CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3406

Heard in Montreal, Wednesday, 11 February 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Violation of agreement 4.16, including articles 27 and 30. Implementation of an appropriate remedy consistent with the provisions of article 85, addendum 123 of agreement 4.16.

UNION'S STATEMENT OF ISSUE:

On August 19, 2003, a Hornepayne crew was ordered to deadhead east of Foleyet to relieve train 337 when a Capreol crew was first up and available at that location. The Union maintains that track east of Foleyet is under the jurisdictional control of Capreol crews and those employees should be called to protect all relief trains on this territory.

It is the Union's position that the Company violated the reasonable intent of the 4.16 agreement including articles 27 and 30 and, as a result, requested an appropriate remedy be applied.

The Company has declined the Union's request.

FOR THE UNION:

(SGD.) R. A. BEATTY
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

J. Coleman	– Counsel, Montreal
K. Tobin	– Counsel, Toronto
J. Torchia	– Director, Labour Relations, Edmonton
B. Hogan	– Manager, Labour Relations, Toronto
D. VanCauwenbergh	– Sr. Manager, Human Resources, Winnipeg
D. Fournier	– Division Manager – CMC, Montreal

J. Krawec	– Sr. Manager, Labour Relations, Toronto
O. Lavoie	– Trainmaster, Montreal
D. Parent	– Trainmaster, Montreal
T. Marquis	– General Manager, S.O.D.

And on behalf of the Union:

M. A. Church	– Counsel, Toronto
R. A. Beatty	– General Chairperson, Sault Ste. Marie
R. LeBel	– General Chairperson, Quebec
J. W. Armstrong	– Vice-President, Edmonton
J. Gagné	– Vice-General Chairperson, Quebec
G. Anderson	– Vice-General Chairperson
B. R. Boechler	– General Chairperson, Edmonton
W. G. Scarrow	– Vice-Local Chairperson, Sarnia
G. Dubois	– Local Chairperson
J. P. Paquette	– Local Chairperson
J. Robbins	– Vice-General Chairperson
S. Tapp	– Local President
S. Pommet	– Local Chairperson
R. Dyon	– General Chairman, TCRC, Montreal
P. Vickers	– Vice-General Chairman, TCRC

The preliminary objection filed by the Company prior to the hearing of this dispute was resolved between the parties at the hearing on Wednesday, February 11, 2004. The hearing was therefore adjourned by the Arbitrator to April 2004.

On Tuesday, 13 April 2004, there appeared on behalf of the Company:

K. Tobin	– Counsel, Montreal
J. Coleman	– Counsel, Montreal
B. Hogan	– Manager, Labour Relations, Toronto
D. Van Cauwenbergh	– Sr. Manager, Human Resources, Toronto
J. P. Krawec	– Sr. Manager, Labour Relations, Toronto
T. Marquis	– General Manager, Operations, Toronto
D. Fournier	– Division Manager, CMC
J. Quik	– Manager, COMPORT
J. Torchia	– Director, Labour Relations, Edmonton
F. O'Neill	– Locomotive Repair Centre, Toronto
D. Laurendeau	– Manager, Labour Relations, Montreal

And on behalf of the Union:

M. A. Chuch	– Counsel, Toronto
R. A. Beatty	– General Chairperson, Sault Ste. Marie
R. LeBel	– General Chairperson, Quebec
J. Robbins	– Vice-General Chairperson, Sarnia
W. G. Scarrow	– Vice-Local Chairperson, Sarnia
G. Marcoux	– Local Chairperson, Montreal
W. Namink	– Local Chairperson, Sarnia
G. Ethier	– Secretary, GO-105,
S. Pommet	– Local Chairperson – Yard,
Me. R. Marolais	– Legislative Representative, TUT, Local 1139

Me. S. Groulx – Observer

AWARD OF THE ARBITRATOR

This grievance is brought under the provisions of article 85 and Addendum 123 of the collective agreement. It is well established that when the Union invokes those extraordinary provisions of article 85 there are certain minimal requirements which apply, as a condition precedent to the Arbitrator giving consideration to the extraordinary remedies which can flow from the application of Addendum 123. That was reflected by the award of this Office in **CROA 3310** which reads, in part, as follows:

> … It does appear to the Arbitrator that the parties intended the letter to apply to situations where a violation of the collective agreement was **blatant and indefensible**, and clearly should not have been committed by local management. It is in that context that the deterrent character of the remedy is to be understood. The letter is an agreement between the parties to establish a disincentive to violations of the collective agreement being resorted to simply as a means of doing business, ensuring that violations of the collective agreement do not pay.
>
> (emphasis added)

The case at hand concerns an allegation that a Hornepayne crew, which normally operates on territory west of Foleyet, between Hornepayne and Foleyet, was ordered in straightaway service to a location some twenty-two miles east of Foleyet where their train had been tied up a previous crew operating from Capreol to Foleyet, by reason of that crew having booked rest. In the result, the Hornepayne crew, which was then at their away from home terminal of Foleyet, was ordered in straightaway service Foleyet to Hornepayne via Tionaga, the location twenty-two miles east of Foleyet where

the train had been tied up. The position of the Union is that the work in question should have been given firstly to available spareboard employees normally assigned to the territory between Foleyet and Capreol, or alternatively to a regularly assigned Capreol based crew. In other words, the Union asserts firstly that the work in question was in the nature of relief work which should have been assigned to Capreol based spareboard employees, or in the alternative, to regular employees who are also Capreol based, arguing that work jurisdiction on the territory between Capreol and Foleyet lies exclusively with Capreol based employees.

The Company takes a substantially different view. Firstly, it disputes that there is any exclusive work jurisdiction, on a subdivision basis, which can be asserted by the Union. It stresses that there is no language within the provisions of the collective agreement which would grant such jurisdictional exclusivity. Additionally, it argues that the decision of this Office in **CROA 362** dealt squarely with the same issue. That case involved the assignment of a Capreol crew to proceed westward from Foleyet to Missonga, some 18.6 miles, to pick up a train which had been tied up by reason of its crew having booked rest, and to take that train back eastward through Foleyet to Capreol, in straightaway service. While in that case there was no assertion of any jurisdictional limits, and the case concerned a claim for an additional day's pay for the Foleyet – Missonga – Foleyet leg of the trip, Arbitrator Weatherill commented, in part, "In my view, nothing turns on the fact that the territory west of Foleyet is usually served by Hornepayne crews." In other words, that case proceeded on the basis that there was

no challenge to the propriety of the Company ordering a Capreol crew onto the territory normally serviced by Hornepayne crews.

Additionally, the Company relies upon what it maintains is the practice of decades. Company officer T. Marquis, General Manager of Operations, Toronto, gave evidence that since the 1980s, both as a member of running crews and as a supervisor, he has been aware of operations similar to those giving rise to this dispute being performed on a widespread basis throughout the Company's operations in various parts of Ontario. In addition, the Company maintains that crews have gone beyond their traditional territory in similar circumstances, notably between Capreol and South Parry, as well as between Toronto and South Parry. The Company also points to the clear difference between the instant collective agreement and the provisions of collective agreement 4.3 between the same parties and governing employees in Western Canada which expressly contains language regulating the use of employees "off their own subdivision", a limitation not found in the instant collective agreement.

In the Arbitrator's view the threshold issue with respect to the application of article 85 and Addendum 123 of the collective agreement is not whether there was a violation of the exclusive jurisdictional rights asserted by the Union, assuming that such rights exist. The threshold question is whether the alleged violation by the Company would amount to a blatant and indefensible action on the part of the employer such as to bring the extraordinary provisions of Addendum 123 into play.

After careful consideration the Arbitrator is satisfied that this is not such a case. Plainly, the Company does not acknowledge that it in any way violated its obligations under the collective agreement. It categorically rejects the assertion of the Union that road crews can claim jurisdictional exclusivity or priority in a circumstance such as that disclosed in the case at hand. In that regard it specifically relies on the decision of this Office in **CROA 362**, as well as on what it maintains is long-standing past practice. It also relies on a comparison with the very different language of the Union's collective agreement in Western Canada, which does provide a degree of jurisdictional protection.

Whatever the merits of the dispute concerning the jurisdictional claim, the Arbitrator is amply satisfied that the dispute at hand does not involve what any objective observer would fairly view as a blatant and indefensible violation of the collective agreement, whatever may be the view of the Union's representatives. On the contrary, what the dispute at hand discloses is a deep disagreement between the Company and the Union with respect to the issue of jurisdictional exclusivity. That disagreement reflects an arguable *prima facie* case for the Company's interpretation of the issue in dispute, whatever the ultimate merits of that interpretation may be.

It is important to stress that the Arbitrator makes no determination as to the merits of the Union's claim to an implied right of jurisdictional exclusivity on a subdivision basis for road crews. The resolution of that issue can properly await another

grievance and the presentation of more considered and fully prepared evidence and argument. For the purposes of the instant dispute, it is sufficient to find, as I am satisfied I must, that the Company did not proceed in blatant and indefensible disregard of the provisions of the collective agreement, as alleged by the Union. This is not, therefore, a circumstance in which the application of article 85 is made out.

For the foregoing reasons the grievance must be dismissed.

April 20, 2004

(signed) MICHEL G. PICHER
ARBITRATOR