CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 3978

Heard in Montreal, Thursday, 10 February 2011

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

The Company's unilateral decision to terminal local rules in Revelstoke, BC and Sudbury, ON.

JOINT STATEMENT OF ISSUE:

On February 10, 2009, the Company wrote to the Union concerning the practice of paying an $18.00 meal allowance to Track employees on the Sudbury BST. On February 16, 2009, the Company wrote a similar letter concerning the practice of paying a $15.00 meal allowance to the members of the Revelstoke B&S crews. The letters advised that the practices in question would be unilaterally terminated by the Company upon the conclusion of the current round of collective bargaining. A grievance was filed.

The Union contends that: **(1)** During the last round of bargaining the parties agreed that all new local rules would require the agreement of the Company's Director of Labour Relations and the President of the TCRC/MWED. At the same time it was agreed that pre-existing local rules would stay in force. Appendix E of the Memorandum of Settlement provided that "both the Company and the Union agree to determine all existing local rules." In other word, it was agreed during negotiations that all established local rules would continue in force and, in effect, become part of the collective agreement. **(2)** Because the local rules concerning meal allowances in Revelstoke and Sudbury predated the last round of bargaining, and because the parties agreed

that such rules would continue in force, the Company may not unilaterally cancel or alter them. **(3)** The Company's actions are in violation of section 22.2 of Agreement 41 and Appendix E (B-50) of the June 6, 2007 Memorandum of Settlement.

The Union requests that the Company be ordered: **(1)** to maintain and to continue to pay the meal allowances in Sudbury and Revelstoke and **(2)** to make whole any employee who has been adversely affected by this matter.

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

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) WM. BREHL	**(SGD.) K. HEIN**
PRESIDENT	**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

M. Goldsmith	– Labour Relations Officer, Calgary
R. Hampel	– Counsel, Calgary

There appeared on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. Brown	– Counsel, Ottawa
W. Phillips	– Local Chairman, Belleville

AWARD OF THE ARBITRATOR

It is common ground that local rules and practices have been established at various locations on the Company's system, generally involving agreements or understandings which go beyond the content of the collective agreement. An example of such understandings are meal allowances which apparently were paid to crews on the Sudbury and Revelstoke territories when they are required to work beyond certain hours.

On June 6, 2007 the parties made a Memorandum of Settlement which includes, in part, the following:

17(a) All Local Rules are to be approved by the Director Labour Relations and the President (or designate) of the TCRC MWED. The approval process of all Local Rules will eliminate future disagreements with respect to the interpretation of what was agreed and maintain a centralized filing of all such rules.

Refer to Appendix E of this Memorandum of Settlement establishing a new Appendix B-50 in the Collective Agreement concerning a Local Rules Letter.

Additionally, Appendix B-50 was fashioned on the same date, June 6, 2007 to read as follows:

> This is in regard to our discussions during negotiations pertaining to the approval process of all local rules.
>
> Effective January 1, 2008 all new local rules will need to be approved by the Director of Labour Relations (or designate) and the President (or designate) of the TCRC MWED. During 2007 both the Company and the Union agree to determine all existing local rules and ensure documentation exists to support the rule.
>
> If the foregoing accurately reflects your understanding of this matter, please indicate your concurrence in the space provided below.

The Union's president did sign and concur in the foregoing appendix.

The Company notes to the Arbitrator's attention the fact that in the 2006-2007 round of bargaining the Union also proposed a meal expense to be payable where extra hours are worked. That proposal resulted in the addition to the collective agreement the provisions of section 12.27, which now provides as follows:

12.27 Employees working away from their home location that are not being provided with meal expenses or per diem expenses and are on duty in excess of three hours beyond their regular quit time will be supplied with a meal or a $13.00 meal allowance in lieu thereof.

> The practice of continuing to provide meals to employees who return to Boarding Car Outfits under the aforementioned circumstances shall remain in effect.

The grievance arises because of two letters sent to the Union by the Company. On April 23, 2008 Mr. Scott Seeney, Director, Labour Relations wrote to the Union's president with a proposal with respect to local rules. That letter reads as follows:

> This is in connection with Appendix B-50 of the June 6, 2007 Memorandum of Settlement and the requirement for the Company and the Union to determine all local rules that are in effect.
>
> As stipulated in Appendix B-50, effective January 1, 2008, all new local rules will need to be approved by the Director of Labour Relations (or designate) and the President of the TCRC-MWED (or designate).
>
> In this regard, the following are the local rules that the parties agree to be in effect prior to January 1, 2008.
>
> The parties agree that any subsequent local rules will be added to this list.
>
> It is agreed that these local rules will remain in effect for the duration of this collective agreement.
>
> These local rules may be cancelled in whole or in part by either party providing 14 days' written notice.

The Union's president declined to concur in the letter as drafted by Mr. Seeney. It appears that the Revelstoke "Rule" was placed into the existing rules package in the communication from Mr. Seeney on April 23, 2008. The payment of an additional meal allowance of $18.00 in accordance with the practice which had existed for some time at Sudbury was not included. It appears that that issue arose in a subsequent letter from the Union's president to Mr. Seeney dated February 4, 2009. Mr. Brehl then advised Mr. Seeney of the nature of the practice in Sudbury, indicating that it should be included in the existing practices list.

Shortly thereafter, by an email communication dated February 16, 2009 Mr. Seeney advised the Union's president that the Company was also terminating the arrangement at Revelstoke. That communication reads as follows:

> Thank you for providing your clarification by the Company in the letter dated February 10, 2009, concerning a meal allowance on the Sudbury BST for Track employees, this correspondence shall serve as formal notice of the Company's intention to terminate the Revelstoke B&S Meal provision allowance practice and then apply the proper application of the collective agreement.
>
> In this regard, the Company will process expense claims for Revelstoke B&S Crews, based upon the practice, until such time as the parties conclude the next round of collective bargaining, at which time the Company will revert to the strict application of the collective agreement, as it applies to such matters.
>
> As clarification, the substance of the practice, as understood by the Company, is captured in the April 23, 2008 Draft system Local Rules document, and states as follows:
>
> > Revelstoke B&S Crew – Meal provision when working overtime
> >
> > – Employees working more than four hours beyond their normal quit time will be provided with a $15.00 meal allowance, in the application of section 12.27, employees are not entitled to a duplicate meal allowance payment.
> >
> > – An employee claiming a per diem allowance is not entitled to the $15.00 meal allowance for working in excess of four hours beyond their normal quit time.

In essence the Union submits that the additional meal allowance arrangements at both Sudbury and Revelstoke were agreed by the parties to become, in effect, provisions of the collective agreement. On that basis, its representative argues that the Company was not at liberty to unilaterally terminate the allowances as it purported to do. Additionally, in the Union's submission, as the company has not bargained any different arrangement in the renewal of the collective agreement, the allowances must be deemed to still form part of the current collective agreement.

The Arbitrator has substantial difficulty with the Union's position. It is obviously open to the parties to allow for local practices to be put into place, including practices which may provide benefits in excess of what may exist under the collective agreement. It is also open to them to agree, in writing, that such practices may be deemed to form part of the collective agreement and be enforceable as such. Bearing in mind that section 3.1 of the **Canada Labour Code** defines a collective agreement as "… an agreement in writing" concerning terms and conditions of employment, it would obviously be important for any party seeking to convert a local practice or a local agreement into an enforceable term of a collective agreement to do so through an appropriate written instrument.

In the instant case the Union can point to no language in any of the communications between the parties which can fairly be construed as expressly stipulating that either local practices or local agreements are henceforth to be deemed to be part of the collective agreement. At most, what the material before the Arbitrator reveals is that in the text of Appendix B-50 of the collective agreement, in accordance with the paragraph 17(a) of the Memorandum of Settlement of June 6, 2007 made between the parties, from and after January 1, 2008 all new local rules must be approved by the appropriate officers of both the Company and the Union. There is nothing in that memorandum of agreement, in Appendix B-50 or anywhere else within the collective agreement of which the Arbitrator is aware, which would confirm or suggest that existing local rules or local practices are deemed to be part of the collective

agreement. Indeed, it would appear that the exercise in which the parties were engaged with respect to identifying local rules has not in fact been brought to any agreed completion.

In the result, the Arbitrator is compelled to sustain the position advanced by the Company. The local rule arrangements at Revelstoke and Sudbury were not and are not collective agreement provisions. They could be terminated unilaterally by the Company, albeit in a manner consistent with the doctrine of estoppel. That is to say that the Union must have the opportunity to bargain the continuation of those arrangements at the next round of bargaining. That is precisely what Mr. Seeney's two letters to the Union giving notice of the cancellation of the arrangements at Revelstoke and Sudbury do provide for. It was clearly open to the Union to negotiate the inclusion of those allowances into the actual terms of the collective agreement at the bargaining table, if it chose to do so. I cannot sustain the view that it was under no obligation to do anything as these provisions must be deemed to form part of the collective agreement unless they are bargained out of it by the Company itself.

It should be stressed that the observations in this grievance relate entirely to prior existing practices, and not to new practices which are vetted and approved by the appropriate officers of both the Company and the Union. Whether those arrangements can be enforceable as a provision of the collective agreement is a matter which is not an issue in these proceedings and upon which I make no comment

For all of the foregoing reasons the grievance is dismissed.

14 February 2011

(signed) MICHEL G. PICHER
ARBITRATOR