# CANADIAN RAILWAY OFFICE OF ARBITRATION

# & DISPUTE RESOLUTION

# CASE NO. 4102

Heard in Montreal, Wednesday, 11 April 2012

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Policy Grievance regarding the improper handling of unassigned pool crews in violation of the Collective Agreements, including Articles 15 and 24 CTY and Articles 30, 5 and 11 LE.

**JOINT STATEMENT OF ISSUE:**

On March 4, 2011, the Company advised the Union that the Company would no longer refer to, or gain guidance from, the bulletin noted herein and would henceforth be governed by the guidance provided through *CROA 2906*. Immediately, the Company commenced determining whether any operating employee had the appropriate amount of time remaining under maximum hours legislation for "valid business reasons," regardless of their position on the working list.

The Union contends that the arbitrary practice of randomly calling crews with short maximum hours clock is in violation of Article 15 CTY and Article 30 LE contained within the respective collective agreements. The Union contends that the issues in this grievance are distinguishable from circumstances of *CROA 2906*. In *CROA 2906*, the Company made representations of having definitive guidelines and policy to balance the legislation with the provisions of the Locomotive Engineer's collective agreement. The Union contends the Company's new practice does not meet the arbitral jurisprudence in regards to a policy. Further, the Union contends that the Company's new vague and arbitrary practice and corresponding reliance on "valid business reasons" is a violation of the collective agreement and inconsistent with *CROA 2906*.

The Union requests that the Company cease and desist from violating the first in first out provisions and randomly running around the crews. Further, the Union requests the Company re-institute the guidelines contained in the 1994 Bulletin or, alternatively, provide the Union with a clear, unambiguous policy not inconsistent our collective agreement rights. The Union also seeks a declaration that, absent any clear policy or guideline from the Company, the strict provisions of the first in/first out provisions of our collective agreement must be adhered to. Finally, the Union requests all individual run-around claims be placed in line for payment.

The Company disagrees and denies the Union's request.

**FOR THE UNION:**

**(SGD.) D. ABLE**
**GENERAL CHAIRMAN**

**(SGD.) D. OLSON**
**GENERAL CHAIRMAN**

**FOR THE COMPANY:**

**(SGD.) M. THOMPSON**
**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

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| M. Thompson | – Manager, Labour Relations, Calgary |
| D. Freeborn | – Director, Labour Relations, Calgary |
| C. Ruff | – General Manager, Network Management Centre, Calgary |
| J. Cranney | – Superintendent, Field Operations Centre, Calgary |

There appeared on behalf of the Union:

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| K. Stuebing | – Counsel, Toronto |
| D. Able | – General Chairman, Calgary |
| D. Olson | – General Chairman, Calgary |
| D. Fulton | – Vice-General Chairman, Calgary |
| D. Becker | – Vice-General Chairman, Medicine Hat |
| G. Edwards | – Vice-General Chairman, Revelstoke |

## AWARD OF THE ARBITRATOR

The record confirms that on February 21, 1994, the Company issued Bulletin TT000052. That bulletin followed the Hinton collision inquiry which raised concerns about whether running trades employees were sufficiently rested under the then maximum hours on duty policies of the railways in conjunction with the legal limitations respecting the on duty time of employees in the accordance with regulations pursuant to the **Railway Safety Act**. Notably, the work/rest rules for railway operating employees issued by Transport Canada provide the following:

> **5.1 Maximum Duty Times**
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> 5.1.1 a) The maximum continuous on-duty time for a single tour of duty operating in any class of service, is 12 hours, except work train service for which the maximum duty time is 16 hours. Where a tour of duty is designated as a split shift, as in the case of commuter service, the

combined on-duty time for the two on-duty periods cannot exceed 12 hours.

b) When calculating on-duty time as outlined above, arbitrary time or allowances are not to be included. Preparatory and final times each shall not exceed 15 minutes.

5.1.2 Ticket splitting in order to circumvent compliance with subsection 5.1.1 is prohibited.

5.1.3 The maximum combined on-duty time for more than one tour of duty, operating in any class of service, cannot exceed 18 hours between 'resets' as outlined in subsection 5.1.4.

5.1.4 The following is required to 'reset' the calculation of combined on-duty time to zero:

a) at the home terminal, 8 continuous hours off-duty time, 'inclusive' of call time, when entering into yard service or;

b) at the home terminal, 8 continuous hours off-duty time, 'exclusive' of call time if applicable, when entering into road service or;

c) at other than the home terminal, 6 continuous hours off-duty, 'exclusive' of call time if applicable.

Additionally, the collective agreement which governs conductors contains a provision in article 15 which governs the method by which employees are to be run in and out of terminals, which is in accordance with the first-in and first-out principle. That article reads as follows:

**Article 15 – First in and First out**

**15.01 First-in and First-out Rule**

Unassigned crews in freight service and spare employees will run first-in first-out of terminals. When an unassigned crew has come on duty in turn and they have got their engine and commenced work, they will remain with the train called for, even though another crew comes on duty later and gets out of the terminal first.

A crew will have commenced work when all members of the crew have reported for duty at the time required and when it has received the engine from shop, tie up or other track, except that on run through trains a crew will be regarded as having commenced work when all members of the crew have reported for duty.

**15.02 Run-Around Rule**

Except as otherwise provided, a Trainperson or crew standing first-out when run-around will be paid 50 miles for each run-around and continue to stand first-out.

The collective agreement which governs locomotive engineers on Western Lines contains a similar rule, as reflected in articles 5, 11 and 30 of that collective agreement.

On February 18, 1994 the Company issued a policy bulletin dealing with maximum hours on duty. As noted above, that was in response to the new federal regulations which contained a number of provisions, including a rule whereby the maximum on duty time for running trades employees was established as being no more than eighteen hours in any twenty-four hour period. Additionally, the working clock of any employee was to be reset in accordance with the continuous hours of off duty time, being eight continuous hours at the home terminal, inclusive of call time in yard service and exclusive of call time in road service, as well as six continuous hours, exclusive of call time, at any location other than the home terminal.

In its policy bulletin of February 18, 1994, the Company included an estimated run time for all of the subdivisions in Western Canada. For example, the Brooks Subdivision guideline established seven hours as the expected time for assignments running both east and west on that subdivision. Normal estimated run times for the various subdivisions range from a high of ten hours to a minimum of five hours.

Paragraph 11 of the Q&A portion of the memorandum, which includes the estimated times for eastward and westward travel on each of the subdivisions, contains the following sentence:

> Employees who have less time remaining than the time listed in the table, will not be called.

The above sentence refers to the time remaining on an employee's clock of eighteen hours in any twenty-four hour period. The memorandum effectively put an employee who, for example had worked twelve hours, and had only six hours remaining on his on duty clock, on notice that he would not be assigned to operate on the Brooks Subdivision where the assignment was estimated to be for seven hours. It appears that the system established by the memorandum worked well for employees who, according to the Union, had a relatively reliable basis to know in advance when they could be expected to be called for work on their respective subdivisions. While it appears that run-around claims were made on occasion, the Arbitrator is advised that the great majority of them were resolved, either by payment or by withdrawal, and very few ever proceeded to Step II of the grievance procedure.

The operation of the eighteen hour clock and the bulletin of February 18, 1994 was reviewed by this Office in **CROA 2906**. In that case a locomotive engineer whose on duty clock had eight hours and twenty-one minutes remaining was denied an assignment which required eight hours and thirty minutes to complete. The rationale for the dismissal of that grievance is reflected in the following passage:

> By the Company's estimate the assignment which was not given to Locomotive Engineer Florence would, in normal circumstances, have required 8 hours and 30 minutes to complete. As the grievor then had 8 hours and 21 minutes remaining on his 18-hour clock, the decision was made to assign the trip to Locomotive Engineer Maniquet, who had 10 hours remaining on his 18-hour clock.
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> The Council submits that the Company could not depart from the first-in first-out principle contained within the collective agreement for the purposes of calling the grievor, as provided in article 26(a) and article 5(b)(7) of the collective agreement, in the circumstances disclosed. The Arbitrator cannot agree. It is well

> established that the parties to a collective agreement cannot negotiate terms in their collective agreement, or apply and administer such terms, in a manner that is inconsistent with public law, be it statute or regulations. In the case at hand it is obvious that the first-in first-out calling provisions of the collective agreement must be rationalized and applied in a manner that is consistent with the federal regulations in respect of mandatory limits on duty, which the Company has undertaken to apply. It is, moreover, significant that the Council, which obviously has an equal interest in seeing reasonable rest provisions enforced for the protection of its members, apparently took no exception to the Company's bulletin of February 18, 1994 which indicated that employees are not to be called should they have insufficient time remaining on their on duty clocks to be able to handle the assignment in question.

As is evident from the foregoing award, there is nothing in the collective agreement nor in the Company's policy of February 18, 1994 to prevent the "run-around" of an employee whose eighteen hour clock has been reduced to the point where his or her available on duty hours are not sufficient to complete a given assignment. It appears that over the years the assignment of employees in and out of terminals in accordance with the first-in first-out principle, as qualified by **CROA 2906** operated reasonably well.

However, on March 4, 2011 the Company gave notice to the Unions that it would no longer use the 1994 bulletin. The Company viewed the 1994 memorandum as a means of responding to employee expectations in the wake of the federal order of August 26, 1993 under the **Railway Safety Act** which established the eighteen hour clock in any twenty-four hour period as the maximum permissible on duty time. The Company considered that there was no longer any need for a memorandum to respond to an event from 1993, and felt that the principles reflected in **CROA 2906** would suffice to administer the operation of the first-in first-out principle for locomotive engineers and conductors at Western terminals.

Since the adoption of the new policy there has been a mushrooming of run-around claims. According to the Union, which cites a number of specific examples to the Arbitrator, on the Brooks Subdivision, as elsewhere in the West, employees who have reduced available on duty time on their eighteen hour clock are routinely run-around in favour of employees who may also have reduced clocks, albeit theirs may contain more time. The Union submits a number of examples where employees with longer reduced clocks have been preferentially given assignments, even though those assignments were in fact accomplished over a period of time which was less than the available on duty time of the crew which was run-around. As the Union characterizes the situation, with the removal of the 1994 guidelines, employees have no basis to formulate an expectation of when they might be called, nor do they have any explanation or understanding as to why they were run-around when, it appears, the assignment which was denied to them was completed within a period of time equal to or less than their own available on duty time. The Union requests that the Arbitrator direct the Company to reinstate the guidelines which existed under Bulletin TT000052 or, alternatively, direct that the Company develop a clear policy to balance the members' collective agreement rights with the Hours of Service Regulations. The Union also requests that the Arbitrator direct the payment of all outstanding run-around claims, said to number in excess of 130.

The Company's representative explains that in Eastern Canada the employer has never utilized a guideline such as existed on Western Lines since 1994. According to his explanation, Company officers responsible for crew assignments simply take into account the available running time of a crew which is first out as compared with the time which the assignment will require. Where the crew eligible for call out does not have

sufficient on duty clock time to complete an assignment, the assignment is then given to the next available crew which has sufficient time to complete the run in question. He submits that the system which has operated without apparent difficulty in the East is, following the Company's notice to the Union on March 4, 2011, the system which is applied on Western Lines.

Inherent in the Company's position is the unpredictability, from day to day, of anticipated on duty times over any subdivision given the vagaries of weather, train priorities or such unpredictable factors as engineering maintenance repairs and slow orders. In the Company's view the anticipated on duty hours for assignments on the various subdivisions in Western Canada were no longer an appropriate basis for administering the first-in first-out provisions of the collective agreement. The Company decided, as its representative explains, that operations would be better served by utilizing the system which has been in effect in Eastern Canada, whereby specific estimates are made on a case by case basis depending on the circumstances of any given day and the remaining time on the eighteen hour clock of a given crew.

After careful consideration, I am compelled to the conclusion that there is some merit to the Union's grievance. It is not disputed that for some seventeen years, through the currency of a number of collective agreements, the Company adhered to the terms of the bulletin which it issued on February 18, 1994. From that date until March 4, 2011 the Union and its members could and did rely on the bulletin for a general understanding as to how crews would be called on the various subdivisions in accordance with the first-in first-out principle, but also taking into account whether they have sufficient time remaining on their eighteen hour clock to handle a given

assignment. Then, during the currency of the collective agreement, the Company purported to remove what had become a well-accepted understanding between the parties with respect to the operation of the eighteen hour clock in relation to calling assignments on the various subdivisions in Western Canada, including the Brooks Subdivision.

Even if one accepts, as suggested by the Company's representative, that the running times contained in the bulletin were intended as "guidelines", the fact remains that over many years of practice they became a general expectation and, at a minimum, a guidepost whereby employees could understand their relative position in the train calling order. Following the notice of March 4, 2011, and the effective abolishment of the bulletin, employees are left with no indication as to the anticipated time of any given assignment at any terminal on any day. Moreover, if the run-around claims which have resulted from the change should be valid, that would suggest that there has been a radical departure from the expected standards of the first-in first-out principle found in both collective agreements.

On the basis of the material before me, I am not in a position to rule on the merits of the more than 130 run-around claims which the Union submits I should allow. I am, however, satisfied that the doctrine of estoppel must be seen to have operated on the facts of the case presented. Given the well-established practice and the Company's adherence to its own 1994 bulletin for a period of many years, and the related expectations and reliance of the Union, I am satisfied that the Company must be viewed as estopped from abolishing the 1994 bulletin as it purported to do on March 4, 2011, during the currency of the collective agreement. I am advised that the parties are now

re-negotiating the terms of the collective agreement. In other words they would naturally find themselves at a point in time when the estoppel would come to an end. In these unique circumstances I do not deem it appropriate to direct the Company to re-establish the terms of the 1994 bulletin, as the Union is now in a position to fully negotiate whether that should happen or whether some other acceptable objective rule or guideline can be agreed upon at the bargaining table. I am, however, satisfied that the unilateral abolishment of the 1994 bulletin did amount to a violation of the collective agreement and an undermining of the transparency of the first-in first-out rule governing assignments under both collective agreements.

What of the run-around claims? In my view they should be addressed by the parties in light of the determinations made in this award. Should the parties be unable to reach resolution on any given run-around claim, it may be submitted to this Office for adjudication. Should there be an outstanding number of such claims the parties are at liberty to make use of the expedited hearing procedures now available in this Office.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator finds and declares and the Company's notice of March 4, 2011, effectively abolishing its bulletin of February 18, 1994, is an option which was not available to the Company by the operation of the doctrine of estoppel. The Arbitrator directs the Company to bargain in good faith with the Union at the current bargaining table the possibility of finding a suitable guideline or other mechanism which might assist employees in better understanding their status in respect of the application of the first-in first-out principles found in both collective agreements in relation to the assignment of crews at terminals in Western Canada. The Company is likewise directed to review with the Union the

merits of the run-around claims which have been filed in tandem with this policy grievance, in an effort to resolve them, failing which they may be returned to this Office for adjudication.

Should the parties be in any disagreement with respect to the interpretation or implementation of these directions, those matters may be spoken to.

April 16, 2012

**(signed) MICHEL G. PICHER**
ARBITRATOR