

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3445

Heard in Montreal, Tuesday, 14 September 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Issuing of "Conductor Only" pension credits at Capreol, Ontario.

JOINT STATEMENT OF ISSUE:

On May 24, 1991, the Company and the Union reached an Agreement establishing Conductor Only Operations in through freight service. In reaching agreement the parties agreed to provide early retirement opportunities under specific and identifiable circumstances.

In early 2001 there remained 28 pension credits at which time the Company issued 21 pension credits.

The Union maintains that 7 pension credits remain at the terminal of Capreol. The Union submits that the Company failed to issue the remaining credits as was required by the conductor only agreement. The Union requests that the remaining credits be immediately issued at the terminal of Capreol.

The Company submits that no pension credits remain at the terminal of Capreol. The Company argues that an agreement was reached with the union whereby the issuance of the 21 pension credits in early 2001 eliminated all 28 pension credits.

The Company declined the Union's request.

FOR THE UNION:

(SGD.) R. A. BEATTY
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) B. J. HOGAN
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

- A. Giroux – Counsel, Montreal
- B. Hogan – Manager, Labour Relations, Toronto
- A. MacNab – Manager, Labour Relations, Montreal
- K. Tobin – Counsel, Montreal

And on behalf of the Union:

- M. Church – Counsel, Toronto
- R. A. Beatty – General Chairperson, Sault Ste. Marie
- R. LeBel – General Chairperson, Quebec
- R. Hackl – Vice-General Chairperson, Edmonton
- G. Anderson – Vice-General Chairperson,
- A. McDavid – Local Chairperson, Capreol
- T. Beatty – Local Chairperson, Belleville
- C. Little – Vice-Local Chairperson, Belleville
- S. Pommet – Local Chairperson, Montreal

AWARD OF THE ARBITRATOR

The Company maintains that there are no longer any conductor only pension credits remaining at Capreol, Ontario. The Union submits that there are seven unused credits still outstanding.

The facts in relation to this grievance are not in substantial dispute. It is common ground that under the conductor only agreement there were a total of forty-nine conductor only bridging pension credits accorded to Capreol. It is further agreed that as of August 8, 2000, twenty-eight conductor only pension credits remained unclaimed. Because of a surplus of employees in Capreol and elsewhere, the Company proposed to accelerate the granting of credits, offering to make some twenty-one credits available

to employees who might not otherwise qualify by reason of their age or length of service.

It is not disputed that the position which the Company initially communicated to the Union was that in exchange for accelerating the issuance of twenty-one credits at Capreol it wanted the Union to accept that all twenty-eight conductor only credits outstanding would then be deemed exhausted. The evidence before the Arbitrator confirms that a conversation in respect of the Company's position took place between the Company's then Labour Relations Officer, Frank O'Neil and Union General Chairperson Rex Beatty. During that conversation Mr. O'Neill reaffirmed to Mr. Beatty that the Company's offer of twenty-one credits on an accelerated basis was conditional on the Union agreeing that the offer would exhaust all twenty-eight credits then outstanding. According to Mr. O'Neill's recollection he stated to Mr. Beatty that the Company's offer would be in full and final settlement of the twenty-eight credits to which Mr. Beatty responded "Yes, it is."

Counsel for the Union submits that at best the exchange between Mr. O'Neill and Mr. Beatty would simply reflect Mr. Beatty's acknowledgement that he understood the condition being put forward by the Company. Counsel submits that Mr. Beatty's response cannot reasonably be taken as acceptance of the Company's offer.

The Union advances further evidence in support of its view that the Company's offer was never accepted, notwithstanding that the Company did proceed of its own accord to grant the twenty-one bridging pension credits at Capreol. Significantly, that material includes an email communication from Local Chairperson Redge Simpson to his local union officers on September 19, 2000, a communication which went well after the conversation between Mr. O'Neill and Mr. Beatty. That email reads, in part, as follows:

Rex has advised me that the Companies [sic] position is that 21 Bridging Credits for the 28 N/Essential positions.

1. – This is a one time deal account of budget allotment.

2. - if 21 positions available for bridging are not filled the 28 N/Essential positions are gone forever and this includes the C/Only retirement credits. 3. – If we don't go for the opportunities will be offered to the BLE

...

This offer dies the first week of October.

A special meeting will have to be called and Rex has offered to attend to fill in the detail "PRO'S & CON'S"

The Union's submission is that the meeting was held and, although no record exists, the local rejected the Company's offer. It does not appear disputed that there was no communication one way or the other about the Union's position made to the Company. Significantly, however, the record reveals that the email communicated by Mr. Simpson to his local committee was in the possession of the Company, as is evident from the fax records of the Company's Crew Management Centre which administered the bridging offers. In fact, the record discloses that Company offices in both Capreol and Moncton were in possession of the email, and were plainly on notice

that the Union was deliberating over the Company's offer as of September 19, 2000, well after the conversation between Mr. O'Neill and Mr. Beatty.

The conductor only agreement was a major initiative in the relationship between the parties. In exchange for the ability to eliminate brakemen's positions in road service the Company offered a number of incentives including bridging, early retirement opportunities at a number of locations, including Capreol. Those obligations became an intrinsic part of the collective agreement regime between the parties. While it was obviously open to the Company and the Union to make adjustments or amendments to their arrangement, they could only do so by mutual agreement. In a recent ad hoc decision between these same parties concerning the alleged violation of article 12 of the collective agreement, dated June 24, 2004 the arbitrator found that the Union's position that the parties had settled the grievance was not proved. In that regard the award reads, in part:

Clearly no letters of settlement were ever drafted or signed by both parties ...

... Those familiar with collective bargaining are well aware that, generally speaking, labour relations statutes define collective agreements as documents in writing, and that parties to collective agreements invariably settle their disputes by executing a written memorandum of settlement. ...

As argued by counsel for the Union, those principles have their proper application in the case at hand. To the extent that the Company would argue that there was an agreement between itself and the Union to exchange the twenty-one accelerated bridging opportunities for the twenty-eight outstanding credits at Capreol,

the onus is upon it to establish by proper evidence that that agreement was made. While it might be possible to discharge that onus by compelling evidence of a verbal understanding, the evidence before the Arbitrator falls well short of that standard. I must agree that at best the exchange between Mr. O'Neill and Mr. Beatty, which occurred some four years ago, falls substantially short of demonstrating the Union's categorical acceptance of the Company's offer. There is, moreover, no evidence in writing of any such agreement. On the contrary, such written evidence as remains would indicate that the Union was still deliberating the issue as late as September 19, 2000, and was doing so to the knowledge of the Company. Given that the Union never communicated any acceptance to the Company, the Arbitrator cannot sustain the position that the remaining seven conductor only early retirement credits outstanding at Capreol are no longer available.

The grievance is therefore allowed. The Arbitrator therefore declares that the seven credits remain outstanding at Capreol and directs the Company to issue such credits to employees who may have retired from the Company who would otherwise have benefited from them, and to advertise forthwith all remaining conductor only pension credits to the terminal of Capreol, to be awarded consistent with the terms and conditions of the conductor only agreement.

September 20, 2004

(sgd.) MICHEL G. PICHER
ARBITRATOR