CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4548

Heard in Montreal, April 11, 2017

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's violation of Articles 56, 61 and 85 of the 4.16 Collective Agreement along with the Extended Run Principals on December 10, 2011 when the Company failed to properly call Conductor Emery to work train Q10721-10 Toronto to Capreol. The Company mixed the crew and used a Capreol Conductor with a Toronto North Engineer causing Conductor Emery a loss of earnings and the Union seeks to have him made whole.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On December 10, 2011 the Company failed to properly call Conductor Emery to work train Q10721-10 Toronto to Capreol. Instead the Company called Toronto North Engineer Rod Kearney with a Conductor from Capreol, Claude Nadeau.

The Company should have utilized Mr. Kearney as the Extended Run Principals call for the crews not to mixed so as to get a true measurement of the monthly miles that are allotted to each terminal as set out in the Extended Run Principals.

The Union is seeking a significant remedy in accordance with Addendum 123 of the Collective Agreement in this instance as the Company continues to violate Article 51.

It is the Union's position that the Company blatantly and indefensibly violated Articles 56, 61 and 85 of the 4.16 Collective Agreement along with the Extended Run Principals when they called a Toronto North Engineer and Conductor from the terminal of Capreol to work as a crew on December 10, 2011.

The Union seeks to have the Company cease and desist from this practice of mixing the crews in violation of the 4.16 Collective Agreement and the Extended Run Principals.

The Company disagrees with the Union's contentions and declines the Union's request.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On December 10, 2011, the Company ordered train Q107 from Toronto to Capreol with an Engineer from the Toronto North Spare Board, and a Conductor from Capreol at the away-from-home terminal. The Union filed a grievance, alleging that Conductor Emery from the Toronto North Conductor's Spare Board should have been called instead.

It is the Union's position that the Company blatantly and indefensibly violated Articles 56, 61 and 85 of the 4.16 Collective Agreement along with the Extended Run Principles when they called a Toronto North Engineer and Conductor from the terminal of Capreol to work as a crew on December 10, 2011. The Union seeks to have the Company cease and desist from this

practice of mixing the crews in violation of the 4.16 Collective Agreement and the Extended Run Principles.

The Company does not agree with the Union's position and does not agree that any article of the collective agreement has been violated.

The Company objects to the Union's inclusion of arguments in their ex parte statement that were not raised during the grievance process; more specifically, that the crews should not be mixed so as to get a true measurement of the monthly miles that are allotted to each terminal. In any event, the Company does not agree. The miles are allocated on an individual basis.

The Company asserts that there is no collective agreement language to preclude the assignment of employees in the manner described above. Further, the collective agreement and the Principles for Extended Run Operations expressly recognize the right of the Company to select a home terminal or away-from-home terminal crew, as well as the critical importance of flexibility when crewing trains out of the away-from- home terminal.

The Company is not in agreement that Addendum 123 is applicable or was violated, as alleged by the Union.

FOR THE UNION:
(SGD.) J. Robbins
President

FOR THE COMPANY:
(SGD.) L. Williams
Labour Relations

There appeared on behalf of the Company:

L. Williams	– Manager, Labour Relations, Toronto
V. Paquet	– Manager Labour Relations, Toronto
R. Helmle	– Manager CMC, East
K. Morris	– Senior Manager Labour Relations, Edmonton
O. Lavoie	– Manager Labour Relations, Montreal

And on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
J. Robbins	– General Chairman, Sarnia
N. Drew	– Vice General Chairman, Horne Payne
J. Lennie	– Local Chairman, Port Robinson

AWARD OF THE ARBITRATOR

Nature of the Case

1. This decision must decide two issues. Procedurally, TCRC objects to CN's filing of an ex parte statement just three full business days before the arbitration.

2. On the merits, the parties dispute the proper interpretation of the Extended Run Principles (ERP) for a run in a specific geographic area (Union Submission; U-1; Tab 2 (Addendum 101) and Tab 3 (Principles for Extended Run Operations). TCRC alleged that

CN violated the ERP, since an extended run train's crew did not all come from the same terminal.

3. For the reasons which follow, the arbitrator has decided to grant CN leave to file its ex parte statement. On the merits, TCRC did not meet its burden of demonstrating that it had negotiated sufficiently clear language which would oblige CN to assign conductors and engineers based on their home or away-from-home terminals.

Procedural Objection: Filing an Ex Parte just prior to the arbitration

4. The parties' ex parte statements are reproduced above. On April 6, 2017, TCRC wrote to the CROA office, as well as to CN, objecting to the latter's April 5, 2017 filing of an ex parte statement:

> The Statement comes very late, after the Union had already prepared its brief and only three full business days before the hearing. Per the attached documents, the Union provided 48-hours' notice of its intention to progress Mr. Emery's file on June 10, 2015, some 22 months ago, after the Company failed to respond to the Union's proposed JSI in May 2015. The Union then provided its ex parte statement on June 12, 2015. The Union has had no notice that the Company was intending to finally participate through the submission of an Ex Parte statement.
>
> For these reasons, we write to advise the Union will be asking the Arbitrator to refuse the statement, and declined to consider the submissions and objections therein, pursuant to the CROA Rules of Arbitration. (sic)

5. At the hearing, TCRC argued that CN had not asked for this Office's permission to file an ex parte and, even if had, it was unfair for CN to add new arguments at this late

juncture. In the TCRC's view, since CN chose not to participate in this Office's process, the hearing should be limited solely to the issues raised in its ex parte.

6. CN noted that TCRC had filed its ex parte outside the time lines, though CN had consented to the late filing. CN also relied on CROA&DR 3491 which dismissed a similar objection:

> The Union objected to the filing of an ex parte statement of issue by the Company after the scheduling of this case and prior to the hearing. Arguments from both sides were heard. There is nothing in the rules of the CROA&DR to prevent a party from filing an ex parte statement of issue, with leave of the Arbitrator, after the other party has already done so. The Union's objection in that regard must therefore be dismissed.

7. In May 2004, a Memorandum of Agreement (MOA) was signed amending and renewing the 1965 founding agreement for the Canadian Railway Office of Arbitration (CROA). Article 10 of the MOA describes the parties' obligations to agree on a joint statement of issue (JSI). In the event the parties cannot agree on a JSI, an arbitrator may authorize a matter to proceed based on one party's submission:

> The joint statement of issue referred to in clause 7 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated. In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours notice in writing to the other may apply to the Office of Arbitration for permission to submit a separate statement and proceed to a hearing. The scheduled arbitrator shall have the sole authority to grant or refuse such application.

8. In practice, the parties, as a group, have been proceeding far more frequently on an ex parte, rather than JSI, basis and, perhaps for logistical reasons, arbitrators have not been called upon outside of formal hearings to grant authorizations.

9. The MOA encourages the parties to agree on the facts and the collective agreement articles which have allegedly been misinterpreted or violated. For disciplinary matters, the parties have further negotiated into their collective agreements an investigation process which ensures evidentiary transcripts appear in the record filed with this Office.

10. The grievance process, a JSI and transcripts, comparable to pleadings and discovery in a civil case, identify the parties' positions on the issues. Rather than engaging arbitrators to hold multiple day arbitration hearings for a single case, the record the parties create allows each monthly CROA expedited arbitration session to hear and decide, within 30 days, up to 21 grievances.

11. The signatories to the 2004 MOA expressed their concerns about the expanding use of ex parte statements as summarized in their letter dated December 1, 2004 sent to CROA arbitrators:

> As you are aware, traditionally in the CROA the principal means of proceeding before the Arbitrator has, historically, been by the filing of a joint statement of issue. The obligation to engage in the negotiation of a joint statement has, for many years, compelled the parties to cooperate in the identifying of issues to be presented to the Arbitrator, thereby avoiding allegations of surprise and the related risk of adjournments and delay. In recent years, for reasons attributable to both sides, there has been greater and greater recourse to the filing of ex parte statements, substantially occasioned by what the Committee views as an increasing tendency on the part of both sides to fail to make good faith efforts to conclude a joint statement of issue in a timely fashion.

12. The MOA signatories felt that the use of ex parte statements undermined the "conciliatory and cooperative efforts" in which the parties had traditionally engaged:

> In the result, in many relationships within the CROA&DR the use of ex parte statements has become the rule rather than the exception, contrary to what was originally intended in the memorandum of agreement establishing the CROA. On more than one occasion this has caused conflict between the parties with respect to timeliness and requests for adjournments. More fundamentally, a sustained departure from good faith efforts at fashioning a joint statement of issue has meant a departure from the positive influence of a long standing procedure that involved conciliatory and cooperative efforts between the parties as they proceed toward the hearing.

13. The MOA signatories expressed to the arbitrators their expectations, particularly given the wording of Rule 8 in the MOA:

> We ask the Arbitrator to take cognizance of the foregoing provision and, with a view to compelling the members of the CROA&DR to follow the spirit of cooperation contemplated in the memorandum, to instruct the General Secretary that ex parte statements of issue are not to be processed automatically, but are to be referred to the Arbitrator on a case by case basis for approval. It is the view of the Committee that the Arbitrator's approval to proceed on the basis of an ex parte statement of issue should be granted where the party seeking leave to file an ex parte statement can demonstrate that it made all reasonable and timely efforts to reach an agreement with the opposite party in the drafting of a joint statement of issue. Where it appears that such efforts were not made, the Committee would urge the Arbitrator to consider exercising the discretion not to allow an ex parte statement of issue to be filed, in keeping with the original intention of the memorandum.

14. While the ultimate decision on objections remains with the arbitrators, the parties' representatives have expressed their views on the use of ex parte statements. They have similarly noted that for CROA to work as it was intended, the parties are expected to identify and discuss the issues long before the arbitration. Such discussions are crucial to any expedited arbitration system.

15. After considering this background, the arbitrator has concluded that TCRC did not demonstrate sufficient prejudice to prevent CN from filing its ex parte just a few days prior to the hearing. This decision grants CN leave to file that ex parte. The arbitrator does dismiss CN's argument that TCRC cannot argue the issue involving the measurement of miles, given that it had had roughly 22 months to raise that concern following receipt of TCRC's ex parte.

16. This decision should not be taken as an indication that this Office will automatically allow any ex parte statement to be filed mere days before the hearing, or at the hearing itself. The ex parte's content will determine how this Office resolves objections.

17. CN's ex parte did not attempt to add a new issue which would have caught TCRC by surprise. This differs from a situation where a party raises a novel issue in a late ex parte, or in its hearing brief. Novel issues first raised at a hearing could cause prejudice and lead to an arbitrator upholding an objection, depending on the circumstances.

18. As with most adjudication systems, it is up to the parties to police the process, usually by way of formal objection.

Do the Extended Run Principles prevent CN from assigning a conductor and a engineer from different terminals?

19. TCRC represents both conductors and locomotive engineers, but under two separate collective agreements. Collective agreement 4.16 applies to conductors, while

collective agreement 1.1 applies to engineers. TCRC bought this grievance solely under the conductors' collective agreement, given Mr. Emery's position as a conductor.

20. In 1995, the parties negotiated the ERP, which allowed trains to go beyond their own subdivision to more distant away-from-home terminals. The instant case involved an extended run between Toronto and Capreol. TCRC argued that the ERP required that the train conductor and the train engineer come from the same terminal; an engineer could not be from one home terminal while the conductor came from an away-from-home terminal.

21. TCRC alleged that CN failed to call conductor Emery to work with an engineer from his home terminal, but instead called someone who was present at his away-from-home terminal. One of TCRC's arguments focused on CN's ability to track terminal miles, something which, in its view, the use of crews from different terminals would disrupt.

22. CN disputed the relevance of the tracking of terminal miles to the ERP interpretation.

23. TCRC did not persuade the arbitrator that it negotiated sufficiently clear language which would have obliged CN to call Mr. Emery, rather than the Capreol conductor who was present at his away-from-home terminal. There are several reasons for this conclusion.

24. TCRC had the burden of proof for this grievance. Two different collective agreements apply to conductors and engineers. It was not disputed that CN usually had the right to assign mixed crews to its trains. For TCRC to succeed, it needed to identify clear ERP language which restricted CN's ability to assign conductors and engineers for extended runs.

25. As a general principle, specific language will take precedence over more general language on the same issue. References to articles in the conductors' collective agreement, as well as to those in the engineers' collective agreement, help provide context. The ERP itself, such as at Q&A 6, references both collective agreements on occasion.

26. The parties dispute the meaning of the word "crew". The ERP uses the term "crew" in item 2(d):

> Crews will be run first in, first out at the away from home terminal, **however, the company may, at its option, select a home terminal or away-from-home terminal crew to man any train eligible for Extended Runs, without penalty**. This is provided to ensure, that all turns are worked in their time blocks and that layover times are minimized. (emphasis added)

27. TCRC argued that the use of the term "crew" in item 2(d) covers both conductors and engineers on an extended run. It cites the definition of the term "crew" from a CN glossary:

> Crew: General term used to describe the individuals working together as a unit, such as a train crew.

28. In TCRC's view, the use of the phrase "home terminal **or** away-from-home terminal crew" in item 2(d) obliged CN to assign conductors and engineers who operate out of the same terminal. As a result, given the engineer's home terminal of Toronto North, TCRC argued that CN ought to have chosen Mr. Emery from the Toronto North spare board, rather than a conductor who was at his away-from-home terminal.

29. CN argued nothing restricts it from using mixed terminal crews, especially when the individuals are governed by separate collective agreements. CN referred to specific uses of the word "crew", such as in article 29.7(b) of the engineers' collective agreement (Agreement 1.1), to distinguish between a train crew (conductors/brakemen) and an engine crew (engineers):

> When one or more members of the train or engine crew books rest en route, the locomotive engineer will, if he or she requires rest, take rest at the same time. If rest is not required at that time, the locomotive engineer will complete the tour of duty.

30. A similar provision, but for conductors, is found at article 51.6(c) of the conductors' collective agreement (4.16):

> When the locomotive engineer books rest en route, train service employees will, if they require rest, book rest at the same time. If rest is not required at that time, train service employees will complete the tour of duty.

31. TCRC mentioned that these booking rest provisions would not apply to Toronto-Capreol extended runs, since those runs are 12 hours in length.

32. TCRC also referred to ERP item 2(f) which concerns the exchange or trade off of turns. Item 2(f) includes the phrase “no trade off will be permitted between employees of different terminals”. In TCRC’s view, this further confirmed that there will be no mixing of crews.

33. The parties agreed on the general principle that the arbitrator must interpret a collective agreement as the parties drafted it: CROA&DR 3350. For several reasons, the arbitrator concludes the language the parties negotiated does not demonstrate that ERP item 2(d), or 2(f) for that matter, restricts, based on an employee’s terminal, CN’s selection of the conductor and engineer for extended runs.

34. Firstly, the language in item 2(d) appears to provide CN with enhanced flexibility, rather than less, by eliminating possible penalties when it assigns crews to extended run trains. The ERP contains penalties, such as the “100 mile penalty” (QA3). Penalties act as a deterrent for CN from holding employees beyond their maximum time.

35. Secondly, nothing in the language seemly restricts CN’s usual assignment practices under separate collective agreements. Item 2(d) can be applied when assigning conductors under collective agreement 4.16 and again when assigning engineers under collective agreement under collective agreement 1.1. The language the parties used does not indicate that the choice of a conductor under one collective agreement automatically determines CN’s choice of the engineer under a different agreement, and vice-versa.

36. Thirdly, item 2(d) does not reference the “protection of mileage” principle to which TCRC refers as the purpose behind the clause (Union submission; U-1; Paragraph 16). Rather, item 2(d) states that its purpose is to “…ensure, that all turns are worked in their time blocks and that layover times are minimized”.

37. Clearer language would be needed if the ERP were intended, based on individuals’ home or away-from-home terminals, to restrict CN’s usual discretion in assigning crews. The ERP could have indicated that CN must treat engineers and conductors as a single unit and cannot cycle them independently. But the current wording does not persuade the arbitrator that the parties mutually agreed on such a restriction.

38. The arbitrator is obliged to dismiss TCRC’s grievance.

April 28, 2017

GRAHAM J. CLARKE
ARBITRATOR