CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 4158

Heard in Calgary, Wednesday, 14 November 2012

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAILWAY CONFERENCE

DISPUTE:

Policy grievance concerning the application of articles 115.4 and 148.11 of agreement 4.3 as it applies to employees required to report to shortage locations.

COMPANY'S STATEMENT OF ISSUE:

The Union relies on articles 148.11 and 115.4 of agreement 4.3 to support their interpretation that employees with a seniority date subsequent to June 29, 1990 have the right to take up to 15 days to report for duty to a shortage location when forced to protect work on the seniority territory.

The Company maintains that employees with a seniority date subsequent to June 29, 1990 who are working and are required to report to another terminal at board change pursuant to article 148.11 of agreement 4.3 do not have the right to claim lay off status, nor do they have 15 days to report. In fact, the obligation of non-protected employees to protect service pursuant to article 148.11 of agreement 4.3 is to do so upon being notified of such obligation.

FOR THE COMPANY

(SGD). D. CROSSAN

FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

D. Crossan	– Manager, Labour Relations, Prince George
K. Morris	– Sr. Manager, Labour Relations, Edmonton
D. Brodie	– Manager, Labour Relations, Edmonton
B. Laidlaw	– Manager, Labour Relations, Toronto
P. Payne	– Manager, Labour Relations, Edmonton
J. Boychuk	– General Manager, WR-Alberta, Edmonton

There appeared on behalf of the Union:

M. S. Church	– Counsel, Toronto
R. A. Hackl	– General Chairman, Saskatoon

R. Ermet – Vice-General Chairman, TCRC-LE, Edmonton
R. Thompson – Vice-General Chairman, Saskatoon
B. R. Boechler – General Chairman (Ret'd), Edmonton
R. Donegan – Vice-General Chairman, Saskatoon
J. R. Robbins – General Chairman, CN Lines Central, Sarnia

AWARD OF THE ARBITRATOR

The parties are disagreed as to the relative rights and obligations of the Company and bargaining unit employees with respect to forcing junior employees to protect work on the seniority territory, being obligated to move to a shortage location and away from their home terminal. The Union submits that the Company can only force junior employees to another location on the seniority territory when they are in fact laid off. Additionally, it maintains that in that circumstance the employee has a period of fifteen days in which to report to work at his or her new location. The Company maintains that a layoff is not necessary and that, in any event, it is incumbent upon the employee who is forced to another location to move to that place in a reasonable time. It maintains that employees cannot assert a right to a full fifteen days before appearing for work at the shortage location.

As the matter came on in the form of a policy grievance, there is no particular fact situation which bears on the parties' dispute. A central fact, however, is that the seniority territory here under consideration is virtually all of Western Canada. Under the terms of the instant collective agreement, the geographic bargaining unit, and the related seniority territory, extends from Thunder Bay in the east and Vancouver in the west and northwards to Hay River in the Northwest Territories.

In 1992 the parties concluded what is now referred to as the Conductor Only Agreement, the terms of which have been integrated into subsequent collective agreements, including the current agreement. Employees who held seniority at the time of that agreement on or prior to June 29, 1990 have protection against layoff by virtue of article 107.70 of the collective agreement.

Article 107 of the Collective agreement deals generally with filling vacancies and the manner of which manpower shortages are to be covered. Article 107.42 deals with the filling of the shortage positions in both road and yard service and reads as follows:

> 107.42 If no applications are received for a position of Assistant Conductor/Yard Assistant Conductor, the senior qualified laid-off employee at the terminal where the vacancy exists, or if none, the junior qualified employee who is working on the road/yard spareboard or joint spareboard at the terminal from which relief is drawn for the position will be assigned; if none
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> (a) the junior qualified employee not working with a seniority date as an assistant conductor subsequent to June 29, 2990 on the Seniority Territory, if none;
>
> (b) employees with a seniority date after March 17, 1982 will be required to protect service at the following locations;

Home Terminal	**Exercise Seniority To**
Thunder Bay	Sioux Lookout, Ontario Fort Frances, Ontario
Sioux Lookout	Thunder Bay, Ontario Winnipeg, Manitoba
Rainy River	Thunder Bay, Ontario Winnipeg, Manitoba
Winnipeg	Rainy River, Ontario Sioux Lookout, Ontario Dauphin, Manitoba Brandon, Manitoba

Brandon	Winnipeg, Manitoba Melville, Saskatchewan
Melville	Brandon, Manitoba Canora, Saskatchewan Regina, Saskatchewan
Dauphin	Winnipeg, Manitoba Canora, Saskatchewan
Canora	Dauphin, Manitoba Melville, Saskatchewan Humboldt, Saskatchewan

The Union maintains that since the inception of the Conductor Only Agreement the company has not forced junior employees to fill vacancies at shortage locations away from their home terminal on the seniority territory except in circumstances where those junior employees are laid off. Additionally, it submits that in such a circumstance the employee forced to another terminal has been allowed 15 days to make the move, before being required to enter active service at the new location. The union bases its position on what it submits is the application of article 115 which governs laid off employees, and in particular article 115.4:

> 115.4 A laid-off employee who fails to report for duty, or to give satisfactory reason for not doing so, within 15 days from date of notification, will forfeit all seniority rights.

The nub of the grievance turns on the application of article 148.11 of the collective agreement. That article provides as follows:

> Protecting Service on the Seniority Territory
>
> 148.11 When their services are required elsewhere on the seniority territory, employees on the furlough board will be required to respond in accordance with the following conditions:

(a) Employees with a seniority date on or prior to March 17, 1982 will not be required to exercise their seniority rights outside of their home terminal or situations subsidiary thereto.

(b) Employees with a seniority date after March 17, 1982 will be required to protect service at those locations identified in article 107.42.

Refer to Addendum 70

(c) All employees with a seniority date subsequent to June 29, 1990 will be required:

(i) to protect all work in accordance with this article over the seniority territory governed by this Agreement and in addition they will be required to protect work governed by other Collective Agreements on the Region;

(ii) to accept and successfully complete training as a locomotive engineer or traffic coordinator and will not be permitted to relinquish traffic coordinator's seniority;

(d) Employees with a seniority date subsequent to June 29, 1990 who fail to comply with the provisions of sub-paragraph (c)(i) above will, if failing to report at the expiration of 7 days following notification, forfeit any guarantee payments until such time as they report. Failure to comply with the provision of sub-paragraph (c)(i) above within 30 days of notification or failure to comply with the requirement of sub-paragraph (c)(ii) above the employee will forfeit their seniority and their services dispensed with unless able to give a satisfactory reason, in writing, to account for their failure to report.

(e) Employees on the furlough board will only be required to protect service elsewhere after all employees at the location have been recalled;

(f) When it is necessary to protect service on the seniority territory employees will be utilized in the following sequence:

(i) the junior qualified employee not working with a seniority date as an assistant conductor subsequent to June 29, 1990 on the seniority territory, there being none;

(ii) employees with a seniority date after March, 17, 1982 will be required to protect service at those locations identified in article 107.42.

(g) When the junior employee as provided in sub-paragraph 148.11(f) does not report within a reasonable period of time, the next junior employee at the terminal will be required to protect service. When the junior employee becomes available they shall be sent to relieve the employee who failed the original requirement.

(h) The junior employee as defined in sub-paragraph (f)(i) will be required to protect such service whether or not that employee is occupying a position on the furlough board. Employees failing to report at the expiration of 7 days will forfeit any guarantee payments until such time as they report. At the expiration of 30 days, such employees will forfeit all seniority rights and their services will be dispensed with unless able to give a satisfactory reason, in writing, to account for their failure to report.

(i) The junior employee as defined in sub-paragraph (f)(ii) above who fails to protect service at the expiration of 7 days will forfeit any guarantee payment until such time as they report or until such time their services are not required at that or another location as specified in article 107.42.

(j) In addition to the provisions of paragraph 199.4 the provisions of Article 119 shall apply to employees required to protect service elsewhere in accordance with this provision.

(k) Employees who are on the furlough board and who are advised by the Crew Management Centre that they will not be required for a specified period of time will not have their guarantee reduced in the event they are later required for service for that period of time.

As can be seen from the foregoing, the instant grievance is effectively narrowed to dealing with the obligations of “D” class employees, which is to say employees who hold seniority subsequent to June 29, 1990, to accept to work at shortage locations on the seniority territory when required to do so by the Company. The fundamental position of the Union is that such employees can only be directed to fill vacancies at locations other than their home terminal if, as a first condition, they are laid-off. That, the Union argues, has been the consistent practice of the Company since the inception of the Conductor Only Agreement. It objects to what it describes as the more recent practice of the employer, which is to direct employees who are not laid-off to protect work at other locations on the seniority territory, for example where they may be cut off a particular working board as a result of weekly board adjustments. The Union’s first position is that the language of the collective agreement prohibits the employer from

purporting to assign junior employees who are not laid-off to shortage vacancies at terminals other than their own home terminal. Secondly, the Union also takes issue with the more recent directives of the Company which require employees to attend at their new work location within a reasonable number of days, to a maximum of 7 days, rather than reporting within 15 days, which the Union submits was intended by the agreement of the parties to be the time allowed for an employee to move to work at another location.

I consider it important to clarify one element of the rights and obligations of the parties. During the course of the Union's argument it was suggested that employees who might find themselves unable to hold work at their home terminal were being denied the right which they have under the collective agreement, in particular article 89 for yard service employees and article 107.70 for road service employees, to exercise their seniority independently to obtain work elsewhere, presumably at a location of their choice. During the course of its presentation to the Arbitrator the Company effectively undertook that it will not force any employee to another location until that employee has had the opportunity to exercise his or her seniority, or to choose not to do so. It is only after that that the Company will assert what it maintains is its right to force a junior employee to another location.

As its first position, the Company stresses the language of article 148.11 (c). It notes that employees whose seniority is subsequent to June 29, 1990 are expressly required to protect "…all work in accordance with this article over the seniority territory

governed by this Agreement …". On the basis of the foregoing language it submits that there is nothing counterintuitive or inconsistent with the collective agreement for the company to expect employees of junior seniority to be compelled to work at various locations on the seniority territory, however large it may be.

From that perspective the Company then focuses on sub paragraph (f) of section 148.11 which reads, in part: "when it is necessary to protect service on the seniority territory employees will be utilized in the following sequence: (i) the junior qualified employee not working with a seniority date as an assistant conductor subsequent to June 29, 1990 on the seniority territory, there being none…".

Much of the dispute between the parties concerns the application of the above reproduced provision. The company submits "not working" does not require that an employee be laid-off, a status which would require the issuing of an employment record and the entitlement to claim E.I. benefits, as well as the liberty to seek alternative employment outside of the Company. In the Company's submission the phrase "not working" is, rather, directed to the circumstance of an employee who, as noted above, may be cut off a working board at a given location, by reason of the periodic adjustment of boards. That person, who would be placed in a position of "not working" is, in the employer's submission, precisely the individual who can be compelled by the employer to protect service on the seniority territory in the sequence contemplated by subparagraph (f) of article 148.11 of the collective agreement. In other words, in the Company's submission, an employee cut off from a working board whose seniority

postdates June 29, 1990 can be compelled to protect work on the seniority territory, and need not be laid-off to do so.

The Union maintains that the phrase “not working” must be interpreted to mean an employee who is in fact laid-off and can, at the Company’s discretion, therefore be recalled to a vacancy at a location on the seniority territory other than his or her home terminal. In support of that view the Union stresses that the concept of employees being surplus is grounded, under the collective agreement, on a terminal by terminal basis. It is only when an employee is surplus at his or her terminal that that individual is availed of certain rights and obligations under the collective agreement. As an alternative to its position on the interpretation of these provisions, the Union submits that, in any event, the company should be estopped by reason of the practise which has been followed whereby, for a number of years, it is laid-off employees who have been compelled to fill vacancies at away from home terminals on the seniority territory.

The collective agreement does make express provision for the treatment of employees who are laid-off. That is found in article 115 of the collective agreement which provides, in part, as follows:

> **Employees Laid Off**
>
> 115.1 An employee who is laid off will be given preference of re-employment when staff is increased on the seniority and promotion district and will be returned to the service in order of seniority.
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> 115.2 A laid-off employee who desires to return to the service when work is available must keep the proper officer advised of their address, in writing, in order that they may be readily located.

115.3 A laid-off employee who is employed elsewhere at the time notified to report for duty may, without loss of seniority, be allowed 30 days in which to report, providing:

(a) that it is definitely known that the duration of the work will not exceed 30 days;

(b) that other laid-off employees are available;
(c) that written application is made to the superior officer immediately on receipt of notification to resume duty.

115.4 A laid-off employee who fails to report for duty, or to give satisfactory reason for not doing so, within 15 days from date of notification, will forfeit all seniority rights.

What, then, does the collective agreement contemplate when it refers, in article 148.11(f)(i) to the "… junior qualified employee not working … "? As noted above, the Union maintains that that can only refer to an employee who is laid off. The Company takes a substantially different position. It notes that employees are subject to weekly adjustments in working boards. Depending on the volume of work, junior employees may find themselves cut off from a working board. In that circumstance, according to the Company, the individual so affected is "not working" within the meaning of the article here under consideration. In other words, in the Company's view, that individual is then subject to being forced to protect service on the seniority territory in accordance with the sequence of obligations established in article 148.11 of the collective agreement.

In my view, the position of the Company with respect to the interpretation of sub-paragraph (f)(i) of article 148.11 is more compelling than the position of the Union. As is evident from the materials reproduced above, the parties to the collective agreement, who are sophisticated in the ways of collective bargaining, clearly know when to make express reference to employees who are laid off. That is evident from the language of

article 115 of the collective agreement. As a matter of presumption, it must at a minimum be assumed that if the parties had intended to establish the order of employees who can be forced to other locations on the seniority territory by identifying laid off employees as being the first to be subject to that obligation, they could have made express reference to laid off employees in the language of article 148.11. Significantly, they did not. Of equal significance is the fact that employees may, in fact, enter a status where they are not working, but are not laid off. That would describe the state of an individual, who by reason of weekly working board adjustments, finds him or herself cut off from a working board. While that individual may not yet be laid off, with all of the documentation and formalities relating to that status, they are, at least for a time, in the status of an employee who is not working, which is to say that they have no claim to any particular assignment nor to any status on an active working board.

I do not find the Union's argument with respect to the application of the doctrine of estoppel to be compelling in this case. It suggests that in the past the Company has compelled employees to protect work elsewhere on the seniority territory when they have achieved the status of being laid off. In my view, the most that can be said about that practice is that laid off employees are indeed part of the larger categories of employees who can be qualified as "not working". While they may be legitimately required to protect work elsewhere, I do not see how that can preclude the Company from having recourse to other employees, not laid off, who are nevertheless "not working" within the meaning of article 148.11 of the collective agreement. That would include employees who have been effectively cut off from a working board and can

claim no particular work. The fact that the Company may have been slow in identifying employees who are compelled to protect work elsewhere on the seniority territory does not prohibit it from resorting to a more expeditious means of identifying employees “not working” and forcing those individuals to protect work at shortage terminals on the seniority territory.

In my view this interpretation accords with the general purpose of the overall provisions of the Conductor Only Agreement. That agreement, which established the extraordinary protections of furlough boards for particular classes of employees with seniority dates prior to June 29, 1990, expressly identified those senior employees as being insulated from layoff and, with respect to employees whose seniority pre-dates March 17, 1982, they are insulated from being required to exercise their seniority outside of their home terminal or its subsidiary stations. Moreover, employees with a seniority date after March 17, 1982 and prior to June 2, 1990, can only be required to protect service at adjacent terminals as identified in article 107.39. The categories of employees noted above are generally referred to as “protected employees”. Significantly, employees whose seniority date is subsequent to June 29, 1990 are not protected employees and, as reflected in the language of article 148.11(c), they can be required to protect “… all work in accordance with this article over the seniority territory governed by this Agreement …”.

The Company’s ability to have recourse to forcing non-protected employees comes as an obvious trade off in exchange for the extraordinary protections given to

the categories of protected employees. In that context, an arbitrator should be loath to unduly limit the prerogatives of the Company to protect work at shortage terminals by having recourse to non-protected employees whose seniority is subsequent to June 29, 1990 who in fact qualify as “not working” within the meaning of article 148.11. I also consider it significant that the collective agreement speaks of different maximum reporting times, namely, 7 days for forced junior employees “not working” and 15 days for laid off employees. For these reasons I am satisfied that the Company’s interpretation is to be preferred and this aspect of the grievance must therefore be dismissed.

I next turn to consider the issue of the time which a non-protected employee may take to move to active service when he or she is required to do so when forced to a shortage location under the terms of article 148.11 of the collective agreement. The fundamental position of the Company is that the employee is to make the move “within a reasonable period of time” as contemplated in sub-paragraph (g) of article 148.11. In the submission of the Company’s representative an employee who is forced to a location which is a relatively short distance from his or her home terminal may be expected to do so within a matter of one or two days. He draws to the Arbitrator’s attention the language of a Q&A document which was appended to the original Conductor Only Agreement. Question and answer number 67 of that document reads as follows:

> Q.67 What would the Company consider as a “reasonable period of time” as referred to in 11.1(11)(g)?
>
> A.67 7 days.

The Union takes issue with the Company's interpretation of the collective agreement's indications as to the time an employee may take to respond when being sent to a shortage terminal. It submits that an employee has, as of right, fully fifteen days in which to respond to such a move. In that regard the Union relies on article 115.4 of the collective agreement which provides as follows:

> 115.4 A laid-off employee who fails to report for duty, or to give satisfactory reason for not doing so, within 15 days from date of notification, will forfeit all seniority rights.

I agree with the Union that if the Company recalls a laid off employee, the above provision applies. However, it does not apply where an employee not working but not laid off is forced to another location. In that situation, the "reasonable period of time," mutually agreed to be 7 days, will apply.

The foregoing conclusion is manifestly supported by the parties' own agreement as reflected in the language of the question and answer document appended to the original Conductor Only Agreement. As noted above, by the parties' agreement reference to a "reasonable period of time" within the sub-paragraph (g) of article 148.11 is expressly said to be the order of 7 days. On what basis, therefore, can the union now claim that 15 days is accorded to employees as a matter of right ? I can see none. That conclusion is, moreover plainly inconsistent with the reference to the 7 day period as being "reasonable period of time" as reflected in Q and A 67 appended to the original Conductor Only Agreement.

For these reasons, the Arbitrator is also compelled to dismiss the second aspect of the Union's grievance concerning the time during which an employee should respond to a directive to move to another location on the seniority territory to protect work at a shortage location.

For all of the foregoing reasons the grievance must be dismissed.

December 13, 2012

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MICHEL G. PICHER
ARBITRATOR