CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3411

Heard in Calgary, Tuesday, 9 March 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE [BROTHERHOOD OF LOCOMOTIVE ENGINEERS]

EX PARTE

DISPUTE:

The Company's failure to properly compensate Locomotive Engineer K.P. Barr of Regina, Saskatchewan, guarantee entitlements, as outlined in article 2.3 of collective agreement 1.2.

UNION'S STATEMENT OF ISSUE:

On November 23rd, through November 30, 2003, Locomotive Engineer Barr was assigned to the 523 road switcher assignment at Regina.

The Union submitted that the collective agreement provides for various guarantees, paid at certain rates for different classes of services. In the instant case, the Union contended that given the grievor was working in assigned road service, and therefore a guarantee of 3,000 miles is applicable, and such guarantee must be paid at road switcher rates

The Company submitted that the assignment that the grievor was working was not considered an assigned run as contemplated under the provisions of paragraph 2.3 of article 2 and, accordingly, he was not entitled to road switcher rates.

The Company disagrees with the Union's position.

FOR THE UNION:

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

There appeared on behalf of the Company:

B. Laidlaw	– Manager, Human Resources,
J. Torchia	– Director, Labour Relations, Edmonton
R. Reny	– Senior Manager, Human Resources, Edmonton
S. Ziemer	– Manager, Human Resources, Vancouver
R. Dilssner	– Assistant Manager, Crew Management Systems

And on behalf of the Union:

D. E. Brummund	– Sr. Vice-General Chairperson, Edmonton
B. Boechler	– General Chairperson, UTU, Edmonton
R. A. Hackle	– Vice-General Chairperson, UTU, Edmonton

AWARD OF THE ARBITRATOR

The instant grievance concerns the interpretation and application of article 2.3 of the collective agreement which reads as follows:

> **Monthly Guarantee for Assigned Road Service**
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> **2.3** Locomotive engineers on assigned runs not able to make 3000 miles per month will be paid 3000 miles per month or their proportion thereof if they do not work a full month but may be held to that extent provided such service is not in yard service. Where agreed between the appropriate local officer of the Company and the local chairman, runs less than 3000 miles per month may be established because of local conditions and will not be governed by this paragraph.

It is not disputed that assigned road service can take a number of forms, including through freight service, road switcher, work train, way freight, snow plow and passenger service, each having its own separate rate of pay. The purpose of article 2.3 is to ensure that a locomotive engineer in assigned road service is able to earn no less than a monthly minimum salary equivalent to 3,000 miles' pay.

The instant grievance arises out of the circumstance of Locomotive Engineer Kevin Barr of Regina, Saskatchewan. Mr. Barr worked road switcher assignment 523 for a period of time in November of 2002. In submitting his pay claim the grievor requested the road switcher rate per day of $198.62 for the eight days in November he was assigned to the job, in what he claims is compliance with the guarantee provisions of article 2.3 of the collective agreement. The Company did not, however, calculate the grievor's guarantee on the basis of the road switcher rate of pay. Rather, it gave him his guarantee payment based on the through freight rate of pay, or the equivalent daily rate of $150.30. In the result, the sole issue in dispute is whether the grievor's guarantee is to be calculated on the rate of pay for road switcher service or the rate of pay for through freight service.

In the Arbitrator's view it is significant that there is no formula provided within article 2.3 with respect to the calculation of the monthly guarantee. The article simply provides that employees are to be paid "3,000 miles per month or their proportion thereof if they do not work a full month …". In these circumstances it is arguable that the Company was at liberty, absent any contractual constraint within the terms of the collective agreement, to determine the manner in which the 3,000 mile guarantee is to be calculated. That appears to have been the approach of this Office to the calculation of deadheading rates of pay in a grievance between Canadian National and the United Transportation Union in **CROA 1142**. But in the Arbitrator's view it is unnecessary to rest the instant decision on that basis.

In my view the proper approach was articulated in the following in **SHP 379**, a grievance between CN and the CAW, Local 100, an award dated April 8, 1993. In that award the following comments appear:

> It is a well-established rule in interpretation that where the language of the collective agreement is susceptible of two possible constructions, or where there is ambiguity apparent in a provision, recourse may be had to extrinsic evidence, and in particular to past practice as a means of determining the intention of the parties. …
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> …
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> There the consistent practice for more than 20 years has been to apply the rules in the manner stipulated by the Union. Given that the collective agreement has been renewed several times, without change, over those many years, I find it difficult to accept the suggestion of the Company that its practice simply constituted an error. In my view, in light of the length, consistency and preponderance of the practice, it is better understood as reflecting the original understanding of the parties.

The unchallenged representation of the Company is that for many years it has calculated the guarantee payment for all forms of assigned road service based on the rate of pay for through freight service. In the case of passenger service that has resulted in an adjustment upwards, whereby 3,300 miles are paid monthly, while in the case of crews assigned to road switchers there would be a downward adjustment. That arrangement appears to have operated, without incident or controversy, through the renewal of the collective agreement in successive rounds of bargaining. Nor can it be said that the Union was entirely without knowledge of the practice, as its representative confirmed his own understanding of the adjustment whereby employees in passenger

service are placed on an unequal footing with those in through freight service by an upward adjustment in the miles of their guarantee.

From a purposive standpoint the Company's interpretation is also compelling. It would, in the Arbitrator's view, appear reasonable to conclude that the parties would have opted for a relatively simple method for the calculation of the guarantee of employees in various forms of assigned road service. Were it otherwise, for example, an employee who works a few days in a work train assignment, then does through freight service, road switcher service and some snow plow service all within the same month, an arguably complex and costly administrative burden of averaging formulae would then come into operation. The fact that the Company has used an simple formula for all classes of service, based on through freight rates, for the calculation of monthly guarantees, apparently without complaint or grievance for a number of years prior to the instant case, would suggest that the parties have long recognized and accepted the value of the simple bright line system of calculation which has been in effect for years. In the circumstances I am satisfied that the interpretation of article 2.3 advanced by the Company is to be preferred to that argued by the Union.

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

March 15, 2004

(signed) MICHEL G. PICHER
ARBITRATOR