

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

CASE NO. 3719

Heard in Montreal, Wednesday, 14 January 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The utilization of CEMR (Central Eastern Manitoba Railway) crews to switch cars and assemble their train in Symington Yard, contrary to the memorandum of agreement regarding the Pine Falls Material Change and CEMR operating agreement.

UNION'S STATEMENT OF ISSUE:

On May 12, 1998, the Company served notice of a material change on the UTU, stating the Company's intention to divest itself of certain subdivisions in Manitoba, including the Pine Falls Subdivision. The parties arrived at a mutually agreeable settlement to minimize the adverse effects of this material change. Part of this settlement included an Operating Agreement under which the purchaser of these subdivisions (CEMR) would be allowed to operate within Symington Yard, with certain restrictions.

The Union submits that the Company has been requiring CEMR crews to handle cars and perform switching that the Operating Agreement prohibits them from doing, resulting in lost work for CN employees in Symington.

The Union requests that the Company acknowledge that CN employees are entitled to this work; that the Company cease and desist requiring CEMR crews to perform this work; and that all those employees who were adversely affected by the practice be made whole.

The Company disagrees.

FOR THE UNION:

(SGD.) B. R. BOECHLER
GENERAL CHAIRMAN

There appeared on behalf of the Company:

K. Morris	– Manager, Labour Relations, Edmonton
D. VanCauwenbergh	– Director, Labour Relations, Edmonton
J. Cavé	– Counsel, Montreal
C. Wagner	– Observer

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
R. A. Hackl	– Vice-General Chairman, Edmonton
R. Barr	– Witness
D. Bolianaz	– Local Chairman, Winnipeg

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in dispute. Having divested itself of certain subdivisions in Manitoba, and through their sale to the Central Manitoba Railway (CEMR), the Company negotiated an arrangement whereby employees of CEMR would have a limited ability to perform certain work within the Company's facility at Symington Yard, specifically in relation to the operation of CEMR trains. That arrangement, in turn, required the negotiation of an agreement with the Union, now called the "Interchange Understanding" (IU). That agreement is dated April 5, 1999 and includes a summary which reflects the following terms:

In Summary:

CEMR trains will operate into and out of the respective "zones".

The Carman Subdivision Industrial traffic may be set off or lifted from tracks WC50-51, (designated BNML interchange tracks. CEMR will, upon request from BNML, interchange BNML traffic on tracks WC50-51. Fort Rouge will not be used for this purpose.

CEMR will not be permitted to double cars from one zone to another for the purposes of making up a train, or yarding trains.

CEMR will be permitted to double one track to another in the same zone only as it relates to blocks of traffic for their train. Two examples would be, (1) Pine Falls line traffic is on one track and the Norcrean or Transcona Industrial traffic is on a another track. When these two traffic flows move on one CEMR train, they will be permitted to perform their own double over. Another example is trains that are destined to the Carman Subdivision, which is predominately grain dependent cars, could double over the Carman Subdivision industrial traffic, (Agrico and Wildwood) to the train.

CEMR can double cars on arrival to another track in the same zone, only if the train will not fit in one track. They will not be given a designated cut.

CEMR cannot pull through a track and double their train into another track.

Locomotives that are to be operated by CEMR employees, either into or out of Greater Winnipeg Terminal, will be taken to/from any designated location in Symington, to/from where a CEMR train is yarded or departing.

CEMR employees will not under any circumstances take cars from the class yard to the departure yard, except trains that are set in the "long" class tracks that are designated as departure tracks.

Through the instant policy grievance the Union alleges that the Company has violated the IU, essentially allowing CEMR employees to perform work which it maintains is reserved to employees of the Company from within its bargaining unit. As a preliminary matter the Company submits that the dispute now advanced to arbitration by the Union was settled. In that regard its representative points to a letter dated July 12, 2007 issued over the signature of Labour Relations Officer Basil Laidlaw, on behalf of Sr. Vice-President, Southern Region Gordon Trafton. That letter records the meeting between the parties and the settlement of a substantial number of CEMR claims being advanced by the Union. The letter identifies some nineteen claims which are being placed in line for payment. The body of the letter reads, in part, as follows:

This is in reference to our meeting on June 29, 2007 with yourself and Dave Bolianaz to review and resolve a number of outstanding time claims surrounding the operation of the CEMR in Symington Yard.

The parties agreed, where it could be shown that CEMR employees performed switching/marshalling of CN cars on their train in Symington Yard contrary to the Interchange Understanding dated April 5, 1999, that settlement of those claims would resolve the CEMR dispute short of arbitration.

The following reflects the parties' agreement with respect to the time claims (24) that we examined during our meeting, and represents full and final settlement of these claims.

The Company's representative submits that the foregoing letter reflects an understanding of the parties that all of the claims and disputes and respect of CEMR operations in Symington Yard are settled. On that basis he submits that the instant matter should be viewed as effectively inarbitrable.

While the Arbitrator can understand the perspective of the Company, on a broader view of the dispute its position cannot be sustained. Firstly, the letter of July 12, 2007 does little more than reflect the settlement of certain individual claims, as agreed between the parties. The statement within the letter, with respect to the claim settlements being a full and final settlement is not co-signed by any Union representative. More significantly, it makes no specific reference to the policy grievance dated January 31, 2003 filed by the Union. The scope of that grievance appears, on its face, to be relatively broad, and does not limit itself to the monetary claims made by specific employees, such as those resolved and reflected in the letter of Mr. Laidlaw dated July 12, 2007. There is, very simply, no evidence of any written resolution between the parties which would sustain the view of the Company that all matters in dispute with respect to the CEMR operations at Symington Yard have been resolved by agreement so as to render the issues herein in arbitrable. On that basis the Company's position cannot be sustained.

As regards the merits of the dispute, there is in fact little difference between the parties. Firstly, it would appear that the parties are not in dispute that CEMR cannot double cars from one zone in Symington Yard to another for the purposes of making up a train or yarding a train. Secondly, CEMR is restricted to operating into and out of their respective zones, being confined to a single zone in each instance. Thirdly, CEMR employees are not to switch or otherwise deal in any way with CN cars or CN customers. Fourthly, with the exception of the main thoroughfare track in Symington

Yard, referred to as the "X" track, CEMR cannot pull through a vacant track and double their train into another track.

The principal point of disagreement appears to be with respect to whether CEMR crews are entitled to marshal their own cars into blocks prior to doubling them over in the process of preparing a train for eventual departure. The Union submits that the work with respect to marshalling the CEMR trains into blocks, including the order of cars within the blocks, is work to be performed exclusively by CN employees in the yard. The position of the Company is that such work is contemplated by the IU agreement as work to be done by CEMR, to the extent that it relates exclusively and entirely to CEMR's own trains.

The Union also challenges certain specific operations performed by CEMR employees, apparently on an ongoing basis, virtually up to the point of the hearing of this grievance. For example, the Union draws to the Arbitrator's attention an incident on July 31, 2008 where a CEMR train was in fact yarded at Fort Rouge, in apparent contravention of the IU agreement. Reference is made to another incident on August 27, 2008 where CEMR employees operated over two different zones, again contrary to the understanding. The Union further alleges that on November 17, 2008, CEMR employees doubled their train into two zones, improperly marshalled cars and set out CN cars contrary to the agreement. These and similar incidents documented before the Arbitrator are, the Union claims, evidence of the ongoing violation of the IU to the present date.

The Arbitrator is satisfied that, with one exception, the claims of the Union as regards practices which appear to have continued beyond the settlement of the claims as reflected in the letter of Mr. Laidlaw dated July 12, 2007, do in fact disclose violations of the IU. The documentary evidence tendered does, to the Arbitrator's satisfaction, demonstrate by a preponderance of evidence that CEMR employees have, on occasion, disregarded the zone restrictions contained in the IU, that they have handled CN cars contrary to that agreement and that, on at least one occasion, they have yarded their train in a zone prohibited to them, namely at Fort Rouge. In the Arbitrator's view these incidents are deserving the declaration which the Union seeks, and a cease and desist direction for the future.

With respect the Union's claim, however, the Arbitrator has more substantial difficulty with its argument that the IU prohibits CEMR employees from marshalling their own trains within Symington Yard. With respect to that issue the Union relies on the fourth bullet point in the summary to the IU. Its representatives also rely on a provision found within a commercial agreement between the Company and CEMR with respect to the blocking of CEMR cars. Article 7.4 of that commercial agreement states, "The cars forwarded by CN to CEMR at the Interchange will be blocked in accordance with the provisions of Appendix C, as modified by the parties from time to time." While Appendix C appears to place a blocking obligation on CN in the delivery of cars to CEMR, that agreement appears not to have been followed and, more significantly, it is not an agreement to which the Union is privy or whose terms can be enforced by the Union. It is, in other words, entirely open to the Company and CEMR to vary their own

understanding of the blocking obligations of CN, subject of course to not violating the provisions of the IU.

The issue then becomes whether the bullet point which the Union relies upon in the summary of the IU can be said to be a contractual understanding which prevents CEMR employees from marshalling their own cars within Symington Yard. The Arbitrator cannot find that it does. While the summary has its value, reference must also be made to the general text of the IU. As stressed by the Company's representatives, the highlighted phrase of that agreement, conveyed in bold print, is that: "**The intent is that CEMR employees will NOT switch CN cars or CN customers.**" The IU reads, in part, as follows:

The route segments and traffic flows are as follows:

1. Traffic to the Pine Falls Subdivision, beyond the industrial switching area, presently serviced by trains 535 and 534. The principal purpose of this traffic flow is to service Pine Falls proper, and the various line customers.
2. Transcona Industrial Zone, which presently consists of the Griffin Wheel, Border Chemical and Imperial Oil.
3. The Carman Subdivision, beyond the Terminal Industrial Switching area.
4. Carman Subdivision Industrial Customers, which consists of Agrico and Wildwood Forest Products.
5. Train 770 is a coal train that arrives from the USA via Emerson. A CN crew will deliver the train to the CEMR crew at any specified change off point within the Greater Winnipeg Terminal. Train 771 will be delivered by the CEMR crew from East Selkirk to the Greater Winnipeg Terminal.

With respect to items 1 and 2, traffic will be humped for each respective traffic flow into appropriate class tracks. The Pine Falls traffic will be in one track and the Transcona Industrial traffic will be in another track. A CN assignment will pull the two traffic flows to any departure track. When CEMR traffic is set to a departure track, it will not be coupled to CN cars.

The CEMR employees will lay over their private locomotives in the "old refer shop lead", between SS04-SS08. The switch will have a private lock. Upon train make up, the CEMR employees will brake test their train and depart to the Pine Falls Subdivision.

With respect to items 3 and 4, the Carman Subdivision train (grain peddler/pickup) will be humped to an appropriate area within the class yard, and the outgoing train will be established in the "long" class tracks, or designated departure tracks. CEMR will move their engine to the designated departure track and complete the air test.

It must be noted that the foregoing language is less than explicit with respect to the marshalling of individual cars and blocks of cars, whether by CN employees or by employees of CEMR. The unchallenged representation of the Company is that at the initial stage of the application of the IU CEMR cars were shunted into two separate small tracks, one for the Pine Falls Subdivision and the other for the Transcona Industrial traffic. It would appear that when operations were organized in that manner there was little if any marshalling to be done by CEMR employees. More recently, however, the Company has, without apparent objection from CEMR, decided to simply hump all CEMR traffic into a single longer track where the CEMR crews then perform such blocking and marshalling as is necessary for the preparation of their particular train. However, it would appear not contentious that CN's fundamental obligation is to place the CEMR traffic into a departure track. There is no specific reference to any further blocking or marshalling.

Significantly, in the Arbitrator's view, the IU expressly refers to the make up and departure of the CEMR train. It states, in part "Upon train make up, the CEMR employees will brake test their train and depart to the Pine Falls Subdivision." That reference, in the Arbitrator's view, would appear on its face to contemplate the CEMR employees having a role in the process of "train make up" with the brake test being performed immediately thereupon by the CEMR employees. In my view the best

reading of that provision is that it in fact contemplates CEMR employees being fully able to marshal and block the own train. With the greatest respect to the Union's viewpoint, the text of the IU does not, on its own face, expressly prohibit any such work by CEMR employees. Nor does it limit their involvement in the Symington Yard to a simple "hook and haul" operation.

The grievance is therefore allowed, in part. The Arbitrator finds and declares that the Company has violated the IU agreement of April 5, 1999 by allowing CEMR employees to operate their trains within and across more than a single zone in Symington Yard, contrary to the agreement, that they have yarded at Fort Rouge in a manner not contemplated by the agreement and that they have handled or switched out CN cars, also contrary to the agreement. The Arbitrator therefore directs the Company to cease and desist from the continuation of these practices, and that it abide by the terms of the IU, taking all reasonable efforts to ensure that the CEMR also respect the limitation of that agreement.

With respect to the issue of blocking and marshalling, for the reasons related above, the Arbitrator cannot sustain the position of the Union and must find and declare that no violation of the IU is disclosed in that regard.

January 19, 2009

(signed) MICHEL G. PICHER
ARBITRATOR