

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4436

Heard in Toronto, January 12, 2016

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Conductor Justin Bell, of Edmonton, Alberta, whose services were dispensed with on June 4, 2015 in accordance with Article 148.11 (d) of Agreement 4.3.

JOINT STATEMENT OF ISSUE:

On May 11, 2015, the grievor began the classroom portion of Locomotive Engineer training. On May 29, 2015, it was reported that the grievor failed the classroom examination which requires 90% threshold to pass. On June 2, 2015, the grievor met with an Engine Services Officer and was provided with the opportunity to rewrite the aforementioned exam. The Grievor refused to take the second opportunity indicating he did not want to be a Locomotive Engineer.

As the grievor failed to successfully complete the training as a Locomotive engineer, and did not want to proceed with a rewrite of the examination, the grievor's services were dispensed in accordance to Article 148.11 (d) of Agreement 4.3.

The Union contends that subsequent to the grievor failing to successfully complete the training as a Locomotive Engineer's position and refusing to undertake a second examination opportunity, the Company failed to allow the grievor the opportunity to accept and successfully complete training as a Traffic Coordinator, and as such request that the Company return the grievor to active service, allow him an opportunity to successfully complete training as a Yard Coordinator and make his employment record whole.

The Company disagrees with the Union's contentions.

FOR THE UNION:
(SGD.) R. Donegan
General Chairman

FOR THE COMPANY:
(SGD.) P. Payne for D. Van Cauwenbergh
Director, Labour Relations

There appeared on behalf of the Company:

K. Morris – Senior Manager Labour Relations, Edmonton
P. Payne – Manager, Labour Relations, Edmonton

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
R. Donegan	– General Chairman, Saskatchewan
R. Thompson	– Vice General Chair, Saskatchewan
B. Willows	– General Chairman, Edmonton
R. Ermet	– Vice General Chair, Edmonton
J. Bell	– Grievor,

AWARD OF THE ARBITRATOR

Mr. Bell was hired on May 9, 2011 as a Conductor and had four years of service at the time of his termination. The Grievor's four years of service has been reported uniformly positive, and he has not received any disciplinary actions in the course of his career.

Prior to entering service, and as part of the hiring process, the grievor was required to complete a "Working Conditions Questionnaire, Train and Yard Service Employees" document, notably to signify his willingness to comply with training and periodic test assessments rules. Question No 14 of the aforementioned questionnaire stipulates as follows:

14. Undergo training and periodic test assessments?

Upon hiring, candidates are provided with formal and on-the-job training. The training program covers all facets of the work involved and trainees must successfully qualify on examinations. They will also be trained to operate locomotives by Beltrack and operate locomotives in the presence of a qualified Engine Service employee. Training will require candidates to be away from their home location. Requalification examinations are required after the first year and every three years after. Based on seniority and Company needs, Train and Yard Service Employees will also be required to qualify as Engine Service Employees and/or Traffic Coordinator. Additional training will be provided in order to qualify for these positions.

The grievor agreed that he was willing to comply with such requirements or rules.

On May 11, 2015, the grievor began the classroom portion of the Locomotive Engineer Training, in accordance with Article 148.11 (c) (ii) of Agreement 4.3. On May 29, 2015, it was reported that the grievor failed the classroom portion with 81% on the final exam. The Company' requires 90% to pass.

On June 2, 2015, Surender Grewal, Engine Service Officer met the Grievor and the Grievor's Local Representative Henri Lauzon with respect to this matter. The Grievor was offered the opportunity to rewrite the examination and was informed of his obligation to successfully complete the training otherwise his employment relationship would be terminated. The grievor refused to undertake a second opportunity indicating he simply did not want to become a Locomotive Engineer. However according to Mr. Grewal at no time was he offered the option to enroll for Traffic Coordinator training in lieu of qualifying of his responsibility as a Locomotive Engineer.

During the morning of June 4, 2015 a meeting was scheduled with Superintendent Mike Stevenson. During this conversation, it was reported that the grievor was again advised of his refusal to qualify as Locomotive Engineer would result in the termination of his employment relationship. The grievor remained adamant he did not want to become a Locomotive Engineer. He was presented with a letter terminating his services on the above stated date of June 4, 2015. Later that day, the Grievor

applied for the Traffic Coordinator training and submitted his bid through CATS at 13:48 Mountain Time.

Article 148.11 (c) (ii) and (d) of Agreement 4.3 stipulates:

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 stations 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.

The language of Article 148.11 (c) and (d) of the Agreement 4.3 is clear. Every employee hired on June 29, 1990, or later, will be required to accept and successfully

complete training as Locomotive Engineer or Traffic Coordinator and failure to comply with such requirements results with termination.

But, notwithstanding the possible interpretation that can be asserted from the language of Article 148.11 (c) and (d), as a critical fact, the Union underscores that it is not aware of any other employee, since Article 148.11 (d) came into effect in 1992 that had been terminated for not qualifying as a Locomotive Engineer. Not a single employee has been terminated during the last twenty three years as a result of a failure to qualify as a Locomotive Engineer or Traffic Coordinator. In many cases, the Union adds that employees who have not qualified as Locomotive Engineers continued as Conductors with no repercussions. The Company sustains that in some cases, some employees resigned from their employment when faced with similar circumstances to those of the grievor.

Additionally, since 1992, the Union states that in various instances the Company has refused to provide training to employees, despite application for such. The Company has circumvented seniority, allowing junior employees to train as Locomotive Engineers. The Company has in some instances denied training to employees on the basis of having less favorable discipline records. All of these actions have resulted in employees not qualifying as Locomotive Engineers and continuing their employment as Conductors, without repercussion or application of the language of Article 148.1 (d) of Agreement 4.3.

The Company also acknowledges that an employee that has already taken the initiative to be trained and qualified as a Traffic Coordinator will not be forced to train as a Locomotive Engineer. Such assertion supports the Union's contentions that an employee shall qualify as Locomotive Engineer or Traffic Coordinator and has therefore some choice. In any event, the issue is not the interpretation of the language of Article 148 but its application in practice during the last thirty-two years.

I share Union's assertion that twenty three years of uninterrupted practice (no termination for failing in succeeding training in Locomotive Engineer) has given rise to a solid set of expectations on the part of the Union and its membership that such consequence will not be applied even if provided at article 148.11 (d) and Arbitrator Picher's *ratio* in **CROA&DR 1930** applies, with some adaptations, in this case:

(...) As is well established in the prior decisions of this Office, when a given interpretation of a collective agreement has been knowingly applied between the parties, without objection or grievance over a substantial number years spanning the renegotiation and renewal of the Collective Agreement in unchanged terms, the parties are taken to accept the established interpretation as part of their agreement, and the union which has acquiesced in the interpretation so applied cannot assert some different interpretation by means of a grievance.

The Union has established a consistent status quo from 1992 to 2015 in which employee's failure to pass Locomotive Engineer examinations was free of any opposition by the Company under Article 148. Article 148.11 (d) was not per say applied by the Company, others measures were convened when an employee failed to succeed training.

In **CROA&DR 2650**, elements of estoppel were described as follows:

1. A representation made by the Company either verbally or by conduct to the employee;
2. An intention on the part of the employer that the representation would be relied upon by the employee;
3. Actual reliance on the representation by the employee; and,
4. Detriment suffered by the employee as a result of his reliance.

In the case at hand, the Arbitrator finds that the doctrine of estoppel applies. The practice of more than thirty years engaged in by the employer can fairly be characterized as “conduct” amounting to representations to the employees, given that in case of failure to successfully complete training of Locomotive Engineer or Traffic Coordinator will not result in termination.

The sudden change of interpretation and application of article 148.11 in the case at hand is clearly detrimental, resulting in the termination of the employment of the grievor. Even if, the Employer’s interpretation could be considered as accurate, it could not change its practice, in all fairness to the Union and the employees without prior notice to the Union.

The Union and the grievor therefore acted accordingly to the practice and the termination of the grievor’s employment is in the case at hand unfair. Given the practice, the decision is unfair, as it reveals that a conductor can qualify only as Traffic Coordinator without any obligation to qualify for the higher level of Locomotive Engineer.

Having regard to these findings, the grievance is allowed. The Grievor is to be reinstated to his employment as a Conductor forthwith with compensation for all wages and benefits lost and without loss of seniority.

I shall remain seized in the event there arise any issues with the implementation of this Award.

January 20, 2016

MAUREEN FLYNN

ARBITRATOR