CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3491

Heard in Montreal, Wednesday 15 June 2005,
and on Tuesday, 13 September 2005

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Union Policy grievance under the provisions of article 84 of the 4.16 collective agreement, concerning non-bargaining unit employees (including management employees) performing bargaining unit work.

UNION'S STATEMENT OF ISSUE:

On many occasions the Company has utilized the services of other employees (including management employees) to perform UTU bargaining unit work. The Union submits that the Company cannot utilize the service of such employees to perform bargaining unit except on "rare and isolated conditions where extreme emergencies" exist.

The Union submits that the Company has utilized such non-bargaining unit employees in a manner that is in violation of the collective agreement, the *Code* and the parties' commitments, agreements and understandings.

The Union submits that the Company has utilized such non-bargaining unit employees in situations which cannot be defined as "rare and isolated conditions where extreme emergencies" exist. As a specific matter, the Union submits that the utilization of such employees to "meet customer needs" is not considered as "rare and isolated conditions where extreme emergencies" exist.

The Union additionally submits that the Company continually violates the requirement to provide the Union with advanced notices in the "rare and isolated conditions where extreme emergencies" exist which would require the utilization of such non-bargaining unit employees.

The Union, *inter alia*, relies upon a letter of understanding reached between the parties dated April 22nd, 2003 which states, in part, the following:

> As a result of our telephone conversation, we reached an understanding that the Company would take the necessary steps to ensure that non-UTU bargaining unit employees would not be called to perform UTU bargaining unit work.
>
> We understood and agreed that there may be rare and isolated conditions where extreme emergencies occurred which necessitated the use of other employees. In such situations, we indicated that the Company would notify your office in advance of such situations.

The Union, in the alternative to the above stated position, relies on the doctrine of estoppel in the resolution of this dispute.

The Union requested that the Company cease and desist from utilizing such non-bargaining unit employees from performing bargaining unit work except in ”rare and isolated circumstances where extreme emergencies” exist (which does not include the “meeting of customer need”.)

The Union additionally requested that the Company comply with the commitments, agreements and understandings reached between the parties as provided for in the noted letter dated April 22nd, 2003.

The Company disagrees with the Union’s submissions and submits that they are in full compliance with the collective agreement, the *Code*, and the letter of understanding between the parties dated April 22, 2003.

The matter in dispute are properly before the arbitrator for resolution.

COMPANY’S STATEMENT OF ISSUE:

The Company submits that on occasions there is a requirement to utilize non-bargaining unit employees to perform bargaining unit work. Non-bargaining unit employees are only utilized in the absence of available bargaining unit employees.

The Company submits that there is nothing within the collective agreement which prohibits the use of non-bargaining unit employees to perform bargaining unit work when the provisions of the collective agreement have been exhausted. In the contrary the collective agreement is very specific on the use of Management employees when there is no bargaining unit employees available as per Addendum 122 of the 4.16 collective agreement.

The Company additionally submits that the clarification by way of April 22nd, 2003 letter from Mr. Heller does not nullify the provisions within the collective agreement.

The Company maintains that they are in full compliance with the collective agreement.

The Union disagrees with the Company and maintains that the Company has violated the collective agreement, the *Code* and Mr. Heller’s [letter] dated April 22nd, 2003.

The matters in dispute are properly before the arbitrator for resolution.

THE UNION:	FOR THE COMPANY:
(SGD.) R. A. BEATTY	**(SGD.) D. VAN CAUWENBERGH**
GENERAL CHAIRPERSON	**DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Company:

B. Hogan	– Manager, Labour Relations Toronto
D. VanCauwenbergh	– Sr. Manager, Labour Relations, Toronto
B. Olson	– Regional Manager, Training
D. Gagné	– Manager, Labour Relations, Montreal
J. Torchia	– Director, Labour Relations, Edmonton
E. Posyniak	– General Manager, Operations – GLND, Toronto
D. Brodie	– Manager, Labour Relations, Edmonton
D. Fournier	– Regional Manager, CMC
T. Marquis	– General Manager, Southern Ontario Zone

And on behalf of the Union:

R. A. Beatty	– General Chairman, Sault Ste. Marie
J. Robbins	– Vice-General Chairman, Sarnia
W. G. Scarrow	– Vice-Local Chairman, Sarnia
Gary Anderson	– Vice-General Chairman,
B. Boechler	– General Chairman, Edmonton
A. Weir	– Local Chairman, Sarnia
T. Hopwood	– Local Chairman, Sarnia
G. Ethier	– Secretary, CGA
C. Little	– Local Chairwoman, Belleville

AWARD OF THE ARBITRATOR

The Union objected to the filing of an *ex parte* statement of issue by the Company after the scheduling of this case and prior to the hearing. Arguments from both sides were heard. There is nothing in the rules of the CROA&DR to prevent a party from filing an *ex parte* statement of issue, with leave of the Arbitrator, after the other party has already done so. The Union's objection in that regard must therefore be dismissed.

The Union alleges that the Company has violated the collective agreement by assigning bargaining unit work to persons other than members of the bargaining unit, including managers and locomotive engineers. It submits that the assignments have been made in circumstances where bargaining unit employees have been available to perform the work, and that such assignments have not been justified as being on an urgent or emergency basis.

The material before the Arbitrator relates some of the history between the parties concerning the issue of non-bargaining unit employees performing bargaining unit work. It appears that discussion of this issue occurred between the Company's then Senior Vice-President of Eastern Canada, Mr. Keith Heller and the Union's General Chairperson, Mr. R. A. Beatty. On March 12, 2003 Mr. Beatty wrote the following letter to Mr. Heller:

> This will confirm our discussion this date in regard to my letter of March 11, 2003 to Mr. Tony Marquis, General Manager CN Operations.
>
> As a result of our telephone discussion of this date and the understanding as provided herein, it was agreed that a written response to the noted March 11th, letter was not required.
>
> You advised that the Company would take the necessary steps to ensure that no Company Officer would perform UTU Bargaining Unit work. You indicated that it would take a brief period of time to fulfill this commitment. You committed to the Union that no Company Officers would perform Bargaining Unit work, subsequent to March 19th, 2003. You did advise however, that you could not rule out the possibility that a true and extreme emergency may require the utilization of Company Officers. In such a situation you advised, the Union would be contacted and provided with all relevant information.
>
> In consideration of the above, the Union, at this time, is not prepared to progress the matter further. We will advise our Legal Counsel accordingly.

While the Union's chairperson acknowledged that the Company would need a brief period of time to comply with the understanding, he nevertheless wrote a letter dated March 28, 2003 stating that "… the Company continues to utilize the services of Non-Bargaining Unit

Individuals to perform contracted UTU Bargaining Unit work. … I am mystified as to why the Company continues to provoke this Union in such an aggressive manner."

On April 22, 2003 Mr. Heller responded to Mr. Beatty in the following terms:

> This is in reference to your fax letter dated March 28, 2003, concerning Locomotive Engineers working UTU positions.
>
> As a result of our telephone conversation, we reached an understanding that the Company would take the necessary steps to ensure that non-UTU bargaining unit employees would not be called to perform UTU bargaining unit work.
>
> We understood and agreed that there may be rare and isolated conditions where extreme emergencies occurred which necessitated the use of other employees. In such situations, we indicated that the Company would notify your office in advance of such situations.
>
> I welcome the opportunity to review individual situations with you should it be required.

The Union's concerns apparently continued, unabated. On August 27, 2004 Mr. Beatty wrote a letter of protest concerning bargaining unit work to the current Sr. Vice-President for Eastern Canada, Mr. Keith Creel. It appears that that letter was prompted in part by certain testimony provided at hearings of the Canadian Industrial Relations Board (CRIB) and the apparent belief of the Company that it was no longer obligated to notify the Union when utilizing non-bargaining unit employees. A further letter of reply to Mr. Beatty dated October 18, 2004 on behalf of Mr. Creel contains the following statement:

> In reference to your correspondence dated August 27, 2004, you indicate that during the recent CIRB sitting, that Mr. Hogan testified that the Company was no longer obligated to notify the Union when utilizing non-bargaining unit employees to perform UTU work, and that the Company can now utilize non-bargaining unit employees when required to "meet customer needs". A review of the Company notes in respect of Mr. Hogan's testimony fails to support these allegations. The Company denies these allegations and respectfully submits that you have taken Mr. Hogan's testimony out of context. The Company will however, reiterate its

> commitment that Company Officers would not be performing UTU bargaining unit work, except in rate and isolated conditions, and where emergencies occurred which necessitated the use of non-bargaining unit employees. In such situations, the Company will continue to notify your office in advance of such situations.
>
> It is has always been the Company's intention to use bargaining unit employees to perform bargaining unit work, except where exigent circumstances require otherwise. The Company does not deny that in emergency circumstances supervisors, in the absence of available UTU employees, have performed work otherwise characterized as bargaining unit work. The Company does not view the use of supervisors in rare and isolated conditions on an emergency basis as contrary to any previous commitment, nor a violation of the Canada Labour Code.
>
> In respect to your request that the matter proceed to arbitration, the Company is in agreement to have the case heard in CROA and is prepared to discuss a joint statement of issue at your earliest convenience. **It is noted that you have not cited any specific instances in your correspondence on the matter to date, where you feel the Company has failed to meet its commitment in respect to the use of Company officers. Please provide the Company any such specific evidence, where the Company has used Company Officers, that you will be relying on in Arbitration.**
>
> [emphasis added]

Although the Union alleged before the CIRB, as part of a larger unfair labour practices complaint, that management was being assigned bargaining unit work, the CIRB declined to make a finding against the Company. At paragraph 77 of its decision, dated March 24, 2005, the Board makes the following statement:

> With respect to the performance of bargaining unit by management, there is [sic] a matter for a case-by-case determination. The Board notes that the union was not successful in any of the awards that were submitted to the Board. The CROA arbitrator found that the employer's position in these cases was not indefensible and declined to apply the remedy provisions of the collective agreement. The Board would be remiss to find otherwise.

An examination of the record indicates that the parties have been at odds with respect to the specifics of any alleged violation of the collective agreement by the Company with respect to the assignment of bargaining unit work to members of management, or to members of any other bargaining unit. As noted above, the letter of October 18, 2004 asked for specifics.

The Company states that Mr. Beatty nevertheless declined to provide any facts or details to substantiate his allegations. Rather, he requested the Company to provide all documentation concerning management performing bargaining unit work. That is reflected, in part, in a letter authored by Mr. Beatty dated November 12, 2004 which contains the following comment, based on the fact that management assignments are not registered in the CATS computer system:

> … The Union, as a result, is unable to effectively track all such occurrences. In consideration of this reality, we request that you provide our Office with all instances in which Company Officers performed bargaining unit and the time and date this office was notified of such utilization. We will upon review of this requested material, advise you of those instances in which we believe the Company was in violation.

The Company tabled in evidence extensive data with respect to staffing levels at all locations in Eastern Canada over a period of several years. Simultaneously, the Union tabled in evidence data based on the complement of employees at various times as reflected in the collection of union dues, a matter available to it through its own records. The Arbitrator does not propose to deal with the data so provided by either party in any detail, for the reasons related below:

It is trite to say that in this grievance the burden of proof is upon the Union. It is for the Union to establish specific facts which demonstrate, as the Canadian Industrial Relations Board (CIRB) put it, on a case-by-case basis, those situations in which management staff or members of other bargaining units were assigned the work of the bargaining unit of the United Transportation Union when UTU members were available to perform the work and where urgent circumstances did not justify the substitution of manpower.

What specific evidence is tabled in the case at hand? Virtually none. With the exception of two very slim pieces of evidence, emails dated November 27, 2002 and December 3, 2002, there are virtually no documented cases of managers doing bargaining unit work, with corresponding evidence of the specific work which was performed and the employees who were then available to perform that work.

For reasons it best appreciates the Union has taken a “top down” approach to the case at hand. It alleges that the Company has deliberately depleted the employee ranks, including furlough boards and spareboards, precisely to create emergency situations which can then justify the increased use of management employees. That allegation may be true, and it may not. However, there is no evidence before the Arbitrator tendered by the Union to establish any correspondence between the reduction of manpower at any location at any given time and the assignment of bargaining unit work to managers or to members of other bargaining units.

While the Arbitrator appreciates that the burden upon the Union might be considerable to marshal the evidence that would sustain individual grievances with respect to the Union’s claim, that is what the law of arbitration in Canada requires. While, as the correspondence reflected above indicates, it may be the Union’s view that the Company should provide the Union with precise data as to all assignments of running trades work being given to managers, the Union cannot direct the Arbitrator to any obligation negotiated within the collective agreement that would require the Company to either record or provide such information. As matters stand, it is not for the Company to make the Union’s case.

What does the material disclose? The raw data provided with respect to employment rolls at various locations over a period of some three years is of extremely limited value. While the data does show fluctuations in the work force and a general downward trend in the number of employees at the various locations, it also shows a significant degree of hiring by the Company, particularly at shortage locations like Toronto and Montreal. It is also difficult to know the reasons for a decline in employees at any given location at any given time. More significantly, the data gives no meaningful information as to the availability of employees in circumstances where managers may have been assigned. Indeed, it provides no information as to the precise time, place and circumstances in which members of management may have been utilized.

These observations are particularly significant in light of the realities on the ground. For example, the Company's brief cites an example of an employee shortage at Hornepayne, Ontario during the Christmas period between December 28, 2004 and December 31, 2004. Its unchallenged representation is that during that period employees having booked off forced the Company to utilize twenty-eight different management employees to operate approximately forty-five trains. That example underscores the inadvisability, in the Arbitrator's view, of drawing general conclusions or inferences from the raw data, without any better specific evidence or information. It is for the Union, and not for the Company or this Office, to produce that information.

In the result, the Arbitrator cannot sustain the grievance as filed. That conclusion is obviously without prejudice to the ability of the Union to bring a future grievance or grievances based on specific facts.

For these reasons the grievance must be dismissed.

September 21, 2005

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MICHEL G. PICHER
ARBITRATOR