CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3408

Heard in Montreal, Wednesday, 11 February 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Violation of articles 85.3, 84.2(b), 84.6, 82.1 and 62 of agreement 4.16 and the harassment and intimidation of a duly elected union representative contrary to the Canada Labour Code and the collective agreement. The Foregoing dispute(s) are submitted jointly and severally under the provisions of article 85, addendum 123.

UNION'S STATEMENT OF ISSUE:

On December 18, 2003, Conductor (and Local UTU Representative) Bill Namink was required to attend two Company investigations as follows:

1. "Formal Employee Statement in connection with the contents of a letter, subject "Re Violation of Article 84 and common decency!!!" dated October 11, 2003, signed by yourself and delivered to Mr. John Quirk Superintendent Southwestern Ontario."

2. "Investigation in connection with the circumstances surrounding: your time submission made for Q14891-09 on Dec. 10, 2003"

During the noted investigation the Union raised a number of objections which went unheeded by the investigating officer.

It is the Union's position that the Company knowingly and wilfully violated the collective agreement. Further, and in addition, did knowingly and wilfully harass and intimidate a duly elected Union officer.

It is the Union's position that the Company has violated the following provisions of the collective agreement, jointly and severally, both directly and indirectly, with respect to the noted Company investigations.

1. Article 85.3 of agreement 4.16.
2. Article 84.6 of agreement 4.16.
3. Article 84.2(b) of agreement 4.16.
4. Article 82.1 of agreement 4.16.
5. Article 62 of agreement 4.16.
6. Harassment and intimidation of a Union officer contrary to the Canada Labour Code and the collective agreement.

It is the Union's position that a remedy, or remedies, is mandated to be implemented in these matters.

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
G. Ethier	– Secretary, GO-105,
S. Pommet	– Local Chairperson – Yard,
Me. R. Marolais	– Legislative Representative, TUT, Local 1139
Me. S. Groulx	– Observer
W. Namink	– Grievor

AWARD OF THE ARBITRATOR

The instant grievance involves a substantial dispute between the parties as to the scope of the issues which are before the Arbitrator. Counsel for the Company maintains that, based on the *ex parte* statement of issue filed by the Union, the sole issue is the alleged violation of the rights of Conductor Bill Namink of Sarnia in relation to two Company investigations conducted on December 18, 2003. The Union takes the position that the scope of the dispute is far wider, and concerns violations of the five provisions of the collective agreement listed in the statement of issue, as well as harassment and intimidation of Mr. Namink in his capacity as a local union officer.

Before dealing with that issue the Arbitrator deems it appropriate to briefly review the facts.

It is common ground that at Sarnia the Company administered the collective agreement in a manner which the Union viewed as involving repeated, virtually daily, violations of the collective agreement. The two greatest areas of conflict concerned the application of article 41 relating to the work of yard service employees and article 51 which governs booking rest. Over a period of time Mr. Namink apparently filed in excess of 1,000 grievances, in respect of which he received no specific reply. While counsel for the Company submits that the great majority of the grievances were repetitious and essentially concerned the same issues, which he suggests the Union should have appreciated would have been dealt with on a generic basis, the fact remains that specific responses to grievances were not provided, apparently prompting inquiries and protests from employees aimed at Mr. Namink, with the result that he felt himself under considerable personal pressure. Against that background, on or about October 11, 2003 Mr. Namink addressed a letter to Sarnia District Superintendent John Quirk, a letter which he simultaneously circulated to the employees and posted in the employees' booking in room.

It is not necessary to quote fully the letter for the purposes of this award. Suffice it to say that it is highly inflammatory and insulting of the Company's District Superintendent. It variously refers to him as "… beneath common decency" and as one of the Company's "goons". It further states, in part, "Your [sic] afraid to show your face

on the property … your word is no good … how do you sleep at night." In a line which appears to advert to the source of Mr. Namink's ire, the letter states "Why do you have your junior managers cutting pay claims and stealing while at the same time, you have no time to answer grievances."

Based on the letter posted and circulated by Mr. Namink the Company convened a disciplinary investigation which was held on December 18, 2003. During the course of the investigation Mr. Namink made it clear that his letter was prompted by what he views as the Company's failure to respect the collective agreement, and in particular its apparent refusal to reply to grievances as contemplated under the agreement. While not deviating from his view that he felt that Mr. Quirk had demonstrated contempt for the employees by failing to respond to their grievances, he did express a qualified form of regret towards the end of the interview, stating "On reflection I may have been able to use different terminology to express my concerns." Lest that be understood to be a statement of admission of wrong doing, however, he then added "But in doing so I accept no culpable behaviour on my part as such comments were the result of clear provocation by the Company."

No discipline was assessed against Mr. Namink as a result of the investigation. Fortunately, the case at hand does not involve the assessment of discipline, and the Arbitrator need not comment on the actions of Mr. Namink in relation to his personal attack on the person and character of Mr. Quirk. It should be made clear, however, that the Arbitrator does not accept the suggestion of the Union's representatives that Mr.

Namink's actions were justified in the circumstances, and constituted the only way he could demonstrate to the local union membership that he was doing his best to represent them.

The record discloses that on the same day the grievor was interviewed concerning the letter he was also separately investigated for a time claim which, on its face, appeared irregular. His explanation for the time claim submitted was apparently accepted, and no further action was taken in that regard by the Company. The Arbitrator is satisfied that the Company did not act in bad faith in seeking clarification of the time claim which, on its face, could have been construed as the submission of a deliberately false claim.

It is against the foregoing background that the Union invokes the provisions of article 85 of the collective agreement, and the remedy process contemplated in Addendum No. 123. Its counsel submits that the *ex parte* statement of issue properly raises the related articles of the collective agreement which the Union alleges prompted the actions of Mr. Namink and in respect of which a remedy is sought in these proceedings. At the risk of simplification, the Union's fundamental position can be briefly stated. It asserts that the Company, presumably on the directions of highest management, has adopted a strategy calculated to destroy the effectiveness of the Union and to undermine the application of the collective agreement to achieve greater efficiency and profitability. According to the Union, it has therefore deliberately declined to respond to grievances against what the Union characterizes as repeated violations of

the collective agreement, in a manner calculated to frustrate the members of the bargaining unit and destroy the credibility of their union representatives.

As a preliminary matter respecting the scope of the dispute, the Arbitrator has some difficulty with the position advanced by the Company. Firstly, the Company did not join in the fashioning of a joint statement of issue, nor did it file its own *ex parte* statement of issue, as it is entitled to do. While it is indeed open to the Company to question the scope of the dispute based on the *ex parte* statement of the Union, care should be taken to not be unduly technical in restricting either party from advancing the true nature of the dispute. As the courts have made clear, boards of arbitration should not adopt an unduly technical and restrictive approach to the reading of grievance documents, but should endeavour to deal with the real substance of the dispute (**Re Blouin Drywall Contractors Ltd. And United Brotherhood of Carpenters and Joiners of America, Local 2486** (1975), 57 D.L.R. (3d) 199 (Ont. C.A.)). I am satisfied that the scope of issues before me is as argued by the Union.

I therefore turn to consider the allegations as they are presented. Does the material before the Arbitrator disclose a violation of article 85.3 of the collective agreement? That article reads as follows:

> **85.3** No ruling will be made by an Officer of the Company changing any generally accepted interpretation of any Article of this Agreement without first having discussed the matter with the General Chairperson. A copy of the ruling issued will be furnished to the General Chairperson.

I can find no violation of the foregoing provision on the material before me in the case at hand. The Union has produced no evidence of any written or oral declaration by a Company officer concerning an interpretation of any article of the collective agreement which could be the basis for a dispute with respect to the application of that article. The mere fact that a Company officer or a Company policy might proceed in a way which the Union maintains violates a provision of the collective agreement does not, of itself, constitute evidence of a "generally accepted interpretation", much less a change or violation of any such accepted interpretation. To use the language of the last sentence of article 85.3, no "ruling" can be said to have issued in the sense contemplated by the article. If there is a dispute between the parties concerning the application of article 41 and 51 of the collective agreement, a matter which may well be close to resolution, it is far from clear to the Arbitrator that those disputes would constitute changes of interpretation within the meaning of article 85.3 of the collective agreement. I am therefore satisfied that no violation of that provision is disclosed.

Article 84.6 of the collective agreement concerns disputed time claims and provides as follows:

> **84.6** In the application of paragraph 84.2 to a grievance concerning an alleged violation which involves a disputed time claim, if a decision is not rendered by the appropriate officer of the Company within the time limits specified, such time claim will be paid. Payment of time claims in such circumstances will not constitute a precedent or waiver of the contentions of the Company in that case or in respect of other similar claims.

Counsel for the Company submits that claims for 100 miles which may have been submitted by road crew employees alleging that they were required to do yard work, or yard employees alleging that their work was denied to them, by violation of article 41 of the collective agreement, or punitive claims for the payment of 100 miles for alleged violations of article 51 of the collective agreement, do not constitute “time claims” within the meaning of article 84.6 of the collective agreement. After close consideration the Arbitrator is compelled to agree.

The concept of time claims is well defined within the collective agreement. Article 62, which extends for some two pages, governs the “submission of time returns”. A review of the details of that article, which is extensive, clearly reflects the parties’ own understanding of the meaning of “time claims”. In some circumstances specific compensation claims, such as run-around claims, are referred to, as for example within the wording of article 62.1(g). The collective agreement variously calls for specific time payments in certain circumstances, such as a run-around or where employees are called and cancelled in road or yard service. The collective agreement abounds with other provisions such as those governing broken time, initial and final terminal time and guarantees, all of which would arguably fall within the general rubric of “time claims”. On what basis, however, can it be said that an employee who alleges that he or she was the victim of a violation of the collective agreement, and as a result he or she files a claim for 100 miles, or any other form of payment, can fairly be said to have made a “time claim” in the sense contemplated by the collective agreement. At best what such a claim would involve is a claim for damages for work improperly assigned or work not

assigned at all. It cannot, in my view, be fairly characterized as a time claim which would be eligible for automatic payment upon the failure of a reply by a Company officer within the contemplation of article 84.6 of the collective agreement.

The prior awards of this Office, as well as the Shopcraft awards, are clear on that issue. In **CROA 507** which concerned a claim for the default payment of "a claim for unpaid wages" the Office declined to interpret language similar to article 84.6 of the instant collective agreement as extending to penalty claims or grievance compensation claims for work either improperly assigned or for work not assigned. That award reads, in part:

> … Thus, a claim that an employee has performed certain work for a certain time and should be paid is, clearly, a claim "for unpaid wages". On the other hand, a claim that an employee ought to have been assigned work, but was not and should therefore be paid, is not a claim "for unpaid wages", but is rather a claim of improper discipline, a seniority claim, a contracting-out claim, or whatever the case may be. In such cases, failure to reply has the effect of allowing the case to go to the next stage of the grievance or arbitration procedure, it does not of itself preclude consideration of the merits and require payment.

In **SHP 153** Arbitrator Weatherill applied the same analysis to the phrase "time claim" in a similar provision within the collective agreement between Canadian Pacific Limited and the Canadian Council of Railway Shopcraft Employees and Allied Workers. He commented as follows:

> It was contended by the union that the claim should be allowed because the company failed to respond within the time limit provided at Step 2 of the grievance procedure. This claim is based on article 28.11 of the collective agreement. That article is as follows:
>
> > **28.11** A grievance not progressed within the time limits specified shall be dropped and shall not be subject to further appeal. Where, in the case of a grievance based only on a time claim, a

> decision is not rendered by the designated officer of the Company at Steps I or II within the time limits specified in such steps, the time claim will be paid. Payment under such circumstances shall not constitute a precedent, or waiver of the contentions of the Company in that case or in respect of other similar claims.

It seems that the company did not in fact give its reply to the grievance at Step 2 within the time provided. If this were "a grievance based only on a time claim", then it would have to be paid, regardless of its merits, by virtue of article 28.11. In the instant case, however, the grievor is not submitting a claim in respect of time worked, but is rather making the claim that he ought to have been assigned certain work which was performed by others. The grievance is clearly not one "based only on a time claim". A somewhat similar provision (calling for payment of "a claim for unpaid wages", where it was not replied to within time limits), was dealt with in **CROA Case No. 507**, and in my view the general comments made in that case with respect to the meaning of the phrase "a claim for unpaid wages" apply as well to claims based "only on a time claim", to use the language of this collective agreement. As was noted in that case, claims of improper discipline, seniority claims, contracting-out claims or, as in that case and in this, claims of entitlement to be assigned work are not "wage claims", and they are certainly not "only" "time claims", even although a claim is made for wages (or "time"), by way of relief. This is not, therefore, a case coming within article 28.11, and the grievance is not to be allowed on the basis only that the company did not reply to the grievance at Step 2 within the time provided. The remedy for that default was that the union was then entitled to process the matter to the next step, without waiting for a reply.

For all of the foregoing reasons the grievance must be dismissed.

CROA 1799 dealt with a union's argument that the penalty mile claim filed by a locomotive engineer became automatically payable by the default of a timely reply from the Company. The arbitrator rejected that position, commenting:

> In the Arbitrator's view the facts of the instant case do not fall within any of the provisions of Article 69 respecting the filing of time returns. Putting it at its highest, it would appear that the grievor believed that he was entitled to some form of penalty payment, analogous to what is provided within the Collective Agreement for an employee who is run around, the claim for which is to be made by filing a time ticket. There appears to be no comparable provision, however, within the Agreement for the payment of penalty rates resulting from an alleged error on the part of the Company in crew dispatching. I cannot find, therefore, that the grievor was entitled to file a time claim under Article 69 or any other part of the Collective Agreement in the circumstances disclosed.

(See also **CROA 487, 3199** and **SHP 194**.)

The record before the Arbitrator is entirely unclear as to the precise nature of the more than 1,000 claims which Mr. Namink maintains were never responded to. If there are genuine outstanding time claims within the list of grievances which he filed then the position of the Union is correct, to the extent that those claims were not responded to in a timely fashion by the Company. The Arbitrator would so declare and direct the parties to examine the claims in question and to make such payment as would be appropriate under the normal operation of article 84.6. I would further direct that in all cases where such payments are made notice thereof be provided to the Union's General Chairperson. For the purposes of clarity, however, the direction herein applies to true claims for time worked or for agreed penalty claims such as for a run-around. It does not apply to penalty claims not specifically provided for in the collective agreement, such as claims for 100 miles for an alleged breach of articles 41 and 51 of the collective agreement.

Article 84.2(b) of the collective agreement deals with the Step 2 appeal to the District Superintendent within the grievance procedure. Sub-paragraph (3) of that article provides as follows:

> **(b)(3)** the decision will be rendered in writing within 60 calendar days of receipt of the appeal. In cases of declination, the decision will contain the Company's reasons in relation to the written statement of grievance submitted.

The Arbitrator can appreciate the frustration experienced by the Union's officers to the extent that grievances which they view as duly submitted at Step 2 received no decision from management within the 60 calendar days as provided, much less a statement of the Company's reasons for declination. As regards the administration of the collective agreement, however, there is a clear avenue of redress contemplated by the parties for such a violation. Article 84.5 of the collective agreement provides, in part, as follows:

> **84.5** … Where a decision is not rendered by the appropriate officer of the company within the prescribed time limits, the grievance may, except as provided in paragraph 84.6, be progressed to the next step in the grievance procedure.

The foregoing article establishes what was characterized by Arbitrator Weatherill in **SHP 153** as "the remedy for that default." From the standpoint of an arbitrator charged with dealing with the administration of a collective agreement, as concerns the application of Addendum 123 in the circumstances of a failure of the Company to deal with a grievance under the provisions of article 84.2(b) the collective agreement would appear to have a specific consequence or penalty contemplated. It is that the grievance can, in that circumstance, be automatically progressed to the next step of the grievance procedure, and presumably onwards to arbitration. This is therefore not a situation which falls to be dealt with under Addendum 123 of the collective agreement. Under that addendum the remedy provision is available "… if and only if the negotiated collective agreements do not provide for an existing penalty."

In such matters jurisdiction is important. If, as the Union alleges, the failure to respond to grievances is so widespread and systematic as to constitute a deliberate intention to undermine the trade union by the sustained perpetration of an unfair labour practice, that is a matter better dealt with by the tribunal of competent jurisdiction with respect to such issues, the Canada Industrial Relations Board. Indeed, the Arbitrator is advised that a complaint is pending before the CIRB with respect that issue. In the circumstances, I am not satisfied that any declaration or determination with respect to the alleged violation of article 84.2(b) of the collective agreement can be made through the remedial application of Addendum 123.

Article 82.1 of the collective agreement concerns disciplinary investigations. It provides as follows:

> **82.1** Employees will not be disciplined or dismissed until the charges against them have been investigated. Employees may, however, be held off for investigation not exceeding 3 days and will be properly notified, in writing and at least 48 hours in advance, of the charges against them.

On the material provided, the Arbitrator can find no violation of the foregoing provision. The material before me confirms that Mr. Namink was duly advised of the two investigations held on December 18, 2003, that he was accompanied by a Union representative and had the fullest opportunity to participate in the manner contemplated by the provisions of article 82 of the collective agreement. The Arbitrator has reviewed the objections raised by the grievor's union representative during the investigation and

finds nothing in those objections to estalish a violation of the standard of a fair and impartial investigation. No violation of article 82.1 is disclosed.

Article 62 of the collective agreement relates to the submission of time returns. As noted in the discussion above concerning the application of article 84.6, it is not clear on the material before the Arbitrator to what extent, if at all, true time returns have not been lined up for payment following the expiry of time limits as contemplated under the collective agreement. It is difficult to see how the failure to pay a defaulted true time claim would be other than a blatant and indefensible violation of the collective agreement. In the circumstances, the Arbitrator retains jurisdiction for the purposes of determining whether any violation of the provisions of article 62 is disclosed, whether independently or in tandem with article 84.6, as related above.

The final allegation is that the Company engaged in harassment and intimidation of Mr. Namink. The Arbitrator cannot agree. Mr. Namink's published letter can only be characterized as a vicious attack on the person and reputation of Mr. Quirk calculated to destroy his character in the eyes of employees. It can scarcely be characterized as something that was justified by the alleged violations of the collective agreement by the Company, much less the pressures supposedly put on Mr. Namink by dissatisfied employees. While arbitral jurisprudence recognizes that union representatives are given some latitude in resorting to strong words in the progressing of grievances or in the general representation of their members, statements which cross the line of deliberate malice do not enjoy such protection. Faced with the stated accusations against Mr.

Quirk of theft and dishonesty, it was not improper for the Company to convene an investigation and make its own determination as to whether the statements of Mr. Namink were in fact malicious and deserving of discipline. Nor was the inquiry into his time claim, which on its face was clearly questionable, proceeded with in bad faith or in a manner calculated to harass or intimidate Mr. Namink. It is also clear that Mr. Namink was apparently not intimidated, given his denial of culpable behaviour, albeit coupled with his offer of "an apology for any discomfort my letter may have caused."

The foregoing comments are not offered by the Arbitrator out of indifference for what may be genuine concerns on the part of the Union regarding the handling of grievances by the Company and what it may perceive to be a deliberate strategy to undermine the Union, whatever the actual merit of that view may be. However, even accepting, without finding, that the actions of local management at Sarnia provoked employee anger and prompted the actions of Mr. Namink, nothing in such a scenario would justify a departure from normal standards of civility. Nor should such a view of matters have caused the Union to do other than simply pursue all grievances to the point of arbitration, using policy grievances or group grievances to achieve efficiencies if necessary, while taking parallel action in respect of the alleged unfair labour practice before the Canada Industrial Relations Board. No responsible tribunal can endorse the kind of communication engaged in by Mr. Namink. More specifically, this Office cannot find that the Company's investigation of his publication of the letter can fairly be characterized as a form of bad faith, harassment or intimidation.

What, then, of the remedy which would flow given the findings above? The only matter of substance which the Arbitrator is satisfied might constitute a legitimate claim under Addendum 123 involves the submission of time claims which were not responded to by the Company, bearing in mind that such time claims would not include 100 mile claims for alleged violations of articles 41 and 51. Given that the parties are in the process of what will hopefully be a fruitful resolution of the dispute concerning those two articles, I deem it appropriate to simply retain jurisdiction with respect to determining whether there have been legitimate time claims which were not responded to in a timely manner within the contemplation of article 84.6 of the collective agreement. Should any such claims be determined to exist, the Arbitrator reserves jurisdiction to make such remedial directions as are appropriate, whether in respect of the specific claims or any larger remedy under the provisions of Addendum 123.

On the basis of the foregoing, the matter is remitted back to the parties.

April 20, 2004

(signed) MICHEL G. PICHER
ARBITRATOR