CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3540

Heard in Montreal, Tuesday 14 February 2006

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

&

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Union policy grievance alleging violation of the material change provisions found in article 79 of the 4.16 agreement and article 78 of the 1.1 agreement, concerning the temporary diversion of trains from the Northern Ontario route to the Southern Ontario route commencing January 15th, 2005.

JOINT STATEMENT OF ISSUE:

On January 15th, 2005 the Company proceeded to temporarily divert some train traffic from the northern route (Toronto – Capreol – Hornepayne – Western Canada etc.) via the southern route (Toronto – London – Sarnia – USA etc.).

It is the Union's position that the diversion of traffic in this case should have triggered the material change provisions contained in the noted collective agreements.

The Unions requested that the Company address all adverse affects as a result of such diversion of traffic consistent with the noted material change articles.

It is the Company's position that the diversion of traffic that occurred commencing January 15th and ending January 25th, 2005 does not constitute a violation of the material change provisions in the noted collective agreements.

The matters remain in dispute.

The Company argues that such changes fall within the provisions of articles 79/6 – 1.1 and 79.6 – 4.16, which identify when a material change is not applicable.

The Company declined the Unions' policy grievance.

FOR THE UTU:

(SGD.) R. A. BEATTY
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) J. KRAWEC
MANAGER, LABOUR RELATIONS

FOR THE TCRC:

(SGD.) P. VICKERS
GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. Van Cauwenbergh	– Sr. Manager, Labour Relations, Toronto
J. Krawec	– Manager, Labour Relations, Toronto
J. Torchia	– Sr. Manager, Labour Relations, Edmonton
E. Posyniak	– Chief Engineer Track
D. Fournier	– Regional Manager, CMC

And on behalf of the Unions:

M. A. Church	– Counsel, Toronto
R. A. Beatty	– General Chairperson, UTU, Sault Ste. Marie
P. Vickers	– General Chairman, TCRC, Sarnia
J. Robbins	– Vice-General Chairperson, UTU, Sarnia
R. Caldwell	– Vice-General Chairman TCRC,
G. Anderson	– Vice-General Chairperson, UTU
B. Boechler	– General Chairperson, UTU, Western Canada, Edmonton
G. Ethier	– Local Chairperson, UTU, Hornepayne
C. Grant	– Local Chairman, TCRC, Hornepayne
A. McDavid	– Local General Chairperson, UTU, Capreol
D. Behun	– Local Chairperson, UTU, Toronto North

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, beyond dispute, that between January 15 and January 25, 2005, the Company temporarily implemented a service plan diverting up to three trains a day in each direction from the Northern Ontario route linking Toronto and Winnipeg, to the alternate southern route linking Toronto and Winnipeg through the United States, south of the Great Lakes. The Unions allege that the change was implemented in contemplation of a possible strike by the Unions, and that it was in fact discontinued only when the Canadian Industrial Relations Board

issued a directive which foreclosed the possibility of a strike. The Company maintains that the action it took was in no way related to strike action, although it did involve implementing parts of a service plan which it had prepared in anticipation of a possible work disruption.

At issue is whether what occurred was a material change initiated at the sole discretion of the Company, the nature of which would trigger the application of the material change provisions within the collective agreements, notably article 79 of collective agreement 4.16 and article 78 of collective agreement 1.1.

The Arbitrator must agree with the fundamental position of principle argued by the Unions. If the Company were to invoke the abolishment of trains or the rerouting of assignments for reasons unrelated to the exceptions to the material change rules contained in the collective agreements, to the extent that adverse consequences would in all likelihood be visited upon the employees affected, the provisions of the material changes articles of the respective collective agreements would clearly apply. It may also be that such an action could arguably constitute an illegal lockout. Conversely, if the Company can establish that its actions were not motivated by collective bargaining concerns, but rather were influenced only by those things which are inherent in the nature of railroading, the exceptions found with the article 79.6 of collective agreement 4.16 and its counterpart within collective agreement 1.1 would clearly apply.

Article 79.6 reads as follows:

When Material Change Does Not Apply
79.6 The changes proposed by the Company which can be subject to negotiation and arbitration under this article 79 do not include changes brought about by the normal application of the collective agreement, changes resulting from a decline in business activity, fluctuations in traffic, reassignment of work at home stations or other normal changes inherent in the nature of the work in which employees are engaged.

The evidence relied upon by the Unions is entirely circumstantial. They note to the Arbitrator's attention that in January of 2005 the parties were on the threshold of a "no board" report which would free the two unions who grieve in this case, as well as the IBEW, to pursue lawful strike action. For reasons which have never been explained, the possibility of the open period taking effect appears to have been put in question by the intervention of the Minister of Labour. It appears that the Minister of Labour put a reference question to the CIRB with respect to whether a work disruption in the railway industry would cause any problem with respect to the suspension of essential services. That, it seems, happened notwithstanding that the parties themselves had previously reached a recorded agreement that none of the unions in question provided essential services which would be an impediment to a lawful strike.

In light of the question put by the Minister, the parties were given the opportunity to make their own submissions as to whether the CIRB should take jurisdiction. It appears that the Unions made their submissions to the CIRB on or about January 7, 2005 and that the Company eventually reversed its position, at least to the extent that it did not oppose the question put by the Minister being considered by the CIRB. On January 20, 2005 the CIRB made the decision to entertain the issue raised by the Minister. The consequence of that action was to foreclose the possibility of the open

period until such time as the matter was resolved. The question raised by the Minister was ultimately answered by the Board in CIRB decision no. 314, dated March 11, 2005, a decision which essentially confirmed that a strike or lockout would not pose an immediate and serious danger to the safety and health of the public and that, in response to the question put by the Minister, the Maintenance of Activities Agreement made by the parties was sufficient to ensure compliance with subsection 87.4(1) of the **Canada Labour Code**. That decision then opened the way for the possibility of an open period and resort to the economic sanctions of strike and lockout by the parties.

The Unions submit that the timing of the Company's actions with respect to the diverting of trains onto the lines of the Wisconsin Central Railroad, rather than via the Northern Ontario route, was motivated by collective bargaining considerations, as a means of sending a message to the trade unions in advance of a possible work disruption. Their counsel stresses that the diversion of the trains started on January 15, 2005 precisely at a time when it was uncertain whether the open period would be forthcoming, and ceased on or about January 25, at a time when, by reason of the ruling of the CIRB, it had become clear that the possibility of strike action would be indefinitely delayed pending a ruling of the Board.

Bearing in mind that the Unions have the burden of proof in the case at hand, the Arbitrator is left with substantial difficulty as to the allegations which the Unions make. It is not disputed that in anticipation of a possible work disruption the Company had prepared a service plan which included traffic pattern changes and the diversion of traffic south of the Great Lakes, in the event of a possible strike. In other words, the

Company then had at its disposal an off-the-shelf template for scheduling trains to run between Winnipeg and Toronto by going south of the Great Lakes rather than by the Northern Ontario route. What the evidence of the Company's witnesses establishes, to the satisfaction of the Arbitrator, is that the issue which prompted the Company's decision to divert trains in January of 2005 was unrelated to collective bargaining negotiations, and was entirely to do with problems of delay and congestion occasioned by cold weather. Upon a careful review of the objective evidence, the Arbitrator is satisfied that that explanation is not only plausible, but is entirely credible.

The undisputed evidence is that in January of 2005 the Company began to experience serious equipment failures and consequent delays in the movement of trains over its Northern Ontario route. Evidence tabled by the Company confirms, beyond controversy, that the coldest period in Northern Ontario struck substantially in the period between January 15 and January 25. During that eleven day period the low temperature reading at Geraldton, for example, ranged between -44.4° C and -21.3° C. A similar pattern is revealed for Sioux Lookout, Timmins and Sudbury. Nor is it challenged that the cold weather conditions accounted for an increased number of broken rails on a number of subdivisions for the Northern Ontario route. The Company estimates that broken rails, cold weather and slow orders contributed to some 9,000 minutes of delay over the zone in January of 2005, and that still greater delays were occasioned by other factors such as operating shorter trains, crew delays, congestion and dispatching difficulties, all occasioned by winter conditions. Overall, a total of 95,500 minutes of delay over the Northern Ontario zone was recorded for the month of January 2005.

There is considerable objective evidence before the Arbitrator to substantiate the Company's position, quite apart from the record of cold temperatures. The records reveal that weather delays spiked substantially in the period between January 15 and 21, 2005. For example, while no weather delay minutes were recorded for days such as January 9, 10, 12 and 14, and on average weather delay minutes were in the order of 100 to 300 minutes on other days in the first part of the month, the weather delay minutes spiked drastically to achieve 4,036 minutes on January 17 and 6,880 on January 18, respectively. Some 1,759 delay minutes were reported for January 21st, although the situation improved immediately thereafter. When the diversion was finally ended on January 25, the Company had then recorded four successive days of no weather related delays.

What the foregoing evidence confirms, to the satisfaction of the Arbitrator, is that there were unusual conditions causing cold weather delays and congestion over the Northern Ontario route in the period of January 2005 which is here under examination. As indicated by the Company's witness at the hearing, the decision was not made to implement a wholesale diversion of traffic south of the Great Lakes. During the eleven days in question some 200 trains nevertheless continued to operate over the subdivisions linking Winnipeg and Toronto via Sioux Lookout, Hornepayne and Capreol. Only seventeen trains were in fact diverted south of the Great Lakes, as a form of safety valve to ease the pressure of congestion and delays on the northern route. It should be stressed that this was not an option which the Company had readily available to it over many years past, as it had only acquired the Wisconsin Central Railroad in 2001.

To be sure, as the Union stresses, the Company's communications with respect to the diversion made reference to the service plan prepared for the possible work disruption. That, however, does not speak to the reason for the diversions which in fact occurred. While the Company obviously took advantage of the pre-established plan for diverting trains south of the Great Lakes, it did so for reasons which were entirely legitimate, caused by cold weather and which, in the Arbitrator's view, fall squarely within the concept of a change in operations which is normal and inherent in the nature of the work in which the running trades employees are engaged. In other words, what transpired is well within the exceptions described in article 79.6 of collective agreement 4.16, as well as in the counterpart provision of collective agreement 1.1. There was, in these circumstances, no material change implemented by the Company in the sense contemplated within those provisions, and no obligation upon the Company to provide the notice and procedures which relate to a material change circumstance.

For all of the foregoing reasons the Unions' policy grievances must be dismissed.

February 20, 2006

(signed) MICHEL G. PICHER
ARBITRATOR