CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3507

Heard in Montreal, Tuesday, 13 September 2005

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Appropriate remedy regarding the violation of articles 102 and 15 of collective agreement 4.3 involving train 202 in Winnipeg on May 2, 2005.

UNION'S STATEMENT OF ISSUE:

On May 2, 2005, the conductor on train 202 at the initial terminal of Winnipeg, Manitoba was required to perform a set off of traffic from his inbound train. The conductor informed the Company officer that such actions were contrary to the collective agreement. The conductor was instructed to comply with the instructions.

The Company admits that those instructions and actions of the Company officer were contrary to and in violation of the collective agreement.

The only matter in dispute is an appropriate remedy, given the circumstances which are: **(1)** the Company has been order to comply with the requirements of the collective agreement as a result of ad hoc arbitration award 560; **(2)** The Company has committed to comply with the collective agreement through extensive meetings with the General Chairperson's office and, notably, with the Winnipeg UTU local chairpersons on February 25, 2005; **(3)** The Company has committed to comply with the requirements of the collective agreement through their letter to the Winnipeg UTU local chairpersons dates April 18, 2005; **(4)** the supervising officer was informed of the Company's commitments and that his instructions were contrary to the collective agreement prior to the work being performed, yet he still instructed the conductor to perform the work.

Given the foregoing the Union is of the position that the Company has been given every opportunity to live up to their commitments and the provisions of the collective agreement. They have been advised of and acknowledged these violations on many occasions, yet still chose to blatantly and indefensibly violate the collective agreement. As such, the Union is of the position that a substantial remedy is appropriate.

The Company is of the position that, even though they have previously committed to comply with the requirements of the collective agreement, this is the first occasion of a remedy grievance being specifically filed regarding this violation and feels that a lesser remedy is more appropriate.

FOR THE UNION:

(SGD.) B. R. BOECHLER
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

K. Morris	– Manager, Labour Relations, Edmonton
J. Torchia	– Director, Labour Relations, Edmonton
B. Laidlaw	– Manager, Labour Relations, Edmonton
Wm. McGuire	– Assistant Superintendent, Winnipeg

And on behalf of the Union:

R. A. Hackl	– Vice-General Chairperson, Edmonton
B. R. Boechler	– General Chairperson, Edmonton
R. A. Beatty	– General Chairperson, Sault Ste. Marie
G. Ethier	– Secretary-Treasurer, Montreal
C. Little	– Local Chairperson, Belleville

AWARD OF THE ARBITRATOR

This grievance involves the application of the remedy provision of the collective agreement. That provision is a letter signed by the Company's Vice-President of Labour Relations and Employment Legislation which reads as follows:

> During the current round of negotiations the Council expressed concern with respect to repetitive violations of the collective agreements. Although the Company does not entirely agree with the Council's position, the Company is prepared to deal with this matter as follows:
>
> When it is agreed between the Company and the General Chairperson of the Union that the reasonable intent of application of the collective agreement has been violated an agreed to remedy shall apply.
>
> The precise agreed to remedy, when applicable, will be agreed upon between the Company and the General Chairperson on a case-by-case basis. Cases will be considered if and only if the negotiated collective agreements do not provide for an existing penalty.

> In the event an agreement cannot be reached between the Company and the General Chairperson as to the reasonable intent of application of the collective agreement and/or the necessary remedy to be applied the matter may within 30 calendar days be referred to an arbitrator as outlined in the applicable collective agreements.
>
> NOTE: A remedy is a deterrent against collective agreement violations. The intent is that the collective agreement and the provisions as contained therein are reasonable and practicable and provide operating flexibility. An agreed to remedy is intended to ensure the continued correct application of the collective agreement.

It is not disputed in the case at hand that the Company did violate the provisions of the Conductor-Only Agreement in Western Canada. It did so by requiring the conductor on train 202 at Winnipeg, Manitoba to set off cars from his inbound train on May 2, 2005. The Union stresses that the directive given to the conductor was clearly contrary to the Conductor-Only Agreement and to the clarification of that agreement contained in ad hoc arbitration award **AH 560**, and that the conductor registered his objection and was nevertheless directed to proceed as ordered.

The Company submits that the counselling and re-education of managers with respect to the requirements of the Conductor-Only Agreement is a sufficient remedy in these circumstances. The Union seeks a broader remedy, including the payment of 100 miles at through freight rates to the affected conductor, as well as 100 miles at yard rates to any affected yard service employee who would have otherwise performed the work, and a further payment of 100 miles at through freight rates to the Union itself. The Union also seeks legal costs incurred.

The Arbitrator is satisfied that this is an appropriate case for the application of the remedy provisions, having particular regard to the parties' own acknowledgement of the deterrent value of the remedy provision. I am not satisfied that in these circumstances counselling managers is sufficient, given that the content of **AH 560** had already been communicated to the field.

There are, however, mitigating factors to consider. It is not disputed that for a substantial number of years the practice which is the subject of this grievance had gone on in Western Canada, in some degree encouraged by compliant employees who would be paid conductor only premiums for such moves. There is, I think, an element of adjustment in the culture of the workplace surrounding conductor only service which does need be taken into account. Overall I am not satisfied that the assessment of 100 miles, either at through freight rates or at yard rates, is appropriate in the circumstances, nor do I agree that this is an appropriate case for the payment of damages in any form to the Union. In the Arbitrator's view a smaller monetary payment, albeit one of more than token value, is appropriate.

The Arbitrator therefore directs that the Company pay to the conductor the sum of $100.00 and that the same amount be paid to each of the members of any yard crew which would normally have performed the work in question. It should be understood that the amounts herein are not intended to be of general application, and that any future remedy claims will be judged upon their own merits in the light of all relevant factors, including deterrence.

September 19, 2005

(signed) MICHEL G. PICHER
ARBITRATOR