

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

CASE NO. 3830

Heard in Calgary, Thursday, 12 November 2009

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

**TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION**

DISPUTE:

The Company's decision to discontinue the mail-out of Initial Gang Bulletins.

JOINT STATEMENT OF ISSUE:

By way of letter dated October 20, 2009, the Company advised the Union that "Engineering Services (ES) will no longer be mailing out initial TPE Job Bulletins to employees' home addresses, effective the next work season" (i.e. the upcoming 2010 work season). A grievance was filed.

The Union contends that **(1.)** The Company's actions are in violation of articles 10.1 and 10.2 of Agreement No. 41; **(2.)** Because of the long past practice between the parties and the extent to which bargaining unit employees rely upon that practice, the Company is estopped from unilaterally changing the practice; **(3.)** Company has failed to discuss the issues surrounding the implementation of online bidding with the Union in violation of Appendix A-13 of the collective agreement.

The Union requests that the Company be ordered to continue to mail out hardcopies of Initial Gang Bulletins to all TP&E employees as it has always done in the past.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:

(SGD.) WM. BREHL
PRESIDENT

FOR THE COMPANY:

(SGD) D. FREEBORN
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

- R. Hampel – Counsel, Calgary
- D. Freeborn – Manager, Labour Relations, Calgary
- A. Damji – ES Working Force Effectiveness Manager, Calgary
- B. Szafron – General Manager, Engineering West, Calgary
- V. White – Labour Relations Officer, Calgary
- K. Hein – Labour Relations Officer, Calgary

And on behalf of the Union:

- Wm. Brehl – President, Ottawa
- D. W. Brown – Counsel, Ottawa
- S. Brighton – Local Chairman, Revelstoke
- A. R. Terry – Local Chairman, Lethbridge

AWARD OF THE ARBITRATOR

By this grievance the Union challenges what it characterizes as the Company's decision to no longer mail out Initial Gang Bulletins to employees' home addresses, effective the 2010 work season. The Company's intention is reflected in a letter dated October 20, 2009 addressed to the Union's president:

Dear Mr. Brehl,

**Re: Discontinuing Mail-Out of Initial TPE Job Bulletins and
Obtaining Personal Email Addresses**

This is to Inform the Union that Engineering Services (ES) will no longer be mailing out Initial TPE Job Bulletins to employees' home addresses, effective the next work season.

While improving the efficiency of the bulletin-bid-award process, this change will encourage on-line bidding which has numerous benefits for the employees:

- Ease of instant bidding for jobs on-line through the CP RailCity Lite website, while accessing job bulletins.
- Instant confirmation on whether the employee's bid was successfully input. Faxing not always reliable/effective as faxed pages can be lost or illegible.
- Increased accuracy Online bidding automatically prevents duplicate choices

- More secure method to transmit personal information
- Access to view individual seniority and qualifications

Along with distributing the attached letter (Attachment 1) and job aid (Attachment 2) to the field explaining this change and providing directions on accessing bulletins and bidding options, the letter and job aid will be sent by mail to ES employees' homes. The accessing bulletins and bidding options are:

- On-Line Job Bidding,
- Printing From the Public CP Website and Faxing Bid, and
- Requesting Paper Copy (so as to Fax Bid)

Personal Email Addresses

Further to the above, the Company will at the same time distribute and send the attached letter (Attachment 3) to employees requesting personal email addresses on a voluntary basis.

While improving Company efficiency, employees who submit their personal email addresses would enjoy the benefits of the following:

- Business links to on-line job bidding and HR Self-Serve
- Immediate notification/receipt of job bulletins and awards
- Access to both IT and HR Help (example, password reset)

Feel free to call either myself or All Damji should you have any questions.

Sincerely,

Scott Sutherland
 General Manager, Track Programs & Equipment
 Engineering Services
 Canadian Pacific

The Union's obvious concern is the difficulty which the Company's change of policy may visit upon laid-off extra gang employees. Its representatives stress that many extra gang employees who spend the working season in Western Canada return to their homes for the off-season, for example to locations as distant as Newfoundland. For as long as can be recalled Initial Gang Bulletins for the following season have been mailed

to laid-off employees at their homes in a full “hard copy” form. Laid-off employees have then been able to respond to make their elections on the bulletined extra gang work by return mail or, more commonly, by faxing their election to the appropriate officer of the Company. The Union stresses to the Arbitrator that many of the extra gang employees who are the subject of the bulletins in question do not have personal computers or email addresses and would obviously be prejudiced by a system which sets aside the long standing practice of mailing job bulletins to laid-off employees.

The positions of the parties appear to the Arbitrator to be well reflected in an exchange of correspondence between the parties. By letter dated October 20, 2009, the Union filed its grievance, in part in the following terms:

This constitutes a Step II grievance arising out of the Company's letter of October 20, 2009 that advised the Union of the Company's decision to discontinue the mail-out of initial Gang Bulletins ...

The Union objects to this unilateral Company decision. Initial Gang Bulletins have, without exception, always been physically mailed to employees. For as long as we remember they have been sent by registered mail. This has been done to ensure that these bids, which are so important, are accessible to all employees, especially those who are laid-off and do not have access to company property. With registered mail, the company has a record that bids have been made accessible at the employee's last known address in case a dispute arises.

Many employees do not own, or have access to, computers. Since the dates of the initial Gang Bulletins vary from year to year, and are at the discretion of the Company, it will be impossible for workers without computer access to know when the Bulletins are issued or even that they have been issued. This will disadvantage workers, create a great deal of confusion, and seriously affect the operation of the entire bulletining process. It should be noted in this regard that the Company has not made any effort to meet with the Union to discuss these issues. It should also be noted that the company and the Union are in bargaining presently and there has been no attempt by the Company to negotiate a change to this long-standing and fundamental process.

In view of all this, the Union takes the position that (1) the Company's actions are in violation of Articles 10.1, 10.2 and Appendix A-13 of Agreement No. 41; and

(2) the Company is estopped from unilaterally changing this very long-standing practice.

As a resolve to this grievance, the Union requests that the Company continue to mail out hardcopies of the Initial Gang Bulletin to all affected employees as it has always done.

The Company replied by way of letter dated October 23, 2009, as follows:

Your contentions appear to come from a long-standing past practice issue and the fact that many employees do not have access to computers. A secondary argument appears to reference our present state of National bargaining and the fact that this application of the bid/award system, is more properly handled through the bargaining process.

As the parties are aware, the electronic bid/award system was rolled out on a pilot basis in 2007. An injunction was sought by the Union and was heard by the CROA Arbitrator on October 11, 2007. The injunction was declined and the Company moved through various implementation periods, dealing with issues as they arose.

It is clear that employees have had the ability to bid to on-line bulletins for a significant period of time. In fact, a significant number of Track and Structures employees bid on-line today.

As such, we now are extending this opportunity to TP&E employees, for their convenience and respecting the same "option" which other Maintenance of Way employees enjoy.

In fact, referencing paragraph 3, bullet point 3, of the letter dated October 20, 2009, from Mr. S. Sutherland to Mr. W. Brehl, you will note that the employees in question will continue to have the "option" of requesting a paper copy of the bulletin (so as to Fax Bid).

It is the Company's position that providing the employee with "options" for receiving bid forms and submitting applications for positions is not a violation of Article 10.1, 10.2 or Appendix A-13, of the Collective Agreement.

Further and although not contemplated at this time, as long as the bulletins are consistent in format and respect the terms of Article 10.1 & 10.2, and should the Company eventually determine that exclusive on-line bidding is feasible, there is nothing within the Wage Agreement which would restrict our exclusive application on-line bidding on a system wide basis.

Lastly, it is the Company's position that the doctrine of estoppel cannot succeed in the instant case as the Union has been on "notice" since 2007, regarding the Company's intention to develop and implement the on-line bid award process.

The concept and application remains optional at this point and the ability to receive paper copies of bids remains in place.

In sum, the Company is not aware of any language or restriction within the Collective Agreement, which prohibits the Company from providing bid/award options to employees, nor is there any modification and/or change in work rules contemplated through this process.

As indicated above, the issue did come to the arbitrator, albeit in a preliminary form, in **CROA&DR 3635**. The dispute in that case arose as the Company sought to introduce the option of electronic bidding for bulletins at Algoma and Moose Jaw, in the form of a pilot project. The Company made no secret of its intention to roll out the option of electronic bidding subsequently should the pilot project be successful. The Union sought interim relief from the arbitrator directing the Company to suspend the pilot project. In that case the arbitrator found that the elements necessary to support an extraordinary remedy analogous to an injunction were not made out. In that regard the arbitrator concluded, in part, as follows:

On the whole of these facts, the Arbitrator is not persuaded that there is prejudice or damage to the Union of such a kind as would merit the extraordinary remedy which it now seeks. That is particularly so where, as in the case at hand, **the employees subject to the pilot project are under no obligation to bid electronically, and do so only voluntarily**. Whether the Company has the right to implement such a system, whether in light of article 10.2 or Appendix B-55, can be ultimately dealt with in the fullness of time by the grievance and arbitration process. This is not a circumstance, in the Arbitrator's view, where urgency and the possible harm to the Union and its members demonstrably outweighs what appears to be the *prima facie* right to administer the bidding system by introducing automated bidding in a manner intended to lead to its system wide implementation.

(emphasis added)

The collective agreement provisions governing bulletins and, to some extent, communications with employees are to be found in the following provisions:

- 10.1** Except as otherwise provided in Article 1013, except for positions of Trackman "B" which need not be bulletined, employees shall be advised by bulletin on the first Monday of each month of all vacancies or new positions in their department (except official positions), including the positions of Extra Gang Foreman and Assistant Foreman. (When the first Monday is a statutory holiday, the bulletin will be issued on the next regular working day.) Bulletins will be posted promptly in places accessible to all employees affected. A copy of each bulletin will be furnished to the Union officers of the territory involved.

Bulletins will be issued monthly. If there is no information to be distributed, a bulletin to that effect will be issued.

This rule is not intended to preclude the issuance of individual bulletins on other than the first Monday of the month should circumstances so warrant in any particular instance.

Bulletins shall remain open for applications for fifteen (15) days from the date of issuance.

NOTE: Initial gang bulletins, when issued, will remain open for a minimum of twenty-one (21) days to a maximum of twenty-eight (28) days. Positions advertised will be awarded fourteen (14) days following the close of the bulletin.

- 10.2** Bulletins will show classifications of position, location and/or expected work locations in production gang advertisements, rest days, closing date, particulars of living accommodation, if the vacancy is temporary, its expected duration and any other information relevant to the position. The format of bulletins will be standard across the System.

- 11.12** A laid-off employee must keep the proper officer of the Railway advised of their address at all times.

It does not appear disputed that following the events surrounding the decision in **CROA&DR 3635** the Company did return to the practice of mailing pre-season bids for both the 2008 and 2009 work seasons. It is the apparent departure from that practice, as reflected in the letter of October 20, 2009 issued by the Company, which has prompted the instant grievance.

As should be evident from the foregoing material, the parties are far apart on the fundamental rights and obligation surrounding the communication of bulletins, particularly in respect of Initial Gang Bulletins for extra gangs in the Track Program and Equipment Department. The Union submits that by long standing practice the parties have developed the understanding and expectation that employees will be provided written bulletin and bidding materials by mail. The Company, on the other hand, submits that there is nothing the language of the collective agreement which expressly requires mailing, and appears to reserve unto itself the position that although there is currently in its proposal an option whereby employees can elect to receive the mailed bulletins, it is open to the Company in the future to do away with that option.

In the Arbitrator's view there is a degree of value to the arguments on both sides. In my view it cannot be denied that, over many years of practice, it has become the expectation of employees and their bargaining agent that the Company will provide mailed bulletins in hard copy form to extra gang employees who have been laid off and who wish to bid to work in the next operating season. That would appear to be manifest both from the uniform past practice and from the requirement, reflected in section 11.12 of the collective agreement, whereby employees are to keep the Company apprised of their proper mailing address. On the basis of that evidence, the Arbitrator has some difficulty in sustaining the ultimate position of the Company which appears to be expressed in the letter of October 23, 2009 to the effect that it is at liberty to move entirely to an electronic bulletining system. In the Arbitrator's view the doctrine of estoppel must, at a minimum, operate to prevent the Company from denying employees

the option of advising the Company that they prefer to receive bulletins by mail, at least until such time as the parties return to the bargaining table and are able to deal with the issue through normal collective bargaining. In other words, I am satisfied that there is a partial estoppel of the Company whereby it must, at a minimum, give to employees the option of communicating to the Company that they wish to continue individually to receive initial bulletins through the mail, as has been the practice for many years. Whether the parties choose to bargain some different arrangement under an ensuing collective agreement is a matter for their discussion and resolution.

The grievance is therefore allowed, in part. The Arbitrator finds and declares that it is permissible for the Company to institute the communication of bulletins by means of email or other electronic method so long as it does reserve to those employees who choose to advise the Company that they wish to continue to receive bulletins by mail the option of doing so. The Company shall provide such bulletins to those individuals electing that option in the same manner as they have been previously provided. Given the importance of this issue to employees who do not have computers or computer skills, the doctrine of estoppel must preserve that arrangement at least until such time as the collective agreement is renegotiated, at which time the parties will be free to negotiate such arrangement as they deem appropriate. For the purposes of clarity, the language of the current collective agreement is, as the Company maintains, not such as to require the continued mailing of bulletins past the expiry of the current collective agreement. The continuance of the practice, even on an optional basis, beyond that point must then be achieved by the Union through negotiation.

The Arbitrator retains jurisdiction should the parties be in disagreement with respect to the interpretation or implementation of this award.

November 24, 2009

(signed) MICHEL G. PICHER
ARBITRATOR