

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3601

Heard in Montreal, Tuesday, 9 January 2007

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

The operation of caboosless trains without a refrigerator or hot plate.

JOINT STATEMENT OF ISSUE:

On several occasions the Company has directed train crews operating caboosless trains to operate such trains without having a refrigerator and/or hotplate in the lead locomotive.

Article 147.4(g) of Agreement 4.3 states:

These requirements are also found in RTC Order NO. 41-300 and in the July 18, 1988 Larson award with respect to caboosless train operations.

The Union submits that caboosless trains can only be operated when the lead locomotive is equipped in compliance with the foregoing.

The Company disagrees.

FOR THE UNION:

(SGD.) R. A. HACKL

FOR: GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) K. MADIGAN

VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

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| K. Morris | – Manager, Labour Relations, Edmonton |
| K. Creel | – Sr. Vice-President, Eastern Region, Toronto |
| B. Laidlaw | – Manager, Labour Relations, Winnipeg |
| R. Smith | – Assistant Superintendent, Winnipeg |

And on behalf of the Union:

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|----------------|---|
| D. Ellickson | – Counsel, Toronto |
| R. A. Hackl | – Vice-President, Edmonton |
| B. R. Boechler | – General Chairman, Edmonton |
| R. A. Beatty | – General Chairperson, Sault Ste. Marie |

R. LeBel	– General Chairperson, Quebec
S. LeBlanc	– General Chairperson, Prince George
R. Sharpe	– Vice-President, Vancouver
J. Robbins	– Vice-General Chairman, Sarnia
M. Rutzki	– Local Chairperson / Secretary, Melville

AWARD OF THE ARBITRATOR

The union claims in a policy grievance that the employer is in breach of article 147.4(g)(2)(3) of Agreement 4.3 by operating certain cross border trains without a refrigerator or hotplate.

The background of this grievance is well known to the parties. On July 8, 1988, Arbitrator Larson, sitting as an interest arbitrator, set out the language in what is now Article 147.4 (g) of Agreement 4.3. Arbitrator Larson drafted the wording in article 147.4 (g) after reviewing the requirements set out in Order #R-41300 dated December 14, 1987, of the Railway Transport Committee (Canadian Transport Commission).

Article 147.4 reads, in part, as follows:

147.4 Notwithstanding any of the above, no train or assignment shall be operated without a caboose unless the Company complies with the following operating conditions:

...

(g) Each occupied locomotive cab shall be provided with the following:

...

(2) A refrigerator which is not less than two cubic feet in size with a capacity to maintain a temperature of 4 degrees Celsius, or lower, and which is otherwise capable of maintaining perishable foods in a safe and sanitary manner.

(3) A single element electric hot plate suitable for cooking, mounted in such a way that it shall not interfere with the ordinary work functions in the cab;

...

In 1995, the Company implemented an operation to allow train crews to operate for 12 hours (rather than the previous 10 hours) before being able to book rest and for crews to forego the ability to stop the train after 9 hours to obtain a hot meal. In exchange, the Company agreed to equip locomotives with microwaves. The parties negotiated the following provision in a Memorandum of Agreement dated February 12, 2005:

27. Meals in Road Service

In addition to the provisions presently contained within Collective Agreements 4.16 and 4.3, the Union accepts the following commitments of the Company:

1. All train consists with CN Locomotive Power will contain an operational microwave in the lead unit;
2. A cross border train consist without CN power will obtain a properly equipped lead locomotive at the first locomotive power facility (Toronto, Montreal, Chicago (Woodcrest), Winnipeg and Vancouver.) All other trains will contain an operational microwave in the lead unit.
3. The Parties understand that the Company has the right to return the foreign power from the above recognized terminals without microwaves.
4. The parties commit to continue discussions regarding the integration of BC Rail power.

The Union submits that the intent of the Memorandum is clear from a plain reading of the document: it is to allow trains operating with a foreign line consist to do so without having a microwave in the lead locomotive. The Union noted that no other relief is provided to the Company in the Memorandum concerning the other requirements found in Article 147.4 (g), in particular refrigerators (subsection 2) and hot plates (subsection 3).

The Company submits that it was understood at the negotiating table leading up to memorandum that the Company was also seeking relief from the refrigerator and hot plate requirements. The reasoning was that the Company has limited control over the type of equipment received from foreign line consists. The position of the Company is that all CN negotiating committee members recall a verbal commitment from the Union during negotiations leading up to the Memorandum for this type of relief concerning foreign line consists traveling between cross border corridors. In that regard, Keith Creel, a member of the Company bargaining team, testified that it was understood on both sides of the table that the foreign consists from the USA traveling in the Vancouver, Winnipeg, Toronto and Montreal corridors were exempt not only from the microwave requirement but also from the need to carry a refrigerator and hot plate. A CN lead locomotive, on the other hand, traveling outside of those corridors was required to have a microwave as well as a refrigerator and hot plate. The Union denies such a commitment was ever made at the bargaining table or that it ever indicated to the Company during the bargaining sessions leading up to the February 12, 2005 Memorandum that the Company was relieved from its obligations under article 147.4(g).

Arbitrators follow several presumptive rules of interpretation when construing a collective agreement. One of the lead rules is that the provisions in a collective agreement must be read according to their plain and ordinary meaning. That rule will only be set aside when it has been demonstrated, with clear and reliable evidence, that the parties have agreed to an interpretation that is different from its ordinary meaning.

As the Union pointed out, a reading of the first sentence in the introductory paragraph of the Memorandum confirms that the provisions in collective agreement 4.3 are to apply: *"In addition to the provisions presently contained in the Collective Agreements 4.16 and 4.3. Paragraph #1 then sets out the requirement for locomotive power to have a microwave. Paragraph #2 goes on to state that a cross-border train without a CN locomotive at the lead will obtain a "properly equipped locomotive" at the designated power facilities. It then states: "All other trains will contain an operational microwave in the lead unit". The last sentence reference to the microwave clearly reinforces the understanding that a locomotive without a microwave is not a "properly equipped" train. The fact that there is no reference to refrigerators or hot plates does not exclude the requirement for those amenities. Clear language would be required to achieve such a result, particularly so in this case given the direct incorporation of the provisions of collective agreement 4.3.*

Finally, paragraph #3 in the Memorandum again speaks to the issue of microwaves; the parties have evidently agreed that a foreign consist may be returned from the recognized terminal without a microwave. Again, there is no mention of any further exclusion or understanding that the foreign locomotives are not required to adhere to the provisions of article 147.4 (g). The ordinary meaning of the Memorandum therefore supports the position of the Union that foreign line consists traveling in the specified corridors are exempt from the microwave requirement but not the obligation to have refrigerators and hot plates in the lead locomotive.

There is also no foundation for an estoppel based on a mutual understanding reached at the bargaining table that the Memorandum was to be applied in such a manner to exclude refrigerators and hot plates, as well as microwaves. Proposals were exchanged and discussions took place right up to last hours before the parties reached agreement and then signed the Memorandum. There is no clear and reliable evidence from those discussions or proposals which lead the arbitrator to a finding that the union agreed during bargaining to apply the February 12, 2005 Memorandum in a manner which would exempt a lead locomotive from the requirements of article 147(g)(2)(3) of Agreement 4.3.

The grievance is allowed. The Company is in violation of paragraph 147.4(g) of Agreement 4.3 by allowing foreign line consists entering and leaving the named corridors to be equipped without refrigerators and hot plates. In light of the practical considerations involved in the implementation of this award, there shall be no cease and desist order until such time as the parties have met to try and resolve their differences over this issue. Should the parties be unable to reach a solution within 60 days, the matter shall be placed on the CROA&DR docket before this Arbitrator to hear further submissions and issue any further remedial orders required at that time.

January 29, 2007

(signed) JOHN M. MOREAU
ARBITRATOR