CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3456

Heard in Calgary, Wednesday, 10 November 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE (BROTHERHOOD OF LOCOMOTIVE ENGINEERS DIVISION)

EX PARTE

DISPUTE:

The increase of the crew consist from conductor only to a full crew on some trains operating in through freight service in Western Canada.

COMPANY'S STATEMENT OF ISSUE:

In approximately July of 2003 the Company began running some trains in Western Canada with a full crew, rather than a two-person conductor only crew, in order to utilize the services of UTU employees.

The Union contends that their membership has been adversely affected and are claiming loss of earnings in accordance with article 1.5(b) Train Length Allowance and articles 11.7 and 18A Conductor Only payments up to the next change of card.

The Company contends that there has been no violation of the collective agreement and has declined the Union's claim.

UNION'S STATEMENT OF ISSUE:

On or about the end of June, 2003, and the beginning of July 2003, the Company decided to depart from past practice and operate certain trains utilizing employees in excess of the traditional crew consist of conductor only (two man crew). This change in operation had the immediate effect of negating certain provisions of collective agreement 1.2, but not necessarily

limited to, “conductor only” allowances covered under the provisions of article 1.5(b), article 11.7 and article 18A.

The Union contends that all affected locomotive engineers must be made whole for any earnings that have been lost as the result of the Company’s actions.

The Company disagrees with the Union’s positions and has declined the grievance.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. E. BRUMMUND	**(SGD.) S. M. BLACKMORE**
FOR: GENERAL CHAIRMAN	**FOR: VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

S. M. BLackmore	– Manager, Labour Relations, Edmonton
R. Reny	– Sr. Manager, Labour Relations, Edmonton
D. Demery	– Assistant Manager, Pay Systems, Edmonton
B. Kalin	– Superintendent, Edmonton
B. Fernuik	– Transportation Supervisor, Biggar
G. Cronkright	– Transportation Supervisor, Jasper

And on behalf of the Union:

D. E. Brummund	– Sr. Vice-General Chairman, Edmonton
D. J. Shewchuk	– General Chairman, Edmonton

AWARD OF THE ARBITRATOR

By way of background it is worth noting that, beginning in 1992, following national negotiations during the closed period, the Company negotiated a reduction in the crew consist to a two-person Conductor Only service consisting of a locomotive engineer and a conductor. As a result the implementation of Conductor Only operations, train crews operating with a locomotive engineer and a conductor, and no assistant conductor, would be entitled to a number of allowances under the collective agreement including the run-length premium as provided for in paragraph 1.5(b) of article 1 as well as other allowances set out at articles 11.7 and 18A. It is the Union’s contention that, since the

implementation of Conductor Only agreements, crew starts with few exceptions operate as two person crews. The Union did concede that, from time to time, the Company did operate a small proportion of crew starts with three person crews but only on rare occasions due to excessive switching.

The Union, on July 22, 2003, initiated a grievance claiming that the Company should have instituted an “interim change of card” prescribed by article 33.1 given the changes that management undertook by placing furlough board employees as third persons on trains and given that such changes occurred after the regular card in June 2003. The Union pointed out that the Company did not agree to a change of card. In order to attach a monetary value to the claim, an “IP” (Interpretation Process) grievance claim code was implemented to track the losses of allowances set out in the dispute. The Union pointed, for example, to the entry for R.P. Locke, locomotive engineer from Jasper. The IP amount entered on his behalf for all of his assignments between January 1, 2003 and June 26, 2003 is $1,410.

The Union further claims that, as a result of the Company’s change in operations, the pay structure of the locomotive engineers not only resulted in the loss of Conductor Only allowances but also the loss of Method of Pay (MOP) rates. The Union noted that prior to the Company’s change in operations, locomotive engineers were the recipient of MOP rates that had been averaged over a period of time and reviewed on an interim basis. These rates, from the Union’s perspective, have an accrued value that has been lost as a result of the Company placing other personnel on trains. Accordingly, the loss

of what the Union contends is an accrued value of MOP rates is in addition to the immediate effect of having the Conductor Only run length premium disqualified when an additional third or fourth person is added to the crew.

Turning to its legal arguments, the Union takes the position that the Company's unilateral action of assigning a third or fourth person to crew starts forms the basis of an estoppel. The clear basis for the estoppel are the years between 1992 and 2003 of Conductor Only service in Western Canada. The Union states that the test for an estoppel set out in **CROA 2650** have been met. In that regard, the Company operated for eleven years on a Conductor Only basis and employees had grown accustomed to an increase in wages over that time. Employees have suffered detriment as a result of being unable to maintain their previous earnings. The Union emphasizes that the practice continued unabated for some eleven years until it came to an end in July 2003.

The Company submits in reply that there has been no violation of the collective agreement. The articles under which the Union claims are in fact only "pay articles" which the locomotive engineers are entitled to only if operating with a train crew consist of a Conductor Only. As to the Union's position suggestion that the Company should have instituted an interim card change, the Employer points out that the change from a Conductor Only operation to full crew consist is not listed as one of the conditions requiring the Company to re-advertise the run or job and in turn produce an interim card change.

The Company further argues that the Union is essentially trying to limit the Company's operational rights without any collective agreement reference to support its position. Restrictions are imposed on the Company, for example, under article 4.3 of the collective agreement, when the Company decides to operate with a Conductor Only crew. However, there is clearly no recognition in the collective agreement that the Company **must** operate with a Conductor Only crew. Nor has any grievance been filed by the Union since July of 2003 when the additional crew members were added to the train.

With respect to the estoppel argument of the Union, the Company first noted that the doctrine of estoppel does not convert all established practices into rights enforceable under a collective agreement. In any event, the Company maintains that there is no clear historical past practice. In fact the past practice has been a "mixed operation" (trains operating with a full crew and trains operating with a Conductor Only) of both two and three person crews. The Company also noted that employee assignments vary on a weekly basis with every new board change. Accordingly, there can be and frequently is significant movement of employees from one job placement to another. There is no basis in the Company's view to support the Union's position either in the collective agreement or through a past practice.

This Arbitrator notes that the jurisdiction of an arbitrator is to interpret the language found in the collective agreement. An arbitrator cannot add to or modify a collective agreement. To do so, would amount to a jurisdictional error under the collective agreement and the relevant legislation. These are basic arbitral principles but bear repeating in most cases where an arbitrator is required to interpret the scope and application of a collective agreement. As Arbitrator Picher noted in **CROA 3350**:

> It is trite to say that a board of arbitration seized of a grievance cannot disregard or modify the terms of the collective agreement before it. I must take the collective agreement as I find it. …

The Union, as the Company points out, is unable to point to any language in the collective agreement which prohibits the employer from increasing the crew through the addition of an assistant conductor or even a fourth person to the crew consist. The Union has pointed to the manner in which the Rates of Pay article affects the compensation of locomotive engineers when the Conductor Only configuration is increased by the addition of another person, in this case from the furlough boards. Those provisions delineate the employees' entitlement to compensation for specific services but do not, either explicitly or by inference, address anything other than compensation rates.

The main thrust of the Union's position is that the Company has followed a practice since 1993 of assigning Conductor Only crews to a train and, as a result, are now estopped from arbitrarily changing the crew consist. The test for the application of the equitable doctrine of estoppel was noted in both the Company and Union's briefs.

The Union's brief notes that **CROA 2650,** and more recently **CROA 3114**, set out the essential elements of estoppel as follows:

> **(1)** a representation made by the Company either verbally or by conduct to the employee;
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> **(2)** an intention on the part of the employer that the representation would be relied upon by the employee;
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> **(3)** actual reliance on the representation by the employee; and,
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> **(4)** detriment suffered by the employee as a result of his reliance.

There is no evidence, to begin with, that the Company represented to the Union either in writing or verbally that they would follow an exclusive practice of Conductor Only crew assignments. Nor is there the kind of clear and unequivocal evidence required as a basis for an estoppel that the Company, by its conduct, has represented to the Union that it will only use two person crews. The facts before me are there are circumstances which have occurred over the years, such as excessive switching, where a three person crew has been assigned to a train. In that regard, I accept the evidence of the employer that such "mixed operations" have been in place since the Conductor Only agreement was implemented in 1993. Further, as the Company pointed out, there is no evidence that the Union has objected over the last eleven years through a grievance or otherwise to the addition of a third person on those occasions where they felt that the circumstances only warranted a Conductor Only assignment.

Overall, this arbitrator finds that there is an absence of clear evidence before me to conclude that the employer, by its consistent actions over the last eleven years,

demonstrated to the Union that it was abandoning its right to implement full crew operations. Accordingly, the Union has not met the first requirement for an estoppel, that is, a clear representation that the Company would not resort to filling a crew consist on a consistent basis with a configuration which exceeds a two person crew. In the absence of any further contractual language which gives the Union the right to demand a Conductor Only consist, I am left with no other option but to deny the grievance.

The grievance is dismissed.

November 16, 2004

(signed) J. M. MOREAU. Q.C.
ARBITRATOR