CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3504

Heard in Edmonton, Thursday, 14 July 2005

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

EX PARTE

DISPUTE:

The abolishment of five Train Movement Clerk positions at Clover Bar and the reassignment of their work.

UNION'S STATEMENT OF ISSUE:

By letter dated April 13, 2004, the Company, invoking Article 8.1 of the Employment Security and Income Maintenance Agreement, served notice of its intent to abolish five (5) permanent positions of Train Movement Clerks at Clover Bar yard effective August 12, 2004.

The Union submits that the Company, in so doing, has reassigned the work currently and traditionally performed by members of the bargaining unit to employees outside the bargaining unit, in particular but not necessarily limited to Traffic Coordinators. The Union maintains that such reassignment constitutes a violation of article 2.2 of collective agreement 5.1. The Union also submits that the Company has failed to provide full, accurate and timely information about the disposition of the work, contrary to article 8.1 of the ESIMA. The Union requests a declaration to this effect, an order that the Company cease and desist from such violations, and any further remedy required to make whole the Union and affected employees.

The Company denies the Union's contentions and requests.

FOR THE UNION:

(SGD.) A. ROSNER
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:
S. MacDougald – Manager, Labour Relations, Montreal

P. Payne	– Manager, Labour Relations, Edmonton
B. Halbauck	– Trainmaster
S. Canellos	– Director, TSR/Car Distribution
D. Fuller	– TRSMGR
O. Lavoir	– Trainmaster, Montreal
S. Blackmore	– Manager, Labour Relations, Edmonton

And on behalf of the Union:

A. Rosner	– National Representative, Montreal
S. Barwell	– Local Chairwoman, Edmonton
M. Zenewski	– Witness

And on behalf of the Intervener United Transportation Union:

D. Ellickson	– Counsel, Toronto
B. R. Boechler	– General Chairperson, Edmonton
R. A. Hackl	– Vice-General Chairperson, Edmonton

AWARD OF THE ARBITRATOR

At the outset of the hearing, the Company raised a preliminary objection to the Union's expansion of the grievance to include an alleged violation of article 8.1 of the Employment Security and Income Maintenance Agreement (ESIMA), an allegation not raised prior to Step II of the grievance procedure. Having heard the parties' arguments, and in light of the provisions of the collective agreement, the Arbitrator sustained the Company's preliminary objection.

The Union submits that the abolishment of five Train Movement Clerk (TMC) positions at Clover Bar, and the reassignment of much of their work to Traffic Coordinators, who are members of the United Transportation Union, at that location is a violation of article 2.2 of the collective agreement. In a thorough and able argument the Union's representative submits that article 2.2 does give work jurisdiction protection to

the Union, and that it does so on a location by location basis. He argues that the removal of the work of TMC clerks at Clover Bar therefore violated the provisions of article 2.2 of the collective agreement. The Company maintains that the scope of article 2.2 is not based on location, as the Union would have it, and that no violation of the collective agreement is disclosed.

Article 2.2 of the collective agreement reads as follows:

> Supervisors, non-scheduled employees, or employees in other bargaining units shall not engage, normally, in work currently and traditionally performed by members of this bargaining unit.

It is acknowledged that prior to the addition of article 2.2 to the collective agreement, which occurred in August of 1999, the Union had relatively little jurisdictional work protection, as reflected in a long line of cases in this Office. The Union's representative submits that the language of article 2.2 was chosen by analogy to the contracting out provisions common in the railway industry. On that basis he submits that the intention of the parties was to provide jurisdictional work protection to the Union on a location-by-location basis, and not on the basis of work currently and traditionally performed on a national basis across the entire bargaining unit. As the Union's representative would have it, through the language of article 2.2 the parties fashioned an arguably unprecedented jurisdictional work protection clause which would essentially set up each local yard or shop across the country as a separate jurisdictional entity, depending on the nature of work currently and traditionally performed at that specific location.

However, the very issue raised by the Union was exhaustively addressed by this Office in a prior decision which rejected the Union's interpretation. In **CROA 3196** this Office was compelled to consider the grievance of the Union concerning the use of non-bargaining unit personnel to transport crews at Kamloops. The Union then argued the application of article 2.2 to assert that non-bargaining unit employees could not be utilized to transport crews at that location. In dismissing that grievance the arbitrator had occasion to consider the scope of the application of article 2.2 of the collective agreement as argued by the Union. The analysis was prompted, in part, by the assertion of the Company that the work in question was performed variously by members of other bargaining units, non-scheduled employees and supervisors at different locations system wide. In that award the arbitrator dealt with the issue, in part, through the following comments:

> After careful reflection, the Arbitrator retains a fundamental concern with respect to the submission of the Union as to the meaning and operation of article 2.2 of the collective agreement. The Union's submission asserts that article 2.2 was intended, in the context of a national collective agreement, to give a degree of work jurisdiction protection. Its representative stresses that the protection so sought is not in the nature of exclusive work jurisdiction, an argument that appears to recognize that the work might be performed exceptionally by persons other than bargaining unit employees. In essence what is asserted is a right of bargaining unit employees to have the first opportunity to perform work which is currently and traditionally theirs. In that context, it is argued, it should not be "normal" for a supervisor or a member of another bargaining unit to perform the work or, to put it differently, for the work to be assigned to them as part of their normal duties on a relatively permanent basis.
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> The difficulty with the submission so advanced is that it seeks to treat each location, in this case the Kamloops Yard, as a discrete jurisdictional location for the purposes of interpreting and applying article 2.2. Such an approach is, however, at odds with the jurisprudence of this Office over many years, in relation to a number of collective agreements as regards work jurisdiction protection. This Office has acknowledged that local practices may form the basis

of a Union's protections against contracting out in that particular location. In a contracting out dispute the inquiry is whether the Company has justified the assignment of work to a contractor which is done presently and normally by bargaining unit employees. In that circumstance the issue becomes whether the work contracted is work so described at the location where the contract occurs. In that context this Office has sustained contracting out grievances based on local practices, rather than by reference to practice on a national basis. For example, in **CROA 1966** snow removal at Canadian Pacific's St. Luc and Outremont yards in Montreal was found to be work of the Brotherhood of Maintenance of Way Employees which could not properly be contracted out, although snow removal work of that type may have been performed by other employees or contractors at other locations. To the same effect in **CROA 2145** it was found that the contracting out of the painting of track machinery and equipment in the West Toronto work equipment repair shop was improper. Obviously, in cases of that kind the language of the contracting out provisions of the collective agreement requires an examination of the availability of managerial and labour skills, employees, equipment, facilities and other resources at the location in question, among other things. More immediately, in **CROA 3113** this Office rejected the shared jurisdiction argument of the Company to justify the contracting out of crew chauffeuring in Kamloops Yard to taxis. Not surprisingly, there the jurisprudence argued by the Company was entirely based on cases involving the sharing of work within the employer's own operations, and not on cases which concerned contracting out, a practice expressly prohibited by the collective agreement since shortly after **CROA 526**.

Different considerations arise when a board of arbitration is compelled to interpret and apply language fashioned to protect work jurisdiction on a national basis. I am satisfied that that is plainly the scope and intention of article 2.2 of the collective agreement. It is well settled in the jurisprudence of this Office that collective agreement language conferring jurisdictional protection in respect of work cannot, as a general rule, be asserted on the basis of local practice where in fact under the terms of a provision intended to operate nationally, the work in question is one of shared jurisdiction, performed variously by members of different bargaining units, non-scheduled employees or supervisors at different locations system wide. …

…

In the Arbitrator's view it would require clear and unequivocal language to sustain the suggestion, implicit in the submission of the Union in the instant case, that protective jurisdictional language of the type found in article 2.2 of the collective agreement was, notwithstanding the jurisprudence, intended to be interpreted and applied on a location by location basis. In that regard it is significant to note that at the initial hearing of this matter the Company's representation, which went undisputed by the Union, was that in many locations in Canada other than Kamloops the transportation of running trades employees within yards and terminals has been performed on a regular and normal basis by supervisors and employees other than members of the bargaining unit. In that context, therefore, and bearing in mind that the Union bears the burden of proof, the Arbitrator cannot conclude that the work which is the subject of the instant grievance can be said to be "currently and traditionally performed" by members of the

> bargaining unit in the sense contemplated by the language of article 2.2 of the collective agreement.

The Union's representative suggests that the above comments of the arbitrator were *obiter* and unnecessary to the grievance in **CROA 3196**. This, he asserts, is so because the case could have been dismissed on the alternative analysis that at Kamloops itself there was evidence of non-bargaining unit employees having performed crew transportation duties. With respect, the Arbitrator cannot agree. As noted in the award, a significant part of the Company's argument was based on its assertion to the arbitrator that article 2.2 was to be assessed on the basis of practice beyond the specific location, and indeed on a national basis.

More significantly, fundamental principles governing the meaning of a collective agreement come to bear in the case at hand. While the Arbitrator appreciates the submission of the Union's representative to the effect that the decision of this Office in **CROA 3196** should be "revisited", there are fundamental policy reasons for not doing so. As well enunciated in the jurisprudence, it is generally accepted that when a collective agreement has been interpreted in a final and binding manner by a board of arbitration that interpretation is to be taken as the settled meaning of the parties' collective agreement. When an arbitration has been rendered providing such an interpretation, and the parties return to the bargaining table and make no change to the language of their collective agreement, renewing their agreement with the same language, they are taken to have accepted the settled arbitral interpretation of their contract.

How do those principles apply in the case at hand? It is common ground that the instant grievance was filed on June 29, 2004. It was in fact filed under the successor collective agreement to the collective agreement which was interpreted in **CROA 3196**. That earlier collective agreement was the subject of a renegotiation process which led to a national strike. That strike ended on March 20, 2004 with the renewal of the collective agreement without any change to the language of article 2.2. Given those facts, how can a board of arbitration responsibly conclude other than that the parties must be taken to have accepted the interpretation of article 2.2 as rendered in **CROA 3196**? Plainly, if the Union's intention had been to affirm that article 2.2 is to have a location-by-location application, as it unsuccessfully argued in **CROA 3196**, the renewal of the collective agreement was the occasion to advance that position and table language which would support the interpretation which it now advances. Obviously, that was not done. In these circumstances, based on well established principles going to the fundamental integrity of the grievance and arbitration process, the Arbitrator must conclude that the parties are taken to have accepted the interpretation of article 2.2 as rendered in **CROA 3196**. This is plainly not an appropriate occasion to "revisit" that interpretation. Indeed to do so would risk a grave disservice to fundamental principles of consistency and industrial relations stability.

Based on the foregoing principles, and accepting that the interpretation of article 2.2 reflected in **CROA 3196** must be respected, what does the evidence disclose? The uncontradicted material before me amply demonstrates that the functions of the Train

Movement Clerks at Clover Bar cannot be said to be work currently and traditionally performed by members of the bargaining unit when regard is had to the general practice across the bargaining unit. As noted in the submissions made by the Company's representative, virtually all of the functions of the TMCs at Clover Bar have been performed by non-bargaining unit personnel in one or more other bargaining unit locations. The work can therefore not be described as currently and traditionally performed by members of the bargaining unit in the sense contemplated by the jurisdictional protection provisions of the collective agreement.

For all of the foregoing reasons the grievance must be dismissed.

July 19, 2005

(signed) MICHEL G. PICHER
ARBITRATOR