CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4404

Heard in Toronto, May 14, 2015

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Claim submitted on behalf of Locomotive Engineer Myer of Edmonton Alberta for earnings while attending QSOC training on December 8th to the 13th, 2013 pursuant to Addendum 72C versus Addendum 72 of Agreement 1.2.

COMPANY'S EXPARTE STATEMENT OF ISSUE:

Following QSOC recertification in December 2013, M. Myer submitted time claims for lost earnings pursuant to Addendum 72C. These claims were declined by the Company however payment for QSOC was processed pursuant to Addendum 72 of Agreement 1.2.

The Union Argues that payment of lost wages pursuant to Addendum 72C remains applicable in the circumstances. The Company disagrees and maintains position Addendum 72 is applicable.

FOR THE UNION:	FOR THE COMPANY:
(SGD.)	(SGD.) P. Payne for D. VanCauwenbergh
	Director Labour Relations

There appeared on behalf of the Company:

K. Morris	– Senior Manager Labour Relations, Edmonton
D. Larouche	– Labour Relations Manager, Montreal
M. Marshall	– Senior Manager Labour Relations, Toronto
D. VanCauwenbergh	– Director Labour Relations, Toronto
J. Torchia	– Director Labour Relations, Toronto

There appeared on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
R. Hackl	– Vice President TCRC, Saskatoon
J.M. Halle	– General Chair TCRC-LE-E, Québec City
D. Joannette	– General Chair TCRC-CTY-E, Québec
J. Robbins	– General Chair TCRC-CTY-C, Sarnia
J. Lennie	– Vice General Chair TCRC-CTY-C, Port Robinson

R. Caldwell	– General Chair TCRC-LE-C, Ottawa
R. Donegan	– General Chair TCRC-CTY-W, Saskatoon
R. Thompson	– Vice General Chair TCRC-CTY-W, Saskatoon
B. Willows	– General Chair TCRC-LE-W, Edmonton
B. Ermet	– Senior Vice General Chair TCRC-LE-W, Edmonton

AWARD OF THE ARBITRATOR

This Award applies to three separate disputes that were heard before me in Toronto on May 14, 2015. The parties in each are the Canadian National Railway Company (the "Company") and the Teamsters Canada Rail Conference (the "Union").

The disputes relate to submissions of claims for lost wages by running trades employees who underwent mandatory Qualification Standards for Operating Crew Training ("QSOC training") over periods of three-consecutive days. The Company paid these employees QSOC "daily rates" for each day of training. The Union says the Company must pay the QSOC daily rate or lost wages whichever is greater. The Company disagrees and says that only QSOC daily rates are payable when QSOC training takes place over three consecutive days.

The same issue has arisen under all of the parties running trades' collective agreements in force between them between 2012 and 2014 (e.g., collective agreements 1.1, 1.2, 4.16, 4.2 and 4.3 referencing respectively Addenda 66, 66A, 72, 72C, 92, 121, and 62).

The three cases before me pertain to claims made pursuant to Addendum 66A in collective agreement 1.1 covering Locomotive Engineers ("LEs") in the East; Addendum

62 of collective agreement 4.3 covering Conductors, Trainmen, and Yardpersons (“CTYs”) in the West; and Addendum 72C of collective agreement 1.2, covering LEs in the West.

Background and Chronology

The Company is required to provide QSOC training to its running trades employees pursuant to the Railway Employee Qualification Standards Regulations SOR/87-150. In 1992 the parties negotiated Addendum 66 for Agreement 1.1, Addendum 62 of Agreement 4.3 and Addendum 72 for Agreement 1.2 pertaining to QSOC training. The respective Addenda provided employees with, among other things, compensation for their attendance at the training in accordance with QSOC daily rates. At the time the Addenda were negotiated and for years afterward, QSOC training took place over a period of four consecutive days - every three years. The parties also agreed that in the event that the Company contemplated any change to the duration of the training, it would communicate that change to the Union prior to its implementation.

In 2001 collective bargaining was conducted at a national level. The Unions representing the running trades negotiated with the Company jointly as the Canadian Council of Railway Operating Unions (“CCROU”). During negotiations, the CCROU raised the significant impact of the Company’s implementation of extended runs (implemented in 1995) on lost wages for employees attending QSOC training. The Company accepted the concern as a legitimate one and responded to it in its proposals.

In the months leading up to the national negotiations the Company had begun to deliver QSOC training one day per year over a three-year cycle, departing from the previous model of four consecutive days every three years. The CTYs in the East, covered by Agreement 4.16, resisted the Company's move away from the four consecutive day format by way of a policy grievance dated January 8, 2001. The grievance insisted that the Company return to the previous format.

On April 24, 2001, during the national negotiations, the policy grievance was resolved as follows:

> April 24, 2001
> Mr. Keith Heller
> Senior Vice- President – Eastern Canada
> CN Rail
> PO Box 1000
> Concord, Ontario L4K 1B9
>
> **Attention: Mr. Frank O'Neill**
>
> **Re: Policy Grievance on CROR Instruction**
>
> As you will recall, a policy grievance was initiated on January 8, 2001 with respect to the above-noted matter. Given recent discussions on the matter the Union is prepared to withdraw such grievance with the understanding that the provisions of addendum 92 of the 4.16 shall be modified to allow for the following:
> 1. Supervisor – led training will be delivered on a three-year cycle; structured as follows:
> Year 1 – Transportation supervisor leads a one-day Rules Class.
> Year 2 - Transportation Supervisor leads a half-day Rules class for employees.
> Year 3 - Employee is scheduled for a one day testing program for CROR, Block and Interlocking Signals; and Q500 Technical Subjects, which will include instruction in QSOC (non-CROR) subjects.
> Note: an emergency First Aid (EFA) certification course will be provided either in the Year 2 cycle or as otherwise designated.
> 2. Employee attending QSOC training, as modified, shall be entitled to the QSOC rate as provided for in Addendum 92 or loss of wages, whichever is greater.

> 3. It is understood that the options for rest or receiving a call under Addendum 92 shall remain unchanged for each session as provided in item 1 above.
>
> If you are in agreement with the above, please affix your signature in the place provided below.

The General Chairmen of United Transportation Union signed the letter, as did the Company.

By way of Appendix AH-QSOC of the Memorandum of Settlement ("MOS") dated May 13, 2001 for that round of collective bargaining - the parties agreed to adopt the letter dated April 24, 2001, into collective agreements 1.1, 1.2, 4.16, 4.2 and 4.3. Appendix AH-QSOC, sent to all General Chairmen for the CCROU reads:

> Gentlemen:
>
> During this round of negotiations the issue of payment for attending QSOC was discussed. The parties agreed to adopt for Agreements 1.1, 1.2, 4.2, 4.3 and 4.16 the letter dated April 24, 2001 regarding QSOC in Eastern Canada (letter attached at end).

In 2005, the parties worked on the next re-write of certain collective agreements: Addendum 66A was added to Agreement 1.1, Addendum 62 was amended from its original form as described below, Addendum 72C was added to Agreement 1.2 and Addendum 121 was added to Agreement 4.16. The parties did not participate in a re-write of Agreement 4.2 in 2005, however, the Company did its own re-write of Agreement 4.2 in 2007.

Addenda 66A and 72C are effectively reflect the cutting and pasting of the April 24, 2011 letter reproduced above. These new Addenda are dated May 13, 2001, the

same date of the Minutes of Settlement incorporating the letter into the collective agreements. Addendum 121 essentially reproduced Appendix AH-QSOC. Addendum 62 incorporated the negotiated changes from the 2001 round relating to the payment for attendance at QUSOC training directly into the original Addendum 62. The original Addendum 62 was amended to insert a "*Note" following the table with the QSOC daily rates for 2004-2006. It reads: "*Note: Employees attending QSOC training shall be entitled to the QSOC rate provided above or loss of wages whichever is greater." The asterisk before "Note" in the body of the document refers the reader to the very end of Addendum 62, after the signature lines. It reads: "As amended by the Memorandum of Agreement dated May 13, 2001."

Since 2001 QSOC training has been delivered, in the vast majority of cases, on a three-year cycle with one session of training attended by running trades employees every year. The evidence before me reveals that after 2001, until the disputes now before me, when the Company has required employees to attend QSOC training over a period of three consecutive days it has paid them the QSOC daily rate or the employee's loss of wages, whichever is greater (pursuant to Addendum 66A of Agreement 1.1, Addendum 62 of Agreement 4.3 and Addendum 72C of Agreement 1.2).

The Company representative who attended at the hearing confirmed that until the Company had completed its reversion back to a three consecutive day training format in June 2013, its practice had been to pay running trades employees lost wages or the

QSOC daily rate whichever was greater, irrespective of how many days employees were required to attend QSOC training.

The Union presented the following evidence in the disputes before me, which is consistent with the Company's representations at the hearing.

In October 2002 by way of a General Notice to train and engine service employees covered by Agreements 1.1 and 4.3, the Company wrote in reference to the MOS signed May 13, 2001: "Claims must be based solely on lost work or QSOC daily rate as outlined in Addendum 62 [the original Addendum prior to the 2005 re-write process] of Agreement 4.3, or Addendum 72 of Agreement 1.2, whichever is greater, NOT a combination of the two." The examples provided in the General Notice confirm that when an employee attends training over two or three consecutive days they are to submit claims for lost wages or the QSOC daily rate, whichever is greater.

Counsel representing the LE's covered by Agreement 1.1 provided evidence pertaining to specific employees attending QSOC training on the three consecutive day format from as early as 2007 (the computer system precludes the Union from accessing the information earlier than 2007). The Company paid these employees the greater of lost wages or the QSOC daily rate. The difference between the two options is very significant. The Company's response to this evidence was that these examples were exceptions – ones that could have been explained by the circumstances about which the Company had no details at the hearing.

Finally, the Company does not dispute that for the better part of two years prior to the Company's official notification in the summer of 2013 that it was reverting to a training format of three consecutive days, it had been paying employees the greater of their lost of wages or QSOC daily rates provided for in Addendum 66A of Agreement 1.1, Addendum 62 of Agreement 4.3 and Addendum 72C of Agreement 1.2.

Against this factual backdrop, in late June and early July 2013, the Company sent letters to the parties' General Chairmen advising that it had discontinued the delivery of single-day QSOC training on a three-year cycle and that it had reverted to a three-day consecutive training schedule to be delivered every three years. The notices do not specifically reference any change in respect of payment for attendance at QSOC training. To the extent that there were discussions between the General Chairmen and the Company prior to the issuance of the notice letters, at no time did the Company raise any specific reference with the Union about any change in payment for QSOC training – only that the scheduling of the training would be reverting back to three-consecutive days. The letters do, however, refer to Addendum 66, not 66A, of Agreement 1.1, the original Addendum 62 (which had been amended in 2005 as set out above) of Agreement 4.3, and Addendum 72, not 72C, of Agreement 1.2.

Decision

The issue is whether the parties intended when they entered into the MOS on May 13, 2001 to link payment for QSOC training in the form of lost wages or the QSOC daily rate, whichever is greater, to the change the Company had begun implementing in the delivery format for the QSOC training. The Company says it was linked, the Union disagrees.

The intent of the parties, considering that the MOS was entered into in a national bargaining process is the same for all Agreements, irrespective of how the parties ultimately adopted the April 24, 2001 letter into their respective Agreements. My task is to ascertain the parties' joint intent.

The Company's position in these disputes is as follows: that payment for QSOC training once it definitively returned to the three-consecutive days of training every three years is governed by the QSOC daily rate pursuant to Addendum 66, not 66A of Agreement 1.1, the QSOC daily rate pursuant to Addendum 72, not 72C of Agreement 1.2 and Addendum 62 of Agreement 4.3. It argues that it properly denied the grievors' claims for lost wages when they attended QSOC training over three consecutive days in accordance with the respective Agreements.

Extrinsic evidence including past practice and/negotiating history is admissible as an aid to interpretation of collective agreement language if the words of the Agreements reveal either a patent or latent ambiguity. Contract language is said to be latently ambiguous when certain facts relating to its negotiation reveal a lack of clarity. In such

circumstances extrinsic evidence can be used to resolve the ambiguity and also to demonstrate the ambiguity in the first place.

In my view, having carefully considered the parties' arguments surrounding the context of the adoption of the April 24, 2001 letter into Agreements 1.1, 1.2, 4.2, 4.3 and 4.16 as reflected in Appendix AH – QSOC of the 2001 MOS, what is "clear" is that the collective agreement language is ambiguous.

The words "as modified" in the second paragraph of the April 24, 2001 letter which reads: "Employees attending QSOC training, as modified, shall be entitled to the QSOC rate as provided for in Addendum 92 or lost wages, which ever is greater" means, in the Company's submission, that the optional payment scheme applies only to QSOC training in its modified form – that is to say when the QSOC training is delivered on the one day per year format (on a three year cycle). Also plausible, however, is a more general interpretation of the words "as modified", as the Union ascribes to those words, conveying a joint intent that the optional payment scheme was to apply to QSOC training on a go forward basis, regardless of the training format.

In addition to the Company's argument regarding the words "as modified", the Company argues that a review of the policy grievance itself also reveals a clear joint intent to link the method of pay for QSOC training to the format of delivery for that training. The Company submits that the intent of the grievance was to reduce the impact of the change in training format on rates of pay. It asserts that employees, with the

implementation of the new format, would miss more working trips than they had when the QSOC training was delivered over three consecutive days every three years – hence the desire to compensate employees with the optional payment of QSOC rates or lost wages, whichever was greater.

On a careful review of the grievance itself, which can only be appreciated in the larger context of national negotiations then underway, I am not so persuaded.

The policy grievance at issue challenged the Company's decision to change the format of QSOC training without the Union's input or consent. As a remedy, the Union sought to have the Company return to the four consecutive day format. In support of its position (the merits of which I decline to comment upon) the Union referred to item 7 of Addendum 92: it argued that the Company could not abandon the four-day training and simply use the rates negotiated under the Addendum as a basis for payment.

Contrary to the Company's submission, the policy grievance does not reveal what the Company says was the parties' jointly appreciated rationale for the change, and hence the parties' joint intent to link the pay options to the change in format. Moreover, though the Company asserts that employees miss more trips on the one-day per year format for QSOC training, there is no evidence to support that assertion.

More generally, Appendix AH-QSOC, as well as other draft documents, including a Company proposal during the national negotiations, are indicative that the parties

were seeking to address the significantly negative impact of the implementation of extended runs on missed work for employees to attend QSOC training. That issue was on the minds of the parties when they entered into the MOS.

The 2005 re-write process involving Agreements 1.1, 1.2, and 4.16 is of no greater assistance in ascertaining the "joint intent" of the parties than is the April 24, 2001 letter itself. These Agreements either incorporated the body of the April 24, 2001 letter (Agreement 1.1 and 1.2) or incorporated Appendix AH itself (as Addendum 121 of Agreement 4.16)

However, the 2005 rewrite of Agreement 4.3 is instructive in ascertaining the parties' joint intent as to whether or not they understood that the pay option is properly linked to a change in the format of QSOC training. In 2005 the parties agreed to language that amended the original Addendum 62 as set out above. In my view, the parties' amendments to Addendum 62 during the 2005 re-write process, with the asterisk clarification, supports the Union's position.

The Company argues that by placing the asterisk prior to the Note, the parties meant to incorporate the Company's interpretation of the "as modified" language. By means of the asterisk, the Company argues that the additional condition that only employees attending the one day per year of QSOC training format are entitled to QSOC rate/lost wages pay option, was incorporated into the Addendum.

The Company's argument is not a persuasive one. I do not accept that the parties would have incorporated a caveat to the application of the Note, which would have the effect of importing a further condition on the meaning of the Note in the manner reflected in the revised Addendum 62. Moreover, as pointed out by the Union, other changes to original Addenda negotiated by the parties demonstrate that references like the asterisk (*) following the signature line reflect the source of the changes to the document. Finally, the Company initiated re-write of Agreement 4.2 in 2007 also points to what can only be construed as the Company's understanding at least as of 2007, that the 2001 amendment provided Traffic Coordinators with lost wages when they attend QSOC training.

The parties' past practice as it relates to payments to running trades employees since 2001 is also of assistance in resolving what the parties intended in 2001 when they incorporated the April 24, 2001 letter into the May 13, 2001 MOS.

First, despite the delivery format being changed to yearly sessions on a three-year cycle in 2001, the Company has delivered training in the three-consecutive-day format. The Company, in referencing Addendum 72 of Agreements 1.2 and Addendum 62 of Agreement 4.3 in October of 2002, made clear to employees that its view was that claims for QSOC training for two and three consecutive days were to be made for the greater of lost wages or QSOC daily rates and not for both.

Secondly, as pointed out by counsel who made submissions for the Union relating to Agreement 1.1, the evidence before me reveals that when the Company has delivered QSOC training in the three days of consecutive training format since 2007 it has consistently paid employees the greater of lost wages or the daily rate, consistent with the Union's interpretation of the April 24, 2001 letter incorporated into the May 13, 2001 MOS.

Thirdly, the Company continued to pay its running trades employees the greater of their loss of wages or the QSOC daily rate since it began implementing a decision it made to revert to the three consecutive days of training format in 2011. The Company's explanation for continuing to pay its employees the greater of loss of wages or the daily rate was that it was avoiding having two payment methods during the reversion to the three consecutive day training format. I do not accept that submission. Considering the significant differential in payment, it would be unlikely that the Company would choose to incur significantly greater costs for QSOC training than it would otherwise be obliged to under the Agreements. Having regard to all of the above, I think the Company's conduct provides insight into what it believed was its obligation to the running trades employees engaged in QSOC training: that the Company was to pay the greater of lost wages or the daily rate irrespective of the format of the training.

For all these reasons, I am of the view that the Company's argument does not reflect the intent of the parties in 2001 when the May 13, 2001 MOS was entered into. The bargaining history as it pertained to the national negotiation in 2001, the 2005 re-

write process in the case of Agreement 4.3 (and the Company's re-write of Agreement 4.2 in 2007) together with the Company's consistent practice of paying the greater of lost wages or the daily rate when it has delivered QSOC training in the three consecutive days format since 2001 leads me to conclude that the parties' intent as reflected in the May 13, 2001 MOS was and has been, until very recently, to pay running trades employees the greater of lost wages or the daily rate for QSOC training.

Accordingly, the Union's position in these disputes prevails. I declare that the Company has violated Agreements 1.1, 1.2, and 4.3 by failing to pay the greater of the QSOC daily rate or lost wages when it paid the grievor's QSOC daily rates for their three consecutive days of QSOC training. I order the Company to comply with the Agreements relating to the method of payment for QSOC training as set out in this award and that the Company provide accurate loss of earnings information to the Union with respect to these matters. Any other remedial issues stemming from this award are remitted to the parties and I remain seized in the event they are unable to resolve them.

June 16, 2015

CHRISTINE SCHMIDT
ARBITRATOR