CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3813

Heard in Montreal, Tuesday, 13 October 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The decision by the Great Canadian Railtour Company to crew their own seasonal excursion train – the "Whistler Mountaineer" effective 2010.

COMPANY'S STATEMENT OF ISSUE:

On February 5, 2009, the Company provided notice to the Union that the Great Canadian Railtour Company advised effective 2010 they would be operating their seasonal excursion train – the "Whistler Mountaineer" with their own crews and will no longer be contracting CN crews.

The TCRC contends that BCR locomotive engineers must man the train as the work has been performed by BCR locomotive engineers and article 1.11 and item #9 of the Memorandum of Agreement signed December 1, 2005 provides that work historically performed continue to be performed by the BCR locomotive engineers.

The TCRC-CTY contends that BCR conductors must man the train as provided for under article 103.

The Company disagrees with the Unions' contentions.

FOR THE COMPANY:

(SGD.) D. CROSSAN
FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

J. Cavé	– Counsel, Montreal
D. Crossan	– Manager, Labour Relations, Prince George
K. Morris	– Sr. Manager, Labour Relations, Edmonton
B. Laidlaw	– Manager, Labour Relations, Winnipeg

There appeared on behalf of the Union:

S. A. Moore	– Counsel, Vancouver
J. Holliday	– General Chairman, Prince George
R. Ellerbeck	– Local Chairman,
B. Willows	– General Chairman, Edmonton
T. Markewich	– Sr. Vice-General Chairman, Edmonton

AWARD OF THE ARBITRATOR

The facts in relation to this dispute are not essentially contested. The two grievances arise as a result of the announced intention of the Company to permit the Great Canadian Railtour Company (GCRC) to operate its passenger trains over former BC Rail trackage, now owned by CN, using crews hired and employed by GCRC. Under that plan, commencing in 2010, GCRC employees would operate trains which have been exclusively operated by members of the two running trades bargaining units, conductors and locomotive engineers, since the inception of the train in question, the Whistler Mountaineer, in 2006. It appears that the GCRC commenced operating the Whistler Mountaineer between North Vancouver and Whistler as a passenger tourist excursion train between North Vancouver and Whistler, return, commencing April 30, 2006. From that time to the present the train has been operated exclusively by CN employees, with priority rights to the work for former BC Rail (BCR) employees, in keeping with a tri-partite agreement dated October 26, 2005 governing work protections for former conductors of BC Rail following the acquisition of BC Rail operations by CN, and a second tri-partite agreement dated December 1, 2005 relating to locomotive engineers, who worked for the BCR and would thenceforth be employed by CN. It is fair to say that the mutual intention at the time was that CN would effectively take over and respect all collective bargaining rights and obligations of the former BCR conductors and locomotive engineers, with assignment preferences being given to them on former BCR territory. That, for example, is reflected in paragraphs 6 and 9 of the tri-partite agreement between CN, the TCRC which represents CN locomotive engineers and CAW Local 110 which represented former BCR locomotive engineers at the time of the agreement of December 1, 2005. The agreement reads, in part:

> **6.** BCR locomotive engineers who maintain a continuous employment relationship with the Company shall have preference, in seniority order, over other locomotive engineers covered by collective agreement 1.2 [CN collective agreement] in the filling of locomotive engineers' position on the former BCR territory. Such positions are identified herein as protected BCR positions.
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> Protected BCR positions are defined as all regular assignments, spare boards, pools, work train, yard assignments and any other train service that may operate at and/or between the following locations:
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> …
>
> **9.** BCR Agreements including arbitrations, Memorandum of Agreements [sic] and Local Agreements, unless expired, cancelled or re-negotiated, will continue in effect and be applicable to all locomotive engineers working on the territory defined in Item 6 of this Memorandum of Agreement.
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> …
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> **12.** It is understood that Protected BCR positions may be discontinued or work re-scheduled through the issuance of Material Change Notice as outlined in Article 23 of the BCR collective agreement. This will not apply in respect of changes brought about by the normal application of the collective agreement, changes resulting from a decline in business activity, fluctuations in traffic, traditional reassignment of work or other normal changes inherent in the nature of the work in which employees are engaged.

The Union, which now represents both locomotive engineers and conductors, maintains that its members have the exclusive right to operate third party passenger rail trains on any former BC Rail trackage. The Union grounds its position in two ways. Firstly it relies upon a memorandum of settlement dated October 23, 2003 (2003 MOS) which made specific provision for the reduced crewing of trains operating as third party passenger services on the territory of BC Rail. The Union's counsel notes to the Arbitrator that the 2003 MOS contained a concession then sought by BC Rail for reduced crews in such service. The language of the 2003 MOS therefore includes, in part, the following:

> 2) Operational Issues
>
> Third Party Passenger Services

> Passenger trains operated by third parties on BC Rail track will be crewed by one Conductor and one Locomotive Engineer in a Cabooseless Conductor Only configuration
>
> The Railway will consult with the Union with respect to any other work by BC Rail employees on third party passenger trains with a view to finding a mutually beneficial agreement.

Secondly, the Union relies on the provisions of article 103 of the collective agreement respecting conductors and the mirror provisions of article 1.11 of the collective agreement governing locomotive engineers. Those provisions read as follows:

> Article 103 – Detouring
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> Foreign trains detouring over BC Rail Ltd. shall be manned by BC Rail Ltd. crews. The question of operation under joint section or running rights agreement to be the subject of discussion between the Railway and the Union.
>
> Article 1.11 – Detouring
>
> Foreign trains detouring over BC Rail shall be manned by BC Rail engineers. The manner of operation under joint section or running rights agreement to be subject of discussion between the Railway and the Union.

Most fundamentally, the Union submits that a prior arbitration award rendered by Arbitrator H.A. Hope in a dispute between **British Columbia Rail Ltd. and the Counsel of Trade Unions on BC Rail Ltd.**, an award dated November 27, 1998, expressly held that the detouring provisions of the collective agreements mandated that all foreign trains operating on BCR track must be operated by BCR crews. On the basis of that award and the successor obligations assumed by CN, as reflected in the documents reproduced in part above, counsel for the Union submits that the Company must respect the exclusive right of bargaining unit members to operate any foreign train over any tracks which formerly belonged to BC Rail.

The Company maintains that the operation of the Great Canadian Railtour Company which runs entirely over former BC Rail lines, now CN lines, between North Vancouver and Whistler does not involve detouring as contemplated under the collective agreement. Its representatives submit that as the GCRC has no track of its own, the operation of the Whistler Mountaineer does not involve the detouring from the track of a foreign railway onto the tracks of CN, so that no detour is in fact involved. The Company submits that at most what has transpired is the working of a running rights agreement which, in the terms of the detouring provisions of the collective agreement are a matter for discussion between the Railway and the Union, but not a matter which gives exclusive operating rights to the members of the conductors' and locomotive engineers' bargaining units.

The Company further stresses to the Arbitrator numerous other circumstances in which third party trains, operated by the crews of a foreign railway, do so without violating any collective agreement. Examples cited by the Company include the GCRC tourist trains operating between Vancouver and Jasper via Kamloops, as well as VIA operations across Canada and GO Transit operations in Ontario, among others.

The Company submits, in part, that what has occurred is essentially an exception to paragraph 12 of the agreement of December 1, 2005 governing locomotive engineers, for example. Its submits that the elimination of work by reason of the decision of the GCRC to use its own crews is a change "… brought about by the normal application of the collective agreement" which is entirely permissible within the collective bargaining documents which bind the parties.

After careful consideration, and an extensive review of the materials, including the prior award of Arbitrator Hope, the Arbitrator has substantial difficulty with the position advanced by the Company. Central to that view is the analysis of the detouring provisions made by Arbitrator Hope, and the conclusions which he drew in his award of November 27, 1998.

Firstly, the Arbitrator does not view the factual circumstances before Arbitrator Hope as being materially different from those in the case at hand, contrary to the Company's view. Arbitrator Hope dealt with a situation which involved an arrangement between BC Rail and CN which essentially allowed each railway to operate its own trains directly into the yards of the other railway. The agreement also contemplated CN trains operating directly over a BC Rail loop track at the Vancouver wharves. The operations there under consideration did not, it is clear, involve detouring in the sense that the Company would define it in this dispute. Trains in the circumstances before Arbitrator

Hope did not depart their own tracks for a temporary diversion to then return to their own territory. Essentially, under the arrangement there under consideration foreign trains simply operated over a segment of BC Rail track to reach a destination, whether in a yard on tracks at the Vancouver wharves.

As a starting point, Arbitrator Hope recognized the long-standing practice whereby the operation of foreign trains over BCR territory was always reserved to BCR crews. At paragraph 20 of his award he commented in that regard:

> In summary, in terms of the practice of the parties, the invariable practice for as long as they can recall has been to have foreign trains on BCR trackage operated by BCR crews. The Port Sub is anomalous in terms of practice. In physical terms, it is not part of the BCR system and is not included in the railway's timetable … What has not occurred in practice is the operation of foreign trains by foreign crews into the BCR yard. That work has always been performed by BCR crews, as has all road operations involving foreign trains.

The Union asserts that the analysis of Arbitrator Hope leads to the conclusion that "… detouring occurs when a foreign train is operated over BC Rail trackage for any purpose." A careful read of Arbitrator Hope's award confirms that interpretation. At paragraph 48, 49 and 50 of his award Arbitrator Hope commented as follows:

> [48] …That is, in terms of the facts in this dispute, the change proposed by the Railway contemplates that foreign trains in the sense of trains retaining their essential characteristic of belonging to a foreign railway, will be operating on BCR yard trackage. The question then becomes whether such trains are "detouring" on BCR trackage.
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> [49] Caught up in that question is whether the terms, "detouring", and "operation under joint section or running rights agreements" are mutually exclusive. …
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> [49] … However, in dictionary terms, the Concise Oxford Dictionary, Ninth Edition, includes in the definition of detour, "a divergence from a direct or intended route" as one of its meanings. In Webster's Third New International Dictionary, Unabridged, the meanings of detour include, "to divert, turn aside … a turning aside a circuitous route, a deviation from a direct course or the usual procedure, a roundabout way temporarily replacing part of a route". In short, a "roundabout way temporarily replacing part of a route" is only one of the meanings to be ascribed to the term.
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> [50] The question of whether a particular movement constitutes "detouring" must be measured in a consideration of the operation in which the movement occurs. In this dispute, the movement proposed by the Railway occurs in the context of an interchange of trains between railways. On the evidence, the existing procedure in the interchange of trains in North Vancouver is for the foreign train to be handed over, in effect, to BC Rail in the interchange or short extensions of the interchange. In that process, foreign trains are parked or interchanged directly with BCR crews. The proposed change involves foreign trains retaining their foreign identity while they travel over BCR trackage, a change which certainly constitutes "a deviation from … the usual [interchange] procedure".

Finally, at paragraphs 70, 73 and 75 Arbitrator Hope voiced the following thoughts and conclusions.

> [70] However, in selecting between two possible meanings, I conclude that the governing principles favour the interpretation advanced by the Unions. In particular, the structure of the provisions, including their title, favour a conclusion that the entire provision involves detouring, including the language relating to running rights agreements. If, as is argued by the Railway, operations under running rights agreements are unrelated to detouring, a significant question is, why was the title confined to detouring? Similarly, if foreign trains do not fall within the meaning of detouring, why was the running rights language included in the detouring provision? More particularly, if it represents a right reserved to management, why was it necessary to include it in the collective agreement at all?
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> On the Railway's interpretation, the topics of detouring and operating under running rights agreements are unrelated. But it is only if operations under running rights agreements are seen as a particular example of detouring that the inclusion of two topics in one provision under one title can be reconciled with the interpretive principles that apply. …

…

> [73] To accept the interpretation of the Railway would require the second sentence to be read as expressing the meaning that foreign trains operating with foreign crews under a running rights agreement are not detouring, and, more particularly, can be operated with impunity. In a literal application of the language, the Railway could operate foreign trains into any yard, including the Prince George yard, and, in fact, could allow the operation of any number of foreign trains over its trackage provided their operation did not meet the Railway's narrow definition of a detour in the sense of returning the particular train or trains to the foreign railway.
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> [75] In the result, I accept the submission of the Unions and the grievance is granted. However, in terms of declaratory relief, there is no jurisdiction in an arbitrator to prohibit the Railway from entering into a running rights agreement. What is within my jurisdiction is the granting of a declaration that foreign trains operating on BCR trackage outside the interchange process fall within the detouring language and must be operated by BCR crews. The Railway has a clear business interest in negotiating yard to yard movements in place of the interchange process. But, if the objective cannot be achieved within the terms of the collective agreement, the Railway must pursue its objective in negotiations with the Unions.

It is well settled, as has been stated in prior awards of this Office, that under the Canadian collective bargaining system when a board of arbitration has rendered an interpretation binding upon both parties and they have thereafter renewed their collective agreement without making any change in the language so interpreted, they are deemed to have accepted the arbitrator's award as the proper interpretation of their collective agreement. Indeed, that principle is well reflected in the documents before the Arbitrator in the instant case, notably the express provision found in paragraph 9 of the December 1, 2005 tri-partite agreement to the effect that "BCR Agreements including arbitrations, … will continue in effect and be applicable …". In my view the conclusion is inescapable that the Company, in acquiring the property and operations of BC Rail has become compelled to accept the meaning and interpretation of detouring reflected in the Hope arbitration award. That award does, in my view, correctly stand for the principle that foreign trains operating on any former BC Rail territory must be viewed as detouring for the purposes of the collective agreements and must be operated exclusively by the employees of the Company.

While the foregoing observations would dispose of the grievances, the Arbitrator is also of the view that the 2003 MOS is supportive of the same conclusion. In that agreement BC Rail negotiated with the Unions the precise crew consist of passenger trains operated by third parties on BC Rail track. I find it difficult to believe that the parties who made the agreement with respect to the reduction in crew consists did so with the view to binding the employees of another railway. Indeed, the reference within the 2003 MOS to the parties consulting "… with respect to any other work by BC Rail employees" strongly suggests the contrary, and that the underlying principle at all times was that the work in question would belong to the employees of BC Rail.

For clarity, it should be stressed that the instant award must be viewed as confined to the contractual provisions here in question, namely those governing former BC Rail territory. While, as the Company emphasises, different arrangements may exist elsewhere without doing violence to any collective agreement, the collective agreement provisions which govern in the case at hand clearly require that the Whistler Mountaineer, operating over former BC Rail territory, must be operated by running crews of the Company.

For the foregoing reasons the grievances are allowed. The Arbitrator finds and declares that the Whistler Mountaineer must be crewed by Company employees, with priority to be given to former BC Rail locomotive engineers and former BC Rail conductors. The Company is directed to bulletin forthwith the seasonal assignments associated with the Whistler Mountaineer train in accordance with this award.

November 6, 2009

(signed) MICHEL G. PICHER
ARBITRATOR