with such adjustments, it is not unreasonable to conclude that they implicitly understand that each of them must make all reasonable efforts to come to an agreement. In such circumstances neither party can, for example, frustrate the process of agreement by refusing to meet. As indicated in the established jurisprudence, they are compelled to make good faith efforts to achieve agreement, and cannot act in a way that is unreasonable, arbitrary, discriminatory or in bad faith.

For all of the foregoing reasons I am satisfied that the Company is correct on the issue of the jurisdiction of this Office to review the refusal of the Unions to agree to an adjustment of standards. That is not to say that the Unions may not have been justified or reasonable in their refusal. The issue of reasonableness in the case at hand must obviously have reference to the parties' own established principles of extended runs, and general consistency with any other provisions of the collective agreement.

The matter is therefore remitted to the General Secretary for scheduling to be heard on its merits.

March 14, 2003

(signed) MICHEL G. PICHER
ARBITRATOR