CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3907

Heard in Edmonton, Tuesday, 8 June 2010

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The operation of trains and performance of work contrary to the Vancouver Direct Hit Agreements.

UNION'S STATEMENT OF ISSUE:

On January 20, 2000 and April 26, 2000, the Company executed agreements with the UTU and BLE to allow single division freight trains, operating between Boston Bar and Vancouver to operate through Thornton Yard in order to deliver or pickup traffic to/from secondary locations.

Prior to the implementation of these agreements traffic between Thornton Yard and these secondary locations was solely performed by Yard Employees working in Transfer Service. The Direct Hit agreement allowed Road Service employees to perform this work to/from specific locations and subject to specific conditions.

It is the Union's position that the Company has repeatedly violated the Vancouver Direct Hit Agreements by requiring extended run crews to perform direct hits, having crews perform work not provided for in the Direct Hit Agreements and by circumventing the payments provided for in the Direct Hit Agreements.

The Company has not responded to either grievance.

FOR THE UNION:

(SGD.) T. MARKEWICH	**(SGD.) B. R. BOECHLER**
FOR: GENERAL CHAIRMAN	**GENERAL CHAIRMAN**

There appeared on behalf of the Company:

D. Crossan	– Manager, Labour Relations, Prince George
K. Morris	– Director, Labour Relations, Edmonton
R. Reny	– Sr. Manager, Human Resources, Edmonton
P. Payne	– Manager, Labour Relations, Edmonton
B. Laidlaw	– Manager, Labour Relations, Winnipeg

G. Spanos – Assistant Superintendent, Vancouver

There appeared on behalf of the Union:

M. A. Church – Counsel, Toronto
B. R. Boechler – General Chairman, Edmonton
B. Willows – General Chairman, Edmonton
R. A. Hackl – Vice-General Chairman, Edmonton
T. Markewich – Vice-General Chairman, Edmonton
R. Thompson – Vice-General Chairman, Edmonton
W. Franko – Vice-General Chairman, Edmonton
J. Robbins – General Chairman, Sarnia
P. Vickers – General Chairman, Sarnia
R. Lee – Local Chairman, Vancouver

AWARD OF THE ARBITRATOR

The Union alleges that the Company has violated the "Direct Train Agreements" negotiated with both running trades related to the arrival and departure of trains in the Greater Vancouver Yard. The conductors' agreement is dated January 20, 2000 while the agreement concluded with then Brotherhood of Locomotive Engineers was executed on April 26, 2000. The Greater Vancouver Terminal Direct Train Agreement as applies to locomotive engineers, which is materially similar to that of conductors, reads, in part, as follows:

> Locomotive Engineers in Pool Service, operating trains within Greater Vancouver Terminal with an originating or terminating out of Lynn Creek Yard, Vancouver Main Yard, Sapperton or Brownsville Interchanges or New Westminister will be governed by the terms of this agreement.
>
> 1. Locomotive Engineers operating trains to/from the aforementioned yards will be provided a flat rate, all inclusive payment as follows:
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> | | |
> |---|---|
> | Lynn Creek / Vancouver | = 67 miles |
> | Brownsville / Sapperton / New Westminister | =55 miles |
>
> These flat rates are payable under an operating scenario wherein the trains would operate successfully to the following points within the Greater Vancouver Terminal:
>
> — For trains destined north of the Fraser River Bridge, when they have successfully operated over the Fraser River Bridge;
>
> — For trains destined south of the Fraser River Bridge, when the movement has passed under the Fraser River Bridge.

2. Locomotive Engineers originating trains at Lynn Creek Yard, Vancouver Main Yard, Sapperton or Brownsville Interchanges or New Westminister will be compensated an amount equal to that of a yard transfer in the event the train fails to depart the Greater Vancouver Terminal. Additionally, Locomotive Engineers will be compensated under the provisions of article 36.4 of agreement 1.2 ($13.00 one way transfer premium), upon successful arrival at Thornton Yard.

   Note: This will not result in duplicate payment (e.g. flat rates outlined in Item 1 do not apply)

   Note: Locomotive Engineers will be permitted to book rest in accordance with Article 66 of Agreement 1.2

3. Locomotive Engineers upon arrival at Thornton Yard receiving yarding instructions that they will be required to proceed to Lynn Creek Yard, Vancouver Main Yard, Sapperton or Brownsville Interchanges or New Westminister, and unable to proceed, will be compensated as an exception ticket and not subject to the provisions of the System of Pay Agreement as outlined in Addendum 88 of Agreement 1.2.

4. Locomotive Engineers terminating trains at Lynn Creek Yard or Vancouver Main Yard will be released at those respective locations.

5. The aforementioned mileage will be included in the calculation of an employee's monthly mileage under the provisions of Article 64 of Agreement 1.2.

6. Locomotive Engineers originating & terminating trains at Lynn Creek and Vancouver will be compensated the travel allowance provided under the provisions of Addendum B, Item 2 of Agreement 1.2.

   Note: for the above noted trains, the on-duty / off-duty point will be either Lynn Creek Yard or Vancouver Main Yard. The on/off duty point for trains originating / terminating at other locations will be Thornton Yard.

   Note: the travel allowance will be monitored closely and should actual travel times to/from North Vancouver or Vancouver Main Yard prove to be greater that the allowance provided, the parties will meet and adjust the travel allowance to reflect the increased times.

7. This agreement pertains only to the locations specified in Paragraph 1 of this agreement. Should the Company expand or change Direct Train service to include other locations within the Greater Vancouver Terminal, the parties are agreed to meet locally and establish rates and conditions which will be applicable to the new locations.

8. The parties agree to review the effects of this agreement relative to identifying any materially adverse effects emanating from any increase in the number of direct trains operated.

> Note: if the number of direct trains increases above an average of 6 trains or more per day over a 30 day period, the parties will meet to discuss the adverse effects.

The agreements also include provision for a number of early retirement credits, apparently in recognition of the fact that the Direct Train Agreement would have some impact on the reduction of yard work.

The parties have a substantially different characterization of the origins and purpose of the Direct Train Agreements. The Union submits that prior to 1999, by a long and consistent practice, the parties recognized that road crews terminating at Vancouver could operate only through the Vancouver Intermodal Terminal, the Surge Yard and Thornton Yard. As the Union relates it, they could not go beyond Thornton Yard as any work past that point was considered to be transfer or yard work. Beyond Thornton Yard there were a number of other yards and locations serviced exclusively by yard crews, including Sapperton, Vancouver Main Yard and, beyond the Second Narrows Bridge, Lynn Creek. Additionally, subsequent to the agreement the Company acquired the West Vancouver Yard along with the acquisition of BC Rail. According to the Union's interpretation, the Direct Train Agreements were intended to allow road crews entering Vancouver to move beyond Thornton Yard, through the series of yards to be able to deliver their trains directly to customers, the concept of the "direct hit", thereby allowing more timely and cost efficient delivery of trains directly to customers, for example by the destination yarding of trains at Lynn Creek. It appears that direct hit operations have extended to spotting coal and potash trains at Neptune Bulk Terminals, said to be adjacent to and part of the Lynn Creek Yard.

The Union submits that the Direct Train Agreements were intended to apply only to employees in road service over single subdivisions, and not to extended runs. According to its understanding, trains originating at Boston Bar could be directed beyond Thornton Yard, for example to the destination of Lynn Creek Yard. Conversely, trains, generally comprised of empties, could originate at Lynn Creek and be handled by road crews through the series of yards in Vancouver and onwards to Boston Bar in single subdivision service.

According to the Union the Direct Train Agreements operated without substantial difficulty for a period of some five years or more. However, it submits that in subsequent years the Company commenced to apply interpretations of the agreements which it submits violate the letter and intent of the agreements as originally negotiated.

As an example, the Company cites train 403 which operated on June 6, 2009. The train was ordered from Boston Bar to Vancouver with the instruction to yard its consist of cars at Lynn Creek. According to their orders, the crew was then required to operate light engines back to Thornton Yard to go off duty. The Company declined to pay the employees under the Direct Train Agreements. Superintendent of Operations Derek Taylor corresponded with the Union, effectively stating that as the crew returned their power to a shop facility at Thornton Yard, they did not terminate at Lynn Creek yard and were therefore entitled only to final terminal time under the general provisions of the collective agreement. In the Company's view the Direct Train Agreements had no application.

Counsel for the Union questions both the correctness and the logic of that position. He points to the language of the agreements which state, in part:

> [Employees] terminating trains at Lynn Creek Yard or Vancouver Main Yard will be released at those respective locations.

Counsel for the Union questions by what logic a crew which is required to perform extra work, namely returning their power from Lynn Creek Yard back to Thornton Yard, should in the end be compensated at a lower rate than they would have been had they left their power at Lynn Creek Yard and proceeded back to Thornton Yard by taxi, in accordance with the travel allowance contemplated under paragraph 6 of the agreements. He maintains that the original intent of the agreements is that single subdivision road crews assigned beyond Thornton Yard whose trains terminate at Lynn Creek Yard are to be released at those locations, in accordance with paragraph 4 of the Direct Train Agreements. He submits that the Company cannot avoid paying the flat rate remuneration of the Direct Train Agreements by purporting to have the crew

operate their engines light back to Thornton Yard, thereby obviating the application of the Direct Train Agreements.

The second example of an alleged violation raised by the Union concerns the operation of extended run trains. It cites the example of train 730 operated on July 19, 2009 as an extended run from Lynn Creek, through Thornton Yard, onwards over the Yale Subdivision to Boston Bar and then to Kamloops on the Ashcroft Subdivision. The Union characterizes the train in question as an "reverse direct hit" and maintains that because it involves the operation of an extended run train in territory west of Thornton Yard, namely from Lynn Creek, it is a train operating in violation of the yard service work protections reserved to yard service employees under article 102 of the conductors' collective agreement.

In support of its position, which effectively states that extended run trains are not to operate under the Direct Train Agreements in any territory west of Thornton Yard, the Union draws to the Arbitrator's attention the minutes of a meeting between the Company and the Union held at Calgary on April 11, 2000 with respect to the workings of the Direct Train Agreements. It specifically cites the following excerpt from those minutes, which were copied to the Company with the notation that absent any objection to the minutes they would be considered as an agreed reflection of the parties' discussions. No objection was apparently registered by the Company. The minutes read, in part, as follows:

> **No. 1 Extended Run Trains Not To Be Included in Direct Hit Agreement**
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> - No extended run trains will be required to go beyond Thornton Yard with the possible exception of extended run trains destined to Brownsville interchange.
>
> - Prior to requiring extended run trains to proceed to Brownsville interchange the Company and the Brotherhood will meet to agree on method of operation.

The Union submits that the above minutes, reflecting the discussions between the locomotive engineers' representative and the Company's representative confirms that extended run trains should not operate in either direction west of Thornton Yard.

The Unions also object to the Company operating a reverse direct hit train from a location other than Lynn Creek Yard, Vancouver Main Yard, the Sapperton or Brownsville interchanges or New Westminster. It cites the example of train 300, on July 19, 2005 which operated in single subdivision service from the former BC Rail yard at West Vancouver, through Lynn Creek, Thornton Yard and on to Boston Bar. The Union objected to the train operating under the Direct Train Agreement, as there is no reference within that agreement to the West Vancouver Yard as an agreed point of destination or departure. It argues that, as reflected in item 7 of the locomotive engineers' Direct Train Agreement:

> Should the Company expand or change direct train service to include other locations within the Greater Vancouver Terminal, the parties are agreed to meet locally and establish rates and conditions, which will be applicable to the new locations.

The Unions submit that the Company could not originate a direct hit train at the West Vancouver Yard without complying with the obligation to negotiate terms as contemplated in item 7 of the locomotive engineers' agreement. The Company responded that: "The former BC Rail yard is encompassed by the GVT and is essentially an extension of our Lynn Creek operation. It is an obvious and realistic expectation that an originating point of the "North Shore", including the former BC Rail yard would be acceptable as the terminology "Lynn Creek" used in the language of the agreement is meant to cover the North Shore operation."

The Union also disputes other aspects of the service being required of direct train crews by the Company. Among those it cites the pick up and delivery of trains to Neptune Terminals and, as occurred on one occasion on August 21, 2005 with train 798, the requirement to unload some twenty-six coal cars prior to the departure of a train of empties from the Neptune facility, enroute from Lynn Creek to Boston Bar. Additionally, the Union objects to the spotting of trains at the Neptune Terminals, as directed by a memorandum of Superintendent of Operations Charles Ables dated April 5, 2007. It does appear, however, that subsequently the parties have reached an arrangement reflected, in part, in an email from North Vancouver Assistant

Superintendent Bruce Feltham on January 12, 2009. Although it is not entirely clear, representations from Union representatives at the hearing would indicate that the Union has been agreeable with spotting the first four cars of coal trains arriving at the Neptune facility.

The Union further cites examples of delay in departing Vancouver by reason of such factors as congestion and signal failures. It cites the example of train 711 on June 26, 2009 which was a direct train destined for Lynn Creek. Because of signal problems the crew was unable to complete their assignment. The Union objects that rather than relieving them of duty at Thornton Yard, the Company obliged them to work beyond the time at which they had booked rest in a manner it maintains is inconsistent with the Direct Train Agreement and the collective agreement in general.

The Company's representatives deny any violation of the Direct Train Agreements or the collective agreements on the facts discussed above. The Company submits that the fundamental collective agreement right of the Company to direct employees, whether in single subdivision service or in extended run service, to operate to a point of destination which might be through a series of yards is in no way limited by the provisions of the Direct Train Agreements at Vancouver. As explained by a representative of the Company, the purpose of the Direct Train Agreements was to deal with a problem of substantial congestion which existed before and during the year 2000. The congestion within the Vancouver Terminal was due to a number of factors, including the fact that some five different railways operate through the area, and that the Company was then obligated to access Lynn Creek via a bridge system under the ownership and control of the BNFS Railway. As he explains it, the Direct Train Agreements gave the Company the option of operating trains past Thornton Yard through to locations such as Lynn Creek without the added expense of terminal time costs which might otherwise be incurred, using the flat rate payment system of the Direct Train Agreements.

The Company stresses that there is no language within the Direct Train Agreements which would limit its ability, under the general terms of the collective

agreement, to operate either single subdivision trains or extended run trains through a series of yards, including all of the yards of the Vancouver Terminal, such as is done at other locations on Western Lines with multiple yards such as Edmonton and Winnipeg.

The Arbitrator has considerable difficulty with the position argued by the Company. Firstly, the uncontroverted material before the Arbitrator confirms that prior to 1999 no road crews ever operated to the west of Thornton Yard. Crews might be assigned through a series of yards, but that series was limited to the VIT, the Surge Yard and Thornton Yard. Beyond that point, as the Union represents without substantial contradiction, all train movements were handled as transfers by employees in yard service. It is not necessary for the Arbitrator to determine why the parties operated in that manner, although the Union suggests that it is because of the nature of Vancouver as an end terminal, with no forwarding points beyond, contrasted with other terminals on its Western Lines system. Suffice it to say that for many years all work west of Thornton Yard was recognized and treated as being work reserved exclusively to yard service employees. No contrary example has been cited to the Arbitrator by the Company.

That is the contextual reality in which the Direct Train Agreements were negotiated in 1999 and 2000. In fact it appears to have emerged as a compromise following the then Unions' objections to the Company operating road crews through Thornton Yard, apparently commencing in February 1999. As reflected in correspondence to the Company from then BLE General Chairman M.W. Simpson dated November 29, 1999 the operational change of direct train service implemented by the Company on February 4, 1999 became the subject of a grievance and ongoing discussions, the eventual result of which is the Direct Train Agreements which are the subject of this grievance.

From a purposive point of view the argument advanced by the Company does appear questionable. It is difficult for the Arbitrator to appreciate, according to the Company's reasoning, the differential treatment of two train crews in the following example. Train Crew A, operating in single subdivision service from Boston Bar to Lynn Creek, leaving their train and power at Lynn Creek and having the advantage of a travel

allowance from Lynn Creek back to Thornton Yard would have the benefit of the sixty-seven mile premium payable under the Direct Train Agreements. Train Crew B, operating over the exact same territory, but who might be directed to perform additional work by returning their power to Thornton Yard, would be limited to their payment for terminal time under the general provisions of the collective agreement, and would receive nothing in respect of the sixty-seven mile premium under the Direct Train Agreements. While it is of course possible that the parties would have contemplated and agreed to such an outcome, it is on its face counterintuitive to believe that they would have done so, absent clear language to that effect. In the circumstances I must agree that the example of train 403 on June 6, 2009 does constitute a violation of the Company's obligations under the direct train agreement. I am not persuaded by the argument of the Company's representative that, because the CROR can now be interpreted as defining a single locomotive as a "train" for the purposes of the operating rules, the ordering of a train crew to return their power to Thornton Yard removes them from the operation of the Direct Train Agreements. In my view the crew in that case was, within the language of the Direct Train Agreements, clearly operating a train to the terminating point of Lynn Creek Yard. With respect, the details of the storage of the train's locomotive power, and the ultimate location of that storage cannot be advanced to essentially re-characterize the fundamental work assignment which was performed, and which is the essence of the intention of the Direct Train Agreements.

Nor can the Arbitrator accept the Company's submission that it is at liberty to operate extended runs which may originate or terminate west of Thornton Yard. It is true that, on their face, the Direct Train Agreements make no reference to single subdivision or extended run assignments. There is, however, in the Arbitrator's view a latent ambiguity established by reason of the evidence placed before the Arbitrator concerning the negotiation of the agreement itself. As noted above, the locomotive engineers' General Chairperson expressly wrote to the Company's point person in the negotiation of the Direct Train Agreements, Jim Vena, enclosing minutes of their discussion and understanding. That communication includes the title "Extended Run Trains Not To Be Included In Direct Hit Agreement". Most importantly, the ensuing sentence clearly states that no extended run trains are to be required to operate beyond Thornton Yard, with

one exception. Should that exception, involving the Brownsville interchange, be invoked by the Company, the parties are to meet and agree on the method of that operation. Significantly, General Chairman Simpson concluded his communication with Mr. Vena with the following note:

> Jim:
>
> In order to avoid any misunderstanding during the thirty day process, please review my notes from our meeting. If I don't hear from you I will assume we are in agreement that the notes accurately reflect our discussions.
>
> Mike

The Arbitrator considers this to be an important piece of evidence. For reasons it best appreciates, the Company did not have Mr. Vena attend at the hearing nor did it call any other person to give evidence to refute the content of the minutes reviewed above. This is not, in my view, a situation where a self-serving document is tendered by one side. Rather, it is one where a shared document appears to have been accepted for its content by the other side, without objection and without subsequent evidence to suggest that there was in fact no agreement. In my view this extrinsic evidence, admissible in these circumstances, is conclusive. I must find and declare that the Company is not at liberty to operate extended run trains in either direction in that part of the Greater Vancouver Yard west of Thornton Yard, with the exception of the Brownsville interchange destination, subject to mutual discussion. At a minimum, the doctrine of estoppel would prevent the Company from receiving the communication it did from Mr. Simpson, say nothing and then proceed in an entirely different direction. Silence on the part of the Company in that circumstance would clearly raise the doctrine of estoppel, as is well recognized in the arbitral jurisprudence. (See **Hallmark Containers Ltd. and Canadian Paperworkers Union, Local 303**, (1983), 8 L.A.C. (3d) 117 (Burkett).)

The Arbitrator is also compelled to find that the Direct Train Agreements do not presently contemplate a direct train operating from the location of BCR West Vancouver Yard, as occurred with train 300 on July 19, 2005. In my view paragraph 7 of the Direct Train Agreements, quoted above, clearly requires the Company to discuss and

establish rates and conditions with the Union in the event that it should choose to include other locations within the Greater Vancouver Terminal for operations under the Direct Train Agreements. That clearly did not happen in the case of train 300. It should be noted that within the text of the Direct Train Agreements the parties have acknowledged that should they be unable to reach agreement the matter may proceed to arbitration under the terms of article 91.2 of the locomotive engineers' collective agreement. With respect to the conductors, similar reference is made to article 121.1 of their collective agreement, involving the grievance and arbitration procedure.

The Arbitrator also finds that the Unions' allegation of a violation of the collective agreement and the Direct Train Agreements on the occasion of a road crew being required to unload a coal train prior to departure from Neptune Terminals on August 21, 2005 is well-founded. The unchallenged evidence of the Unions' representatives is that four locomotive engineers would have been available to serve on a yard crew at the time of what the Company characterizes as an emergency. Its failure to call those employees to perform the work is, in my view, inconsistent with its obligations under these agreements.

I am not, however, persuaded on the basis of the material before me that the manner in which the Company is now requiring road crews to spot ore trains at Neptune Terminals is necessarily in violation of the agreements. Indeed, it would appear from the representations received that the Union has accepted the legitimacy of spotting the initial four cars, for example on a coal train at Neptune. I therefore make no finding or declaration in respect of that question.

Nor do I consider that this is an appropriate award to deal with the issues of delay, given in the examples of train 798 on August 21, 2005 and train 711 on June 26, 2009. It seems to me that the delay involved in both of those cases is not particularly intrinsic to the circumstances of the Direct Train Agreements, and might arise in other circumstances. I therefore reserve on those two matters, remitting them to the parties to be dealt with further, and spoken to later should that become necessary. The only exception would be that I am prepared to declare that the setting out of cars at Kinder

Morgan does involve a location which is not identified within the Direct Train Agreements. I would therefore find and declare that the Union is correct in suggesting that the Company is under the same obligation as was found above in respect of the BCR yard, to discuss and negotiate that matter with the Union.

Among the remedies requested by the Union is an order against the Company that it cease and desist the violations of the Direct Train Agreements found herein. For the moment I do not consider it necessary to fashion such a remedy, as it is my view that the Company's actions have been prompted by its good faith belief in the interpretation of these provisions which it has made. While I obviously do not share the Company's characterization that it has simply corrected an error in the application of the Direct Train Agreements, I can see at this time no basis to believe that it will do other than comply with the findings and declarations contained in this award and work with the Union to ensure the proper application of the Direct Train Agreements in the future, and to implement such make whole measures as may be appropriate. Should that expectation not be met, all remedial matters may still be spoken to.

On that basis, the matter is remitted to the parties. The Arbitrator retains jurisdiction with respect to all aspects of the remedy, or any dispute which may arise concerning the interpretation or implementation of this award.

June 18, 2010

(signed) MICHEL G. PICHER
ARBITRATOR