

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

CASE NO. 3769

Heard in Montreal Thursday 14 May 2009

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The application of article 15.01 and the footnote referring to the appended letter re: Off Main line/Conductor Only Premiums En Route (EC) in the circumstances involving the operations covered by Eastern Services Area Information Bulletin No. CMC-100/06.

JOINT STATEMENT OF ISSUE:

On November 9, 2006, the Company issued Eastern Services Area Information Bulletin No. CMC-100/06 which involved EC (En Route Switching) and OM (Running Off Main line) claims at Franz. The notice was being issued to running trades operating crews over the territory in question to clarify when EC claims and OM claims are to start and end at Franz.

On December 5, 2006, the Union filed a policy grievance on behalf of all locomotive engineers of Division 319 in respect of the language contained in Bulletin CMC-100/05 referred to above. The Union's grievance claims Off Main line pay under article 15.01 in respect of movements by CP Rail crews on CN lines. In particular, the Union's grievance involves movements on CN lines when switching at Franz, Ontario while en route from White River to Chapleau. The Union claimed payment for all locomotive engineers when required to operate off the CP main track onto another railway's main track in such circumstances.

The Union also relies on an argument based on estoppel. The Union contends that the Company has honoured similar claims under article 15.01 arising out of Franz runs in the past but unilaterally cancelled the practice in November 2006 without offering the Union an opportunity to bargain about the language and application of article 15. In the circumstances the Union took the position that the Company was estopped from unilateral departure from past practice.

The Company disagrees with the Union's positions and denies any violation of the collective agreement.

FOR THE UNION:

(SGD.) T. BEAVER
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) A. A. GARCIA
FOR: ASSISTANT VICE-PRESIDENT

There appeared on behalf of the Company:

A. A. Garcia	– Manager, Labour Relations, Calgary
D. Freeborn	– Manager, Labour Relations, Calgary
S. Nelson	– Manager, Operations, Smiths Falls

And on behalf of the Union:

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|--------------|---------------------------------------|
| M. A. Church | – Counsel, Toronto |
| T. Beaver | – General Chairman, Oshawa |
| K. Travis | – Witness |
| W. Cormier | – Sr. Vice-General Chairman, Chapleau |
| R. Woodruff | – Local Chairman, Schreiber |
| M. Hamel | – Vice-General Chairman, Chapleau |

AWARD OF THE ARBITRATOR

The instant grievance raises a unique situation. It concerns the interchange of rail traffic between the Company and CNR at the intersection of the Company's main line running between White River and Chapleau and the CN main line at Franz, Ontario. While it appears that the interchange activity previously took place on siding tracks known as the ACR Transfer adjacent to the CP main line, starting May 15, 2005 train 434, which handled the transfer traffic on approximately one-half of its runs would, on those occasions, be required to travel off the CP main line, over approximately 1,000 feet of connecting track and enter the CN main line travelling slightly more than one mile to the CN siding at Franz which then became the depository of transfer traffic. Initially, apparently at the direction of the Company's Chief Auditor, employees on train 434 performing that work were paid an OM premium for work off the main line. Those payments were ostensibly made under the provisions of article 15.01 which provides as follows:

15.01 Mileage or hours made, whichever is greater, when engine is run more than one mile off main track will be added to mileage of trip.

However, on November 9, 2006, as a result of OM claims being reviewed through the audit system, the Company reversed its position. It then issued a bulletin in the following terms:

OM Claims:

OM claims are not applicable when running to CN Franz. It is the Company's position that this location is considered a main line of Canadian National Railway.

It is understood that OM claims have been claimed in the past for the time spent running to CN Franz. Effective immediately, OM claims should no longer be submitted for this time at this location.

In essence, the position of the Company is that the movement at Franz off the CP main line onto the main line of CN to the transfer siding does not involve running "off main track" within the contemplation of article 15.01 of the collective agreement. On that basis, therefore, it maintains that the OM premium is not payable, albeit employees are paid the Conductor Only "EC" premium for switching en route in relation to the work performed in the transfer siding. The Company's representative submits that the intention of article 15.01 is to recognize that work off main tracks is subject to more complex operating rules and reduced speeds, thereby justifying the premium. That situation, she argues, does not occur in the case at hand.

The Union argues, firstly, that the Company is estopped from the change in practice which it implemented in November 2006. Alternatively it argues that the language of article 15.01 was not intended to encompass main track of another railway. Its counsel submits that the work performed at Franz should be paid no less than work that would involve leaving CP main track to work on an industrial spur to perform switching. He stresses that in fact no mileage or time, which would be paid in the case of work on an industrial spur, is paid by the Company for the work performed at Franz.

The Arbitrator can appreciate the position of both parties. The language of article 15.01 could credibly be interpreted either way. In my view it is important to consider the purposive dimension of the provision in question, particularly as it applies to the factual circumstances of this case.

Before turning to that aspect, however, the Arbitrator must agree with the Company's representative that a case of estoppel is not made out on the facts before me. The record discloses that at the time the Union was aware of the Company's change of position with respect to the payment practice at Franz it was in bargaining with the Company for the renewal of the collective agreement. In other words, the Union did have every opportunity to deal with the Company's change of position as regards the OM premium being discontinued at Franz, contrary to the previous practice. For reasons the Union best appreciates, however, although it filed a grievance during the same period, it made no attempt to resolve the issue at the bargaining table. In that situation I must agree with the Company's representative that the element of injurious reliance on the part of the Union is not made out.

However the Union's case is more compelling as regards the purposive interpretation of article 15.01. If the Company's interpretation is accepted, an obviously anomalous situation arises where employees would receive no payment in the form of mileage or time for travel over main line which is not main line of the Company. It does not appear disputed that in other circumstances where employees of the Company are compelled to run over CN main line, as for example on the Oakville Subdivision between Toronto and Hamilton, while they are not paid OM premiums they do receive payment for their mileage and time. I am satisfied that the parties would not have intended the anomalous situation by which no such payments are made for the movement of the Company's crews on CN territory at Franz where, if the Company's practice is supported, no OM payment is to be made and no mileage or time payment is to be made either. From a certain perspective that interpretation would occasion something of a windfall to the Company.

The Arbitrator is satisfied that nothing in the instant case creates any obligation on the part of the Company to, as its representative suggests, pay OM premiums for the myriad other situations where Company employees may operate over the main lines of other railways. The ruling in the instant case must be confined to the unique facts of the situation at Franz. In the end, the Arbitrator is more persuaded by the argument of the Union's representatives to the effect that what occurs at Franz, by entering onto the CN main line to switch out the transfer siding is in fact analogous to leaving the CP main line to perform switching work on an industrial spur. I can see no basis upon which to conclude that the parties would have intended that the work so performed at Franz should be treated any differently, particularly as it involves movement over the main line of another railway which in fact attracts no mileage or time payment.

For the foregoing reasons the grievance is allowed. The Arbitrator remits the matter to the parties for the orderly payment of all off main line (OM) claims, it being understood that the interpretation and application of article 15.01 herein is limited to the unique facts of this case.

May 19, 2009

(signed) MICHEL G. PICHER
ARBITRATOR