CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4545

Heard in Edmonton, March 15, 2017

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The allegation that the Company set up relief assignments at Port Robinson contrary to the terms of the 4.16 Collective Agreement.

JOINT STATEMENT OF ISSUE:

Assignments Relief 1 and Relief 2 are road switchers that relieve Train L531. The Union filed a grievance asserting that the inclusion of Train L531, which operates conductor only in the relief assignment makeup is contrary to what is set out in Article 12.17 and 33.5 of the 4.16 Collective Agreement.

It is the Union's position that the Company blatantly and indefensibly violated Articles 12.17, 27, 33.3, 49, 56, 85, 85.5 along with Addendum 123 of the 4.16 when the Company set up assignments under Article 12.17 to relieve assignments which are neither a road switcher or a yard assignment.

The Union seeks a remedy in this matter. The Union further seeks a cease and desist order preventing the Company from doing this in the future.

The Company's disagrees with the Union's position.

FOR THE UNION:
(SGD.) J. Robbins
General Chairperson

FOR THE COMPANY:
(SGD.) V. Paquet
Labour Relations Manager

There appeared on behalf of the Company:

V. Paquet – Labour Relations Manager, Toronto
D. VanCauwenbergh – Director Labour Relations, Toronto
C. Michelucci – Director Labour Relations, Toronto

There appeared on behalf of the Union:

D. Ellickson – Counsel, Caley Wray, Toronto
J. Robbins – General Chairman CTY C, Sarnia
J. Lennie – Local Chairman CTY C, Port Robinson

AWARD OF THE ARBITRATOR

This is an interpretation matter. The parties disagree over what the Employer is entitled to do under Article 12.17 of collective agreement 4.16. The parties agree the matter is properly before me despite an earlier procedural objection. They agree that the Collective Agreement language is binding. The Union refers to **CROA&DR 2886** at p. 3 and **CROA&DR 3209** at p. 3. The Employer argues the same point, but with a different result. It respects the fact that the express collective agreement terms must be followed, and not modified (see **CROA&DR 3350**, **CROA&DR 3456** and **CROA&DR 4138**). However, it notes the following observations about what is needed to restrict management's prerogative to assign work. In **CROA&DR 3359** the arbitrator said:

> Absent any such limitation in the language of the collective agreement, the Arbitrator can find no basis upon which it can be said the Company's prerogative to assign employees in the manner it did is prohibited or limited. If, as the Brotherhood's representatives appear to believe, the Company's method of crew assignment utilized is not consistent with the spirit underlying the Brotherhood's agreement to extended runs in 1995, in the absence of any clear language in the collective agreement dealing with that issue, that is a matter which cannot be resolved at arbitration, but must be the subject of bargaining.

In **CROA&DR 3595** the arbitrator said:

> In approaching this dispute the Arbitrator has fundamental difficulty with the interpretation of the Union as regards the meaning and scope of the establishment of assignments under article 27 of the collective agreement. …
>
> It is, of course, open to a company to effectively give to a union what might arguably be the most important decision making power with respect to the administration of its operations. That is what the Union effectively claims in the case at hand. There are few managerial prerogatives more important than the scheduling and assignment of

> work. A surrender of authority over such a key issue, however, should obviously be supported by clear and unequivocal language. No such language is drawn to the Arbitrator's attention in the case at hand.

I accept that, in asking what was intended by Article 12.17, it is appropriate to recognize the importance of management's prerogative to assign work, but that such a recognition does not displace express contractual terms.

The specific provision in question, part of Article 12 – Road Switcher Service, reads:

> 12.17 When service is required by the Company on the rest days of regular assigned Road Switcher Crews or Yard Crews, such may be performed by other regular Road Switcher or Yard Assignments, by regular Relief Assignments, by a combination of Regular Road Switcher, Yard and Regular Relief Assignments or by spare employees. When not protecting in the foregoing manner, Regular Relief Assignments will be governed as follows:
>
> (a) Except as otherwise provided in this Article, where regular relief assignments are established they:
>
> (1) May have 5 consecutive days work on the same shift: or
>
> (2) May have 5 consecutive days work on different shifts; and/or
>
> (3) May have different starting times on different days provided such starting times are those of the employees relieved.
>
> (b) The following combinations may be bulletined to provide relief where necessitated by Company operations:
>
> (1) Road Switcher Assignments/Yard Assignments
>
> NOTE: The Road Provisions shall be used where the relief assignment is predominately Road Switcher Service in make-up and

> from the Yard Provisions where the relief assignment is predominately Yard Service.

Several of the terms used in these provisions need explaining, based on their use in the collective agreement and more generally by the parties. Before that, it is helpful to describe the work, workplace and employees involved whose assignments given rise to this dispute.

Canadian National Railway has a terminal at Port Robinson, Ontario, on the Welland Canal, a few miles to the west of Niagara Falls. From that terminal, CN runs a freight train service into Buffalo, New York; a distance of 33 kms. That train is known by the identifier number 531, and travels the route seven days per week. Five of those days are staffed by two person crews under what is known as a "Conductor only" arrangement. During these five days, the Conductor may be called to work at any time within an 8 hour operating window in order to take the train out and back. There is no controversy in this hearing over the way these five days operate.

Rather, the controversy arises because of the way the Company sought to staff (or "protect") the two off days; the Monday and the Tuesday. It did so by creating two "Relief Assignments", that is five day shift configurations, each of which assigned one of the five days within the week's work to taking train 531 out and back to Buffalo. The days and times for each of the full assignments were:

Relief Assignment #1

Train 564 – 2300 start time – Thursday and Friday
Train 539 – 2100 start time – Saturday and Sunday

Train 531 – 1815 start time – Monday

Relief Assignment #2

Train 562 – 0700 start time – Sunday and Monday
Train 531 – 1600 start time – Tuesday
Train 563 – 1500 start time – Wednesday and Thursday

The Union described Yard Assignments, Through Freight and Road Switcher as "classes of service" but the Employer disputes that categorization. Rather, it says there are but two classes of service: "Road Freight" and "Passenger". Notwithstanding any misnomer, the parties use, and attach particular collective agreement obligations to, these terms. For this case the relevant terms, tasks and limitations appear to be:

Through Freight:

Persons employed in through freight are subject to "window period" start times. They are paid on the basis of distance, not at a set rate by the hour. These assignments are bulletined and bid upon by employees. The start time uncertainty is counterbalanced by the higher distance-based pay. For through freight service only, the Employer is allowed, although not required, to use a two person crew called a "Conductor Only" assignment. This reduces the normal crew by dropping off the Assistant Conductor, leaving only the Locomotive Engineer and the Conductor on the train.

Road Switchers:

Road Switchers are involved in switching cars on the road. They work for a set hourly rate and always form part of a three person crew. Their service is governed by Article 12 of the agreement (the article in issue). Road switcher assignments, the Union asserts, allot identified days of work with the hours specified, without “window period” call in times. A road switcher can be assigned to work out of the yard, for up to 50 miles (Article 12.4). The Port Robinson to Buffalo run falls within that limitation.

Yard Assignments:

Yard assignments are for work within a terminal, on a three person crew or, if a belt pack is employed, a two person crew. Persons thus assigned work a forty hour week with set start times and at an hourly rate.

Assignments:

While it is perhaps just noting the obvious, “an assignment” has at least one specialized meaning under this agreement. It includes the specific combination of work, shift schedules and so on that are “bulletined” and upon which employees bid for work based on seniority. That, rather than simply a direction to do a specific piece of work at a specific time, as a dictionary definition might suggest. I note this, not in an effort to define the terms, but to note that Article 12.17 must be read recognizing that specialized use.

In the fall of 2014, the Company posted the operation of Train 531 as a conductor only assignment. That posting was for running the train on 5 days from Wednesday to Sunday. The Union grieved the posting as a conductor only (two person) assignment. However, that grievance is being heard separately, and next month.

At the same time, and partly to cover the Monday and Tuesday runs of Train 531, the Company advertised the two 5 day assignments described above each "protecting" or covering off one of the two 531 runs, but each including different work for the other four days. The Employer assigned fixed start times to the two days used for 531 (18.15 Monday and 16.00 Tuesday). It notes that there is some additional flexibility even with fixed start times based on Article 12.11 which reads:

> 12.11 Regularly assigned Road Switcher shall have a fixed starting time. Such starting time may be changed by no more than 2 hours from the original start time, provided 24 hours' notice of such change is given to the assigned crew.

The parties take differing views of the purpose of Article 12.17, in part because of its history. The Union's view begins with the proposition that Article 12 underwent significant change, in 2001, so as to grant the Employer more flexibility under Article 12, which then and now relates, as the Article's title indicates, to Road Switcher Service. While the changes relaxed existing rules they did so only in respect to Road Switcher Service. Article 12.17 is, it argues, a result of the parties addressing their minds to how the Company will provide relief on the rest days of Road Switcher and Yard Assignments. In the Union's view, it is not and never was directed at providing relief for

Conductor Only Through Freight Service. The Company's position is that its rights generally and specifically under 12.17 not so restricted. The Company's view of the dispute is that it concerns its:

> … ability to create a Relief assignment that does not provide relief on the rest days of a regular road switcher crew or a regular yard crew. In this case, each Relief job operates as a stand alone road switcher assignment on one day.

It agrees that one day of each of the two Relief Assignments create for one day, "a standalone road switcher shift (531)". It also asserts that all of Relief Shifts 1 and 2 are paid and operated under the road switcher rates and conditions found in Agreement 4.16.

The Employer's argument downplays the significance of the reference to train identifier 531 in the two Relief Assignments. This identifier, it asserts is only an administrative requirement and does not describe the work to be performed.

The Employer refers to Articles 12.9 and 12.11 (quoted above) as defining the work week and starting times of "regularly assigned road switcher employees".

> 12.9 The term "work week" for regularly assigned Road Switcher employees shall mean a week beginning at the start time on the first day on which the assignment is bulletined. A work week of 40 hours shall consist of 5 consecutive 8 hour days with 2 consecutive days off in each 7 calendar day period.

The Employer argues that Relief Assignments 1 and 2 conform to Article 12.9, but clearly do not have fixed starting times (which for the purposes of 12.11 means the same start time for each of the five days of the week). This, in its view, is where Article

12.17 comes into play. Not only, it argues, does it modify Article 12.11, it gives the Company "more flexibility" to create Relief Assignments.

The initial paragraph of 12.17 gives the Company five options it "may" use (implicitly at least "to protect") the rest days of regularly assigned Road Switcher Crews or Yard Crews. It then, in the Company's view allows other options under 12.17 (a) and (b). May, it argues, means the options in the first paragraph are not mandatory. That much is clear. It then goes on to argue that "the language of Article 12.17 clearly contemplates an alternative basis for a relief assignment". It goes on to argue that 12.17 "clearly contemplates that a regular relief assignment may be required for purposes other than relieving the days off of a Road Switcher Crew or Yard Crew.

The Company's argument seem to alternate between two approaches as to why it can do what it has done with Relief Assignments 1 and 2:

> (i) by suggesting that it has that right unilaterally, through its right to manage unless restrained by the agreement, and
> (ii) suggesting that the second part of Article 12.17 gives it that right by creating an exception, or alternative ways, of staffing that go beyond creating yard crew or road switcher assignments.

However, if the second part of Article 12.17 imposes preconditions that, as the Union argues, have not been met, it is difficult to envision an interpretation where the general right argued for in argument (i) could override any specific limitation under argument (ii).

The Union's position is that the Relief Assignments referred to in 12.17(a) are intended to relate to assignments created to protect only rest days of regular Road Switcher Crews or Yard Crews. Further, the Relief Assignments built to provide that coverage must be for Road Switcher or Yard Crew work. The Union relies on the well-accepted principle expressed in the following extract from *Driedger* on the Construction of Statutes at p. 168:

> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is not express exclusion, exclusion is implied.

The Company, the Union alleges, seeks to justify their 5 day assignments by, in the Union's view, improperly combining the Train 531 Conductor Only assignments for one day each and Road Switcher Relief Assignments for the other four days. That is, on each of the other four days the employees are relieving, (protecting, or filling in) the days off of 5 day week Road Switching crews.

It is the Company's position that all the shifts on the two relief assignments, that is including the Train 531 days, are paid and operated under Road Switcher rates and conditions. The Union says, even if that is so, the single days for Train 531 are for an impermissible through freight service, and are not, on those days, protecting assigned rest days of regular road switcher or yard crews.

The Employer sought to bring those two one day components in Relief Assignments #1 and #2 into line with the fixed start times required (subject to the 2 hours flexibility) for road service assignments by having them start at 18:15 Monday and 16:00 Tuesday. The Union argues that, even with that, these relief shift starting times still, in its view, "are not those of the employees relieved" as required by 12.17(a)(3).

The Company's argument also is that Article 12.17, interpreted with its right to manage in mind, allows it to create 1 day stand-alone switcher assignments not specifically relieving any regular road switcher crew or yard crew.

I find the Union's interpretation of Article 12.17, more probable. I do so in the context of the entire agreement, accepting from the language of the clause, that its purpose was to free up prior restrictions to allow a greater degree of, but not unrestrained, flexibility. I find it fundamentally difficult to accept that Article 12.17, in either part, is directed at creating a relief assignment that does not relieve anyone that the Article is directed at relieving.

The Employer's argument that such an interpretation has the effect of reading out or rendering redundant the words "when not protecting in the foregoing manner" unconvincing. Subclause (a) still has scope to operate in that it provides broader options than the preceding paragraph alone, even if it is interpreted to mean that it is restricted to providing relief assignments for Road Switcher or Yard Crews, and not for work the

Employer seeks to cover on a free-standing basis. In my view, subsection (3) means the starting times of the road switcher or yard crew employees being relieved.

I further find persuasive the Union's argument that the requirement that "such starting times are those of the employees relieved" has not been met by these assignments even if they could apply to the relief of through freight assignments.. The Company has sought, at the same time, to say it has created permissible yard crew assignments with specified start times, and that they are the starting times of those employees relieved. That simply does not mesh with the fact the employees relieved, who for 5 days per week on Train 531 can be called to start within an 8-hour window.

Given this interpretation, the grievance is upheld and the Employer is directed to cease and desist from its use of the two Relief Assignments in question. The parties should address their attention to what, if any, further remedy is appropriate. Jurisdiction is reserved to rule on any further remedial issues should the parties be unable to agree.

April 10, 2017 ____________________________________

ANDREW C. L. SIMS
ARBITRATOR