CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3493

Heard in Montreal Thursday, 16 June 2005

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

EX PARTE

DISPUTE:

The institution of a reward program at Winnipeg Intermodal Program.

UNION'S STATEMENT OF ISSUE:

In September 2004, it came to the Union's attention that management personnel had begun distributing "stickers" to selected employees at the Winnipeg Intermodal Terminal, apparently in recognition of the employees' perceived performance with respect to CN's "Five Guiding Principles". It further became known to the Union that these stickers were exchangeable for various rewards, such as mugs, golf passes, movie passes, etc.

The Union protested that this program had been initiated without its consent or knowledge. The Union submits that the program violates articles 1.1 and 1.3 of the Intermodal Supplemental Agreement; the Rates of Pay table and related compensation articles; other related articles; and section 94 of the **Canada Labour Code**. The Union requests a declaration to this effect and an order that the Company cease and desist from pursuing this reward program, and that all rewards issued to date without explicit union consent be recovered.

The Company denies the Union's contentions and claims.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:
D. S. Fisher – Director, Labour Relations, Montreal

And on behalf of the Union:
B. Mcdonagh – National Representative, Vancouver

AWARD OF THE ARBITRATOR

The Company raises a preliminary issue with respect to two aspects of the process in relation to this grievance. Firstly it argues that the Union failed to abide by the mandatory timeliness requirements both in article 5 of the Intermodal Supplemental Agreement and within clause 9 of the memorandum of agreement establishing the CROA&DR. As reflected in a letter dated May 9, 2005 forwarded to this Office, the Company's representative notes that the Union's appeal was replied to by the Company on November 2, 2004. The Union advised the Company of its intention to proceed to arbitration by a letter from its representative on May 5, 2005. The Company submits that the Union failed substantially to respect the time limits provided for within article 5 of the supplemental collective agreement governing intermodal services. Secondly the Company objects to the fact that the Union filed an *ex parte* statement of issue as its notice to proceed to arbitration on May 3, 2005, only three days prior to the deadline for scheduling cases, in circumstances which do not suggest that there was any good faith effort on the part of the Union to negotiate a joint statement of issue with the Company. In that regard the Company relies on a letter from the Administrative Committee of the Canadian Railway Office of Arbitration & Dispute Resolution to the Arbitrator, stressing the importance promoting joint statements of issue, dated December 1, 2004.

The Union submits that if the time limits were missed this is an appropriate case for the Arbitrator to exercise his jurisdiction to extend the time limits as provided in section 60.1.1 of the

Canada Labour Code. Its representative also submits that the grievance concerns, in any event, an ongoing breach of the collective agreement.

The Arbitrator has some difficulty with the concept of ongoing breach as raised by the Union. That concept has its proper application where it is alleged that a trade union to failed to grieve a matter in a timely fashion at the outset. Where the Union can show that each repeated action of the Company is in effect a fresh breach of the collective agreement it may satisfy a board of arbitration that the original filing of the grievance was timely. The concept has little or no application, however, once a grievance has been filed, as is the case in the matter before me.

There can be little doubt but that there was considerable delay on the part of the Union in progressing the instant grievance. It does not appear disputed that the Company initiated a recognition reward program for employees in September of 2003, and expanded that program in the summer of 2004. On September 9, 2004 the Union commenced a grievance against the Company's unilateral practice at Step 1 of the grievance procedure. It appears that it also alleged a violation of section 94 of the **Canada Labour Code**. On September 24, 2004 the Company declined the grievance. That decision was further appealed on October 5, 2004 by the Union's representative at Step 2, although the Union then dropped the allegation with respect to the alleged violation of the **Canada Labour Code**. The Company asserts that at Step 2 the Union also attempted to expand the scope of the grievance, a matter which need not be dealt with for the purposes of this award. The Company then replied to the Union on November 2, 2004, indicating that it was prepared to see the matter go forward as a policy grievance. It then indicated that the grievance was declined at Step 2. At that point the Union had sixty days to notify the Company of its intention to proceed to arbitration. However the Company heard

nothing from the Union until May 6, 2005 when the Union's representative wrote to the Company stating, in part: "As we wish to proceed to arbitration in the month of June 2005, please accept this as the Union's 48 hour notice in accordance with the rules of CROA." [sic] On that same day the Company advised the General Secretary of this Office that the Company would be objecting to the arbitrability of the dispute should the Union attempt to seek leave to proceed *ex parte*. On May 8, 2005 the Union did submit an *ex parte* statement of issue to have the matter heard by the CROA&DR.

There can be little doubt but that the collective agreement contemplates that the parties are expected to adhere to the time limits upon which they have agreed. Article 5.1 of the Intermodal Supplemental Agreement reads:

> **5.1** The Company and the Union recognize and agree that the prompt resolution of differences concerning the interpretation, application, administration or alleged contravention of this collective agreement is of the utmost importance.

Article 5 of the collective agreement governs the timeliness of the grievance and arbitration process. It provides, in part, as follows:

> **Arbitration**
> **5.10** A grievance concerning the interpretation, application, administration or alleged contravention of this collective agreement or alleging that an employee has been unjustly disciplined or discharged which is not settled at step 2 may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement in accordance with the regulations of that Office.
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> **5.11** The request for arbitration must be filed with the Canadian Railway Office of Arbitration, in accordance with the regulations of that Office, within 60 days following receipt of the decision rendered at step 2 of the grievance procedure.
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> **General**
> **5.12** The settlement of a grievance shall not under any circumstances involve retroactive pay beyond a period of 60 calendar days prior to the date that such grievance was submitted at step 1 of the grievance procedure.

> **5.13** When a grievance is not progressed by the Union within the prescribed time limits, it will be considered as withdrawn.
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> **5.14 (a)** When a decision other than one concerning a claim for unpaid wages is not rendered by the applicable officer of the Company within the prescribed time limits, the grievance may be progressed by the Union to the next step of the grievance procedure.
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> **5.14 (b)** When a decision concerning a claim for unpaid wages is not rendered by the applicable officer of the Company within the prescribed time limits, the claim will be paid.
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> The application of this paragraph 5.14 shall not constitute an interpretation of the collective agreement.
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> **NOTE:** All grievances and responses, at all steps of the grievance procedure, as well as requests for time limit extensions, and referrals to arbitration must be submitted in writing. Verbal or "email" grievances, responses, requests or referrals not submitted in written form shall not be considered as having been properly transmitted, and therefore may, unless remedied within the time limits, trigger the provisions of articles 5.12, 5.13 and 5.14.
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> **5.15** The time limits set out in this article may be extended as may be locally or mutually agreed, as the case may be, between the Company and the Union officer concerned.

The Company's representative stresses the provisions of article 5.13 which state that where time limits are not met by the Union a grievance is to be considered as withdrawn. He also places emphasis on the word "must" which appears in article 5.11 of the collective agreement, mandating that a request for arbitration must be made within sixty days following the Company's Step 2 decision. In the case at hand the Company stresses that the Union took more than four months longer than the sixty days contemplated therein.

Additionally, the Company draws to the Arbitrator's attention the provisions of clause 9 of the memorandum of agreement establishing the CROA&DR which reads, in part, as follows:

> **9.** No dispute of the nature set forth in section (A) of clause 6 may be referred to arbitration until it has first been processed through the last step of the

> grievance procedure provided for in the applicable collective agreement. Failing final disposition under the said procedure a request for arbitration may be made but only in the manner and within the period provided for that purpose in the applicable collective agreement in effect from time to time or, if no such period is fixed in the applicable collective agreement in respect to disputes of the nature set forth in section (A) of clause 6, within the period of 60 days from the date decision was rendered in the last step of the grievance procedure.

The Company's representative refers to **CROA 2935** and **827** in support of the proposition that to be heard in this Office a grievance must first have been progressed properly under the provisions of the collective agreement.

The Union's representative submits that there is no prejudice disclosed and that all of the provisions cited by the Company cannot override the discretion of a board of arbitration to extend time limits as provided under the **Canada Labour Code**. In other words, he stresses, the parties cannot effectively contract out of the **Code**. To the extent that the **Canada Labour Code** contemplates a discretion in the Arbitrator to relieve against failure of time limits, the parties cannot contractually or otherwise remove that statutory discretion.

The Arbitrator accepts the law as stated by the Union's representative with respect to the inability of the parties to contract out of any provision of the **Canada Labour Code**. The issue then becomes whether this is an appropriate case for the Arbitrator to exercise his discretion.

Section 60. 1.1 of the **Canada Labour Code, Part I** provides as follows:

> **(1.1) Power to extend time** – The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the

> extension and that the other party would not be unduly prejudiced by the extension.

As can be seen from the foregoing the Arbitrator is compelled to undertake a two part analysis before deciding to extend time limits in the exercise of his discretion. Firstly consideration must be given to whether there are reasonable grounds for the extension and secondly, the Arbitrator must examine whether an extension of the time limits would unduly prejudice the opposite party, in this case the Company.

In the leading decision of **Re Becker Milk Company Ltd. and Teamsters Union, Local 647** (1978), 19 L.A.C. (2d) 216 (Burkett), a board of arbitration was called upon to consider the virtually identical provisions of the **Ontario Labour Relations Act**, R.S.A. 1970, c. 232, s. 35(5a), the board of arbitration found that it was appropriate to consider three factors: the reason for the delay given by the offending party; the length of the delay; and the nature of the grievance.

Boards of arbitration have made it clear that where it is apparent that there was unexplained laxity on the part of the offending party in progressing a grievance, it may not be appropriate for a board of arbitration to exercise its discretion to relieve against the time limits. (See, e.g., **Re Corporation of the City of Brantford and Canadian Union of Public Employees, Local 181** (1983), 9 L.A.C. (3rd) 289 (Samuels); **Re Helen Henderson Care Centre and Service Employees' Union, Local 183** (1992), 30 L.A.C. (4th) 150 (Emrich); **Re Laidlaw Transit Ltd. and Canadian Union of Public Employees, Local 2151** (2000), 93 L.A.C. (4th) 386 (Devlin).)

In the case at hand has the Union demonstrated reasonable grounds for an extension of the time limits? It is incumbent upon the offending party to demonstrate that such grounds do exist. If, for example, it could be shown that the Union officer having carriage of the grievance was ill or indisposed for a period of time, or absent from his or her duties for some reason beyond that individual's control there might be a basis to conclude that there is a reasonable explanation for the delay and, to that extent, reasonable grounds for granting the extension of time limits. No such explanation is brought forward in the case at hand, however. Indeed, placing it at its highest, the submission of the Union seems to be simply that progressing the grievance in a timely fashion was simply overlooked in the normal crush of business. With respect, that is not a sufficient or compelling explanation, particularly having regard to the language of the parties' collective agreement which clearly emphasises the need to exercise care and expedition in the processing of disputes.

Nor is this a case where irreparable harm would result, given the nature of the grievance. We are not here concerned with an irretrievable loss if the grievance does not proceed for reasons of timeliness, as contrasted with a case of discharge or a wide ranging interpretation affecting wages, for example. Moreover, it appears that the same dispute is being pursued in another bargaining unit represented by the Union. In all of the circumstances, I am not prepared to find, on the basis of the arguments submitted by the Union, that reasonable grounds for an extension have been demonstrated in this case.

Nor can I find that the Union has demonstrated that there would be no prejudice to the Company if the time limits are extended. The dispute concerns the implementation of a reward program for employees implemented unilaterally by the Company without consultation or agreement with the Union. It is not disputed that that program has gone on for a substantial

number of months, and continued to go on during the period of the Union's delay in progressing this grievance. Part of the remedy sought by the Union in this case is that the Company be directed to recover from employees those prizes or rewards which were given. In other words the remedy would involve some greater dislocation to the extent that the Company would be put to the administrative burden of attempting to identify the recipients of rewards and thereafter recover the value of those rewards from them. To the extent that the Union's delay permitted a substantially greater number of rewards to be made and, conversely, would compel a substantially greater burden of recovery should the grievance succeed, I am satisfied that there is an element of prejudice to the employer's interests demonstrated in this case. While the Arbitrator appreciates that "prejudice" in this context has been interpreted by boards of arbitration as meaning an inability to respond to the case, whether by the loss of information, date or other evidence by the passage of time (see, e.g., **Re Carborundum Canada Inc., Niagara Falls and United Steelworkers, Local 4151** (1984) 16 L.A.C. (3rd) 432 (Brown)), I am satisfied that it is prejudicial to the Company for the Union to have created by its own delay the conditions which would create a more administratively burdensome process for the implementation of the remedy which the Union itself seeks.

For the foregoing reasons the Arbitrator is satisfied that the Union has not demonstrated reasonable grounds for an extension of time limits and that to extend the time limits would, in the specific circumstances of this case, in fact work a prejudice to the Company. I therefore find that the grievance is not arbitrable by reason of the mandatory time limits of the collective agreement. In accordance with the provisions of article 5 of the agreement the grievance must be considered as withdrawn.

The foregoing conclusion makes it unnecessary for the Arbitrator to deal with the alternative issue of whether the Union should be granted leave to proceed by way of an *ex parte* statement of issue. If it were necessary to deal with that aspect of the case the Arbitrator would be inclined to give some latitude to the Union, given that the letter of December 1, 2004 directed to the Arbitrator by the Administrative Committee of the CROA&DR was communicated to Union and Company representatives on May 11, 2005, only after the submission of the Union's *ex parte* statement of issue in the case at hand. Obviously different considerations would apply if this situation should arise in the future.

The grievance is therefore dismissed.

June 20, 2005

MICHEL G. PICHER
ARBITRATOR