

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

CASE NO. 3464

Heard in Montreal, Tuesday, 11 January 2005

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Failure to advertise and award early retirement opportunities pursuant to Addendum 31 of Agreement 4.3.

UNION'S STATEMENT OF ISSUE:

The January 15, 1992 Memorandum of Agreement established a number of enhanced early retirement opportunities at various terminals throughout Western Canada. These opportunities are to be advertised and awarded, pursuant to the terms of the memorandum, in terminals where there is a surplus of employees.

The Company has refused to advertise and award these opportunities in some locations, claiming that no surplus exists.

It is the Union's position that surpluses of employees do, in fact, exist and that these early retirement opportunities should be advertised and awarded.

It is also the Union's position that the Company is artificially creating and perpetuating shortages in order to avoid their obligation to advertise and award these opportunities.

FOR THE UNION:

(SGD.) R. A. HACKL

FOR: GENERAL CHAIRPERSON

There appeared on behalf of the Company:

D. Brodie

– Manager, Labour Relations, Edmonton

Wm. Hlibchuk	– Counsel, Montreal
J. P. Krawec	– Manager, Labour Relations, Toronto
M. Becker	– Director, Labour Relations, CN North America, Chicago

And on behalf of the Union:

M. Church	– Counsel, Toronto
B. R. Boechler	– General Chairperson, Edmonton
R. A. Hackl	– Vice-General Chairperson, Edmonton
J. W. Armstrong	– Vice-President, UTU-Canada, Edmonton
R. A. Beatty	– General Chairperson, Sault Ste. Marie
J. Robbins	– Vice-General Chairperson, Sarnia
G. Anderson	– Vice-General Chairperson, London
W. G. Scarrow	– Vice-Local Chairperson, Sarnia

AWARD OF THE ARBITRATOR

The true issue between the parties is what constitutes a surplus which compels the employer to bulletin enhanced early retirement credits. It is common ground that at the time of the conductor only agreement in 1992, 640 credits were established, distributed on a terminal basis. It appears that there are now somewhat fewer than 119 unused credits remaining. It appears that this grievance is prompted, in part, by the decision of the Company, reflected in a letter dated September 12, 2003 addressed to the General Chairman of the Brotherhood of Locomotive Engineers from Mr. J. Torchia, Director, Labour Relations, to allow locomotive engineers certain early retirement incentives at a time the Union submits the Company should have been honouring its obligation to make enhanced retirement credits available to members of its bargaining unit in conditions of surplus.

The rights and obligations in respect of early retirement opportunities are described in Addendum No. 31 of the collective agreement. It provides, in part, as follows:

(1) The parties recognize that the implementation of a conductor only crew consist trains and yard foreman only transfer in the manner set out in the memorandum of agreement signed in Montreal, Quebec on January 15, 1992 will render a certain number of employees surplus. The parties also recognize that the number of surplus employees will be reduced over time by means of attrition. Therefore, in order to accelerate the attrition of surplus employees, a number of early retirement opportunities will be made available at regular intervals equivalent to the number of surplus employees in the work force at the time. Such early retirement opportunities will be made available under the terms and conditions set out in this Appendix.

...

(4) At each change of card or at such other intervals as may be agreed to by the parties, such early retirement opportunities will be made available, on a terminal by terminal basis, to protected employees working under agreement 4.3. Except as provided by the NOTE to this paragraph (4), the total number of such early retirement opportunities to be made available will, in no case, exceed the remaining number of opportunities as calculated pursuant to paragraph (5).

NOTE: If, during the two (2) years immediately following the effective date of the aforementioned memorandum of agreement, the service design specifications of a train or trains, previously identified as requiring an assistant conductor, are revised so that such train or trains meet the criteria for operation with a crew consist of a conductor only, the total number of existing early retirement opportunities to be made available at the terminal will then be increased by one for each such train. For each four opportunities increased, an additional opportunity will be added.

(5) The number of early retirement opportunities will be reduced by one for each protected employee who is removed from the active working list (including employees who are removed from the working list as a result of accepting an early retirement opportunity) other than by discharge or promotion to yardmaster or locomotive engineer or an excepted position.

(6) Such early retirement opportunities will continue to be offered until exhausted in accordance with this Appendix.

The unchallenged representation of the Union is that in 2003 the Company entered discussions with the Union with a view to possibly reducing the amount of surplus employees in Western Canada. The Union agreed, and a series of unsuccessful

discussions ensued. Following the inability of the parties to reach any agreement the Company then took the initiative, as noted above, to offer early retirement opportunities to locomotive engineers in Western Canada in September of 2003. It appears, on the basis of the documents filed, that two such opportunities were offered in Edmonton, one in Sioux Lookout and five in Winnipeg. It does not appear disputed that during the same time period no conductor only agreement retirement credits were offered to members of the bargaining unit of the United Transportation Union.

The Union protested the Company's action in a letter dated October 14, 2003 addressed to the Company's Sr. Vice-President K.E. Creel by the Union's General Chairperson, Mr. Bryan R. Boechler. Mr. Creel responded by way of a letter dated December 3, 2003. That letter reads, in part, as follows:

Dear Sir:

This is in response to your letters dated October 14, 2003 and November 20, 2003, progressing a Step III Policy grievance claiming a violation of Addendum 31 of Agreement 4.3 and Appendix 2 of the Memorandum of Agreement dated January 15, 1992 – Conductor Only credits.

As you are aware, the Company has and will continue to comply with the provisions of the aforementioned agreements in granting retirement credits at those locations that have a Furlough Board. The agreement is clear that retirement credits will only be advertised to UTU employees at surplus locations at each change of card. The Union is well aware that since the inception of this agreement there continues to be locations throughout the Western Region such as Winnipeg and Edmonton that do not meet the criteria for these retirement credits.

Further, the Company does not agree with the Union's contention that negotiations with the Brotherhood of Locomotive Engineers confirm or acknowledge that a surplus exists at these terminals within the context of Appendix 2. The Company's negotiations with the BLE were accomplished within the provisions of Agreement 1.2 and it did not negatively impact the UTU. In fact,

a positive effect was realized by your membership through the promotion of employees including the recall of laid off non-protected employees.

Based on the foregoing, there has been no violation of the collective agreement and the Company must respectively decline the grievance.

The Company argues a two-fold position. Firstly, it submits that under the conductor only agreement a surplus can be found to exist only in circumstances where there is a furlough board. Furlough boards are established as a means of continuing the earnings of employees who are protected under the conductor only agreement, and for whom there may be no active assignment available. In the Company's submission it is in that circumstance that the Company is compelled to bulletin available early retirement credits. The Company further submits that there is a discretion in the employer in considering whether there is a true surplus, taking into consideration such factors as impending retirements or resignations or any other factors which might impact the workplace demographic within a reasonable period.

The Union submits that the position advanced by the Company, and reflected in the letter of Mr. Creel, represents a substantial change of position from the understanding and practice of the parties since the inception of the conductor only agreement in 1992. It's counsel submits that over years of normal operation the conductor only agreement involved the understanding of the parties that the Company was under the obligation to bulletin enhanced early retirement credits at any terminal where there was a surplus of employees. The Union submits that a surplus exists not only where there is an existing furlough board, but also where there is an excess of manpower, as evidenced by a number of factors, as for example the existence of laid off

unprotected employees or a spareboard which holds more employees than can reasonably share the work which is in fact available.

Upon a careful review of the materials filed, the Arbitrator is persuaded that the Union's position does more accurately reflect the original understanding of the parties to the conductor only agreement. Significantly, among the materials placed in evidence by the Union are documents indicating a substantial number of occasions where, in Western Canada, the Company did bulletin enhanced early retirement credits in accordance with the conductor only agreement notwithstanding that there was no furlough board at the terminal in question. In those circumstances the surplus appears to have been based on the lay off non-protected employees. That, moreover, would appear to be consistent with the underlying purpose of the Addendum, which is to accelerate the attrition of employees to relieve against surplus situations. In a manner consistent with special agreements negotiated for years throughout the industry in circumstances of material change, offering enhanced retirement opportunities to eligible senior employees frees up working opportunities for junior employees who would otherwise be laid off. I am satisfied that that is one of the benefits gained by the Union in exchange for the considerable savings realized by the Company in moving to conductor only operations.

Nor can the Arbitrator share the assertion of the Company that the retirement opportunities made available to locomotive engineers are not indicative of a surplus. In its difficult to understand why the Company would incur the added expense of giving

enhanced retirement incentives to any employees, including locomotive engineers, unless it is to reduce the burden of a surplus. If it were necessary to so determine, this Office would be compelled to conclude that an implicit term of the conductor only agreement is that when there is a surplus of employees within the ranks of the Union's bargaining unit, the Company's first obligation is to make available enhanced early retirement credits to the members of the bargaining unit. While the Company is obviously free to make whatever arrangement it wishes with another bargaining agent and the employees of another bargaining unit, including locomotive engineers, given job mobility between the two running trades bargaining units, it can plainly not do so in such a way as to cause a surplus to disappear and thereafter argue that there never was a surplus which would trigger the rights of the Union under the terms of the conductor only agreement.

For the foregoing reasons, having regard to the language of Addendum 31, to the practice and related understanding of the parties themselves over the years, the Arbitrator is satisfied that the grievance must be allowed as regards the interpretation of Addendum No. 31 and the meaning of a "surplus" which triggers the Company's obligation to bulletin enhanced retirement credits. Specifically, the Arbitrator cannot sustain the position of the Company that it is only where there are employees on a furlough board that a surplus exists so as to trigger that obligation. Any surplus of employees in the bargaining unit on a terminal basis, including the lay off of non-protected employees, does constitute a surplus which triggers that obligation.

The Arbitrator is satisfied that it is appropriate to limit the remedy in this grievance, at the present time, to the foregoing declaration, and to remit the matter back to the parties for their own consideration as to any further remedy. In particular, it would appear that there are issues to be resolved with respect to the period of time over which surplus conditions can be said to exist, bearing in mind that there are fluctuations in the number of employees in and out of active service at any given terminal which can impact the existence or non-existence of a genuine surplus. It is in that sense, and to that extent only, that the Arbitrator agrees that there is some measure of discretion, or perhaps more accurately judgement, to be exercised by the Company in the assessment of whether there is a surplus which must result in the advertising of early retirement credits.

The matter is therefore remitted back to the parties to consider what remedies, if any, would apply in the terminals of Western Canada based on the facts which existed in those terminals from the time of the instant grievance to the present. The Arbitrator further directs the Company to cease from limiting bulletins for conductor only credits to circumstances where a furlough board exists at a given terminal, and to recognize the concept of surplus employees within the bargaining unit in a manner consistent with this award. Should the parties be unable to resolve the issue of any further remedies the matter may be spoken to.

January 17, 2005

(signed) MICHEL G. PICHER
ARBITRATOR