CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3467

Heard in Montreal, Tuesday, 11 January 2005
and Tuesday, 8 February 2005

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Union's policy grievance under the provisions of article 84 of agreement 4.16 alleging the Company, in a general application, has and continues to be in violation of article 62.2(b) of agreement 4.16.

UNION'S STATEMENT OF ISSUE:

Article 62.2(b) of the 4.16 collective agreement states in part the following with respect to the submission of time claims:

> "… will be advised, within 30 calendar days from the date of receipt of the time return, of the amount not paid and the reasons therefore; otherwise such claims will be paid …"

The Union contends, *inter alia*, that the Company, in a general application, is in violation of article 62.2(b). Specifically that the Company has not notified many employees within the 30 day time frame of time claims not paid (or portions thereof), or has paid time claims within the 30 day limit only to decline and recoup such payment (or portions thereof) subsequent to the 30 day limit.

The Union submits that the Company, in the application of article 62.2(b), must issue payments for submitted "time claims" if such time claims are not properly declined (or altered) within the recognized 30 day limit.

The Union requested that the Company comply with article 62.2(b) and cease and desist from violating article 62.2(b). The Union requests that the Company thereafter make financially

whole all employees who were/are adversely affected by the Company's non-compliance and misinterpretation of article 62.2(b).

The Company denies that it is in violation of article 62.2(b). The Company subsequently requested that the Union provide more "specific" information with respect to the policy grievance submitted.

The Union subsequently wrote the Company on November 9, 2004. The Union advised the Company that the grievance filed was a recognised policy grievance and the position of the Union was clearly contained within such filed grievance. The Union advised the Company that it was proceeding to arbitration consistent under the provisions of article 84.

The Union referred the Company to similar issues (including specific examples) which formed part of a Union complaint to the Canada Industrial Relations Board. The Union relies, in part, on these particulars with respect to the dispute as progressed to the arbitrator.

On December 6, 2004, the Company wrote the Union advising that the Company will be raising a preliminary objection regarding the arbitrability of noted policy grievance.

On December 6, 2004, the Company wrote CROA&DR (copied to the Union) advising that should the Union progress an *ex parte* statement of issue with respect to the Union's grievance it would have a preliminary objection regarding arbitrability. The reasons for the preliminary objection provided stated "non-specific – no information provided".

On December 7, 2004, the Union wrote the Company advising that it would be proceeding to file to arbitration by way of an *ex parte* statement of issue. The Union referenced the Company's intent to raise its preliminary objection. The Union advised the Company, *inter alia*, that it would request that the Arbitrator address all matters in dispute, including the substantive issue raised by the Union with respect to the grievance submitted.

The Union submits that all matters with respect to the Union's "Policy Grievance" are now properly before the Arbitrator for resolution.

FOR THE UNION:

(SGD.) R. A. BEATTY
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

J. P. Krawec	– Manager, Labour Relations, Toronto
B. J. Hogan	– Manager, Labour Relations, Toronto
D. Van Cauwenbergh	– Sr. Manager, Labour Relations, Toronto
D. Gagné	– Manager, Labour Relations, Toronto

And on behalf of the Union:

M. Church	– Counsel, Toronto
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
R. LeBel	– General Chairperson, Quebec City
B. R. Boechler	– General Chairperson, Edmonton
R. A. Hackl	– Vice-General Chairperson, Edmonton
J. W. Armstrong	– Sr. International Vice-President, Edmonton

PRELIMINARY AWARD OF THE ARBITRATOR

The Union alleges a violation of article 62.2(b) of the collective agreement. That article provides as follows:

> **62.2** Where questions arise regarding time or mileage claimed:
> …
> **(b)** each employee under this Agreement whose name appears upon the time return and for whom compensation is claimed will be advised, within 30 calendar days from the date of receipt of the time return, of the amount not paid and the reasons therefore; otherwise such claims will be paid except that for guarantee claims, the time limits as provided herein will be 60 calendar days.

Article 84.6 further provides:

> **84.6** In the application of paragraph 84.2 to a grievance concerning an alleged violation which involves a 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

The Company raises a preliminary objection to the arbitrability of the grievance. It submits that the Union has not complied with article 84.2(c)(1) of the collective agreement as well as article 7 of Addendum No. 22. In essence, the Company submits that there is insufficient specificity in the Union's grievance, and that it should therefore be dismissed.

Paragraph 10 of the memorandum of agreement establishing the CROA&DR provides as follows:

> **10.** The joint statement of issue referred to in clause 7 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated. In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours notice in writing to the other may apply to the Office of Arbitration for permission to submit a separate statement and proceed to a hearing. The scheduled arbitrator shall have the sole authority to grant or refuse such application.

The grievance takes the form of a letter addressed to the Company's Senior Vice-President for Eastern Canada, dated September 3, 2004, from the Union's General Chairperson. It reads, in part, as follows:

> It has recently come to my attention that the Company is in violation of article 62.2(b), which states in part:
>
> > "… will be advised, within 30 calendar days from the date of receipt of the time return, of the amount not paid and the reasons therefore; otherwise such claims will be paid …"
>
> Specifically, the Company has not notified employees within the 30 day time frame of time claims not paid (or portions thereof), or has paid time claims within the 30 day limit only to decline and recoup such payments (or portions thereof) subsequent to the 30 day limit.
>
> The Union submits that the Company, in the application of article 62.2(b), must issue payments for submitted "time claims" if such time claims are not properly declined within the recognized 30 day time limit.
>
> …
>
> In consideration of the above, we respectfully request that the Company comply with Article 62.2(b). In addition, the Union requests that the Company make financially whole, all employees who were/are adversely affected by the Company's non-compliance with the provisions of Article 62.2(b).

> In the event the Company disagrees with the Union position, as advanced herein, please consider this as a Policy Grievance under the provisions of Article 84 of Agreement 4.16.

It appears that the Union's grievance was triggered by evidence heard in hearings before the Canada Industrial Relations Board with respect to the alleged improper claw-back of time claims submitted by employees, sometimes months after the fact. By way of example, at the arbitration hearing, the Union placed in evidence a number of time claim tickets filed by Conductor M.J. Olejnik of Oakville, Ontario between June 16, 2002 and February 19, 2003, which were disallowed by a notification sent to the employee on April 2, 2003. In essence, the Union claims that the Company has 30 days in which to allow or disallow a time claim, and that it cannot purport to retroactively disallow a claim by subsequently asserting that payments to the employee within the 30 day period contemplated within article 62.2(b) of the collective agreement were made in error and the monies are therefore to be recovered from the employee. The Union did not raise in argument the meaning or impact of article 84.6 on this dispute and the Arbitrator makes no comment on the merits of the grievance at this time.

The Arbitrator can readily appreciate the Company's concern as to the quality of information provided within the General Chairperson's letter to the Company's Vice-President. The letter of September 3, 2004, is plainly something less than a model of clarity. The issue before me, however, is whether the grievance letter contains information sufficient to present an arbitrable issue. In approaching that question it

should be borne in mind that the procedures of this Office, or indeed before any arbitrator under the **Canada Labour Code**, allow considerable latitude for the adjournment of a hearing and the making of directions, whether at or before a hearing, to either party to provide sufficient particulars. When regard is had to the letter of September 3, 2004, it is clear that the collective agreement provision which is alleged to be violated is identified. The quote from the provision is accompanied by a brief allegation to the effect that the Company has either failed to notify employees within the 30 day period contemplated or has paid and then sought to recoup the payments made, in a manner which the Union maintains is contrary to the agreement. The matter is brought forward as a policy grievance with the obvious intention of resolving the issue of principle first, reserving the right to then advance specific claims in respect of individuals who may have been adversely impacted by what the Union views as the Company's violation of the article.

In the Arbitrator's view the foregoing does satisfy the requirements of this Office and sufficiently states an arbitrable issue to be heard. The Union must, of course, appreciate that commencing a grievance at Step 3 and failing to provide sufficient particulars will place the matter at risk of being adjourned upon the request of the employer, pending a direction by the Arbitrator that the Union should provide further particulars. That, however, has not arisen in the case at hand.

For all of the foregoing reasons the Arbitrator declines the preliminary motion of the Company and directs that the matter be scheduled for hearing on its merits. Nothing

herein should be taken as a comment on the arbitrability of any specific claim made on behalf of one or more individual employees. Assuming the correctness of the Union's position, the merits of any individual claims must depend on the specific facts of each case, having regard to the timeliness or any other aspect of the regularity of any such claims.

January 17, 2005

(signed) MICHEL G. PICHER
ARBITRATOR

On February 8, 2005, there appeared on behalf of the Company:

J. P. Krawec	– Manager, Labour Relations, Toronto
J. Torchia	– Director, Labour Relations, Edmonton
D. Fournier	– Regional Manager, Crew Management Centre

And on behalf of the Union:

M. Church	– Counsel, Toronto
R. A. Beatty	– General Chairperson, Sault Ste. Marie
J. Robbins	– Vice-General Chairperson, Sarnia
N. Beveridge	– Local Chairperson, Montreal
R. LeBel	– General Chairperson, Quebec City
B. R. Boechler	– General Chairperson, Edmonton
R. A. Hackl	– Vice-General Chairperson, Edmonton
J. W. Armstrong	– Sr. International Vice-President, Edmonton

AWARD OF THE ARBITRATOR

Article 62 of the collective agreement deals with the submission of time returns. The issue in this case involves the application of article 62.2 which reads, in part, as follows:

> **62.2** Where questions arise regarding time or mileage claimed:
>
> **(a)** Any portion not in dispute will be allowed and paid; and
>
> **(b)** Each employee under this Agreement whose name appears upon the time return and for whom compensation is claimed will be advised within 30 calendar days from the date of receipt of the term return, of the amount not paid and the reasons therefore; otherwise such claims will be paid except that for guarantee claims, the time limits as provided herein will be 60 calendar days.

The Union submits that employees are entitled to payment of submitted (and proper) time claims in the event the Company fails to respond to such time claims (by way of alteration or declination) within the identified 30 day time limit.

By way of background, the Union submits that running trades employees work in a diverse environment and the movement of trains is very complex. This complexity results in the parties establishing various compensation entitlements. Accordingly, employees are responsible for submitting time returns with respect to such compensation. When claiming compensation, employees are required to identify the applicable provisions of the collective agreement. Some examples found in article 62 include those time claims listed under article 62.1(e): extra service; held away from home terminal; operating late; tied up between terminals; travel allowance; calling as

well as article 62.1(f) which deals with guarantee claims and article 62.1(g) which deals with runaround claims.

The Union pointed out that the Company instituted an electronic method for submitting time claims known as the CATS system in 1998. This system replaced the requirement of employees to submit paper time claims. To facilitate the processing of time claims, the Company has assigned various claim codes with respect to such entitlements. A review of a number of time claim documents indicates that time claims which are not directly related to work which was actually performed by an employee, such as those enumerated in article 62.1(e), (f) or (g) have been submitted for payment under article 62.2(b). The Union notes that prior to the introduction of the electronic pay system, the Company notified the employee when such time returns have been altered or declined. The Company in those instances provided the reasons for alteration or declination within the 30-day time limit as set out in article 62.2(b).

The Union has made it clear to the Company that it is not challenging the Company's right to conduct an audit, as long as the audit is consistent with the provisions of the collective agreement. The Union has indicated to the Company in its correspondence that the Company cannot introduce an audit system which violates the terms and conditions of the collective agreement.

The Union noted that the Company first advised the Union in a memorandum dated February 20, 1998 that a post-payment audit process would replace the process that existed at the time involving prepayment verification of time returns at the crew management centres. The Company referred to this new pay system as the Interpretive Process (“IP”). It went on to state that the operating payroll would be subject to various audit procedures including random sampling. It further stated that employees would continue to be accountable for their time submissions and that all operating employees’ submissions would be automatically routed for payment. All operating employees were further notified in a memorandum from the Company dated March 31, 1998 of the new pay process.

In summary, the Union submits that the provisions of article 62.2(b) are mandatory in application. Employees may grieve if their time claims have been altered or declined under article 62 pursuant to the grievance procedure set out at article 84.2 . The Union submits that the failure of the Company to comply with the time limits in article 62.2(b) is prejudicial to the Union and the employees. The ability to recall the facts of any altered or declined time claim is at risk with the passage of time. The Union cited three examples where the Employer recovered monies from the employee well after the 30 days prescribed in article 62.2(b). Those include: Conductor Fowler who received notice of a recovery of $31.21 on August 19, 2004 for claims submitted on February 2, 2004; Conductor Watson who received notice of recovery for $8.60 on August 13, 2004 for time claim submitted on February 13, 2004 and Conductor Fish who was notified in late 2003 that a claim on July 3, 2000 was being disallowed.

The Company submits that the current version of the audit process was put into practice on April 10, 1998 and has been and continues to be openly and consistently applied by the Company until the present time. The auditing of time claims on a periodic and selective basis has been in existence since the Company began operating in 1923. The Company submits that in the absence of any specific factual examples to the contrary, its consistent practice of processing all time claims automatically within 24 hours of submission and payment thereof within 30 days leaves only one arbitral issue: whether it has violated article 62.2(b) when it recovers money that has been overpaid employees beyond 30 days.

The Company submits that the audit process in use to recover overpaid monies is separate and distinct from article 62.2(b) and there is nothing in the collective agreement which precludes the audit process as presently implemented by the Company.

The Company further submits that the grievance can be disposed of purely on the basis of the interpretation of article 62.2. The obligation of the Company is to “advise” employees of the amount not paid within 30 calendar days. If no such advisory notice is given to that employee, the claim will be paid. By extension, if the Company fails to give advice as to why a claim is not paid within 30 days, then the Union may grieve. The Company argues that this obligation is a corollary of the employee’s

obligation to submit accurate time claims that is based on the honour system known to all employees. This honour system is supported through the regular issuance of educational notices within the CATS system.

The Company further noted that as long as claims are paid within the prescribed 30 days, nothing restricts its discretion to apply its audit process as long as it is done in good faith. This discretion flows from the Employer's right to design its pay system to fit its needs. As time claims are consistently processed within 24 hours and paid within 30 days, the Company estimates that it is in regular compliance with article 62.2(b). In other words, the Company's practice of automatic processing and payment of time returns fulfills the obligation central to article 62.2(b). The Company further submits that article 62.2(b) is silent on the Company's right to investigate and act on instances of overpayment, including but not limited to those overpayments motivated by employee fraud. The Company has not bargained away its right to recover monies that have been overpaid.

In the alternative, the Company argues that the extrinsic evidence has demonstrated that the audit process has been a consistent and general practice for almost seven years. Such practice has been known to all parties responsible for the administration of the collective agreement. Through acts and deeds over the years, the parties have confirmed that they consider the audit process to be in conformity with article 62.2(b). In the further and final alternative, the Company argues that the instant grievance should be dismissed on the basis of estoppel. The elements of estoppel are

well-known in arbitral law: representation, reliance and detriment. In terms of representation, the Union has known of the audit practice for years and has acquiesced thereto since it never grieved or raised the audit issue during negotiations. The Company then reasonably relied on the Union's silence through the last round of negotiations and continues to follow its audit process until the present day. The Company has lost any opportunity to negotiate a clarification to article 62.2. To remove the Company's historic right to conduct its audits or to change the application of article 62.2(b) would cause the Company a genuine prejudice in that it would be required to bear additional costs for which it could not have planned. Accordingly, the doctrine of estoppel must apply in the instant case to prevent the Union from asserting the interpretation of article 62.2(b).

The Arbitrator agrees with the manner in which the Company has articulated the issue in dispute: does the Company violate article 62.2(b) when it recovers money that has been overpaid to employees beyond 30 days?

In dealing with a preliminary objection relating to this grievance, Arbitrator Picher captured the essence of the Union's argument under article 62 in his written decision at p. 3 of his award dated January 17, 2005:

> In essence the Union claims that the Company has 30 days in which to allow or disallow a time claim, and that it cannot purport to retroactively disallow a claim by subsequently asserting that payments to the employee within the 30 day period contemplated within article 62.2(b) of the collective agreement were made in error and the monies are therefore to be recovered from the employee.

The evidence is that the Company followed the practice for years of reviewing the time returns through a specialized group of timekeepers. A review of some of the examples of claims submitted by employees back in 1991, well before the new IP pay system was introduced, shows how the claims were handled on a manual basis by the timekeepers. The evidence is that claims which were declined were dealt with within 30 days (or 60 days in the case of guarantee claims). The practice changed in 1998 when all claims submitted were processed automatically once they were entered electronically into the CATS system through a special code identification number.

The Arbitrator does not find article 62.2(b) to be ambiguous. The provision clearly requires the Company to make a decision to either accept or decline a time return. If the Company chooses to decline the time return, it must advise the employee of the amount not paid, and the reasons for not paying, within 30 days of receipt of the time return. The requirements of article 62.2(b) to advise of the amount declined or adjusted within the 30 days of the receipt of the time return were typically met before 1998. Once the new CATS system was adopted by the Company, however, there was a consequent loss of ability to review each and every time return manually as had been done in the past by the timekeepers. An employee cannot be expected to properly defend a claim if months or years have passed before he or she is confronted with a notice that a time return is being disallowed.

The Arbitrator finds that the Company's ability to conduct audits as it sees fit remains unfettered. The Union does not dispute the Company's right to do so as part of

its management rights. But the Company runs afoul of article 62.2(b) when it retroactively tries to disallow a time return claim well after 30 days has expired from the date the time return is submitted.

As this Arbitrator finds no ambiguity in the interpretation of article 62.2(b), it is unnecessary to rely on extrinsic evidence to determine the parties intention. Having said that, it is worth noting that the evidence before me is that the Union has not surrendered its right to grieve. There is no evidence of a written agreement or a practice that has developed since 1998 that would allow the IP audit system to circumvent the collective agreement. Indeed, the Company indicated in 2000 that it would respect the provisions of the collective agreement. In that regard, the Company sent a letter with an attached memorandum to all the General Chairmen dated May 30, 2000 setting out in detail the IP procedures to be followed where employees were uncertain about the legitimacy of a particular time claim under the provisions of the collective agreement. The memorandum reads in part:

> In instances where employees are uncertain about the interpretation of a Collective Agreement provision or the legitimacy of a particular claim, employees will submit a working time return for the portion that is not in doubt. For the portion that is in doubt or where entitlement is uncertain, a stand alone claim will be submitted as follows:
>
> 1) A stand alone claim using claim code “IP” is to be submitted which matches the date, start time, and the end time of the original working time return.

> 2) When the interpretation by the Company has been rendered, a "D" designation on the CATS screen will indicate to the employee that this claim has been handled. **The Company shall render an interpretation under this process within the prescribed time limits of the Collective Agreements.**
>
> (emphasis added)

The Company raised concerns during the course of these proceedings of its rights in cases where a bad faith or a fraudulent claim was uncovered after the 30 days had expired from the date of receipt of the time return prescribed in article 62.2(b). In instances of alleged fraud or bad faith the Company, in the view of this arbitrator, is free to use all the resources at its disposal, within legal limits, to deal with the matter. In that regard, apart from its power to discipline the employee, the Company retains the right and power to recover through its payroll system, or through any other legal means available to it, any and all mounts determined to be obtained through fraud or bad faith. The right to recover monies fraudulently obtained by a dishonest employee are not circumscribed in any way by article 62.2(b).

The grievance is allowed. The Union is entitled to a declaration that the Company is in breach of article 62.2(b) when it disallows a time claim after 30 days from the date of receipt and then proceeds to recover the amount disallowed from the employee. The Company should cease and desist from continuing this practice. Given that this grievance was framed as policy grievance, I will not order the other relief requested by the Union "...to compensate all employees who, if not for the non-compliance of Article 62.2(b) would have been entitled and received such compensation for properly submitted true time claims".

February 18, 2005

(signed) JOHN M. MOREAU, Q.C.
ARBITRATOR