CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4575

Heard in Edmonton, September 12, 2017 and March 13, 2018

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Conductor B. Vickers was required to yard his train at Taschereau Yard in tracks including track MI06 where he was required to couple onto cars and handle cars not in connection with his train in violation of Articles 11.7 and 41 of the 4.16 Collective Agreement on February 2, 2015.

JOINT STATEMENT OF ISSUE:

On February 2, 2015 Conductor M. Vickers was ordered Conductor Only Belleville to Taschereau Yard on train Q10651 27. Mr. Vickers on arrival at Taschereau Yard was instructed to yard/switch out his train in the following manner.

Conductor Vickers was instructed by Yardmaster DJ to stack 87 cars of the head end traffic of his train onto existing cars in the north end of MI06, and then put the air to it, stretch it, and then ride the point approximately 60 car lengths into MI06 to tie onto more cars at the south end of the track, and then split the crossing in the middle of the pad.

There were Yard crews on duty at the time this took place.

It is the Union's position that the Company blatantly and indefensibly violated Articles 11.7, 41, 56, 61, 67, 85, 85.5 along with Addendum 123 of the 4.16 Collective Agreement. The Union is seeking an order that the Company cease and desist from the violation of Articles 11.7 and 41 of the 4.16 Collective Agreement.

The Union submits that the Company is in violation of the 4.16 Collective Agreement and arbitral jurisprudence. The Union further submits that the Company is in violation of CIRB 315 and the May 5, 2010 CIRB mediated settlement and agreement.

The Union is seeking a significant remedy in accordance with Addendum 123 of the 4.16 Collective Agreement in this instance as the Company continues to violate the Collective Agreement.

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

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

FOR THE COMPANY:
(SGD.) D. Larouche
Labour Relations Manager

There appeared on behalf of the Company:

D. VanCauwenbergh	– Director Labour Relations, Toronto
V. Paquet	– Labour Relations Manager, Toronto
J. Torchia	– Director, Labour Relations, Edmonton
J. Orr	– Senior Vice President, Operations, Toronto
C. Trolley	– General Manager, Operations, Toronto
B. Kambo	– Manager, Labour Relations, Toronto

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
J. Robbins	– General Chairman, Sarnia
J. Lennie	– Local Chairman, Port Robinson

AWARD OF THE ARBITRATOR

This grievance, like many before it, involves the ongoing difficulty in determining what road crews can be directed to do when they bring their trains into the destination yard, and what work must, instead, be assigned to the yard crews. Additional considerations arise if the arriving train car is a two person crew, with the limitations set out in Article 11.7.

While the issue in this case is important to both parties, the underlying dispute is relatively straightforward once one strips away ancillary details on which the parties agree.

The arriving crew is required to yard its train. If necessary, this can involve two tracks, with the Company being able to specify the point at which the cut is made. A payment is made if a cut is required. If the tracks are unoccupied there is no issue. However, what if railcars (not from the arriving train) are on the track to be used. Is or

can the arriving crew be obliged to couple onto those railcars and push them back so as to accommodate the length of the arriving train?

There is a preliminary objection that the matter has already been decided, authoritatively, during the grievance procedure. This is in addition to the Union's argument that precedents have already decided the merits of the case.

The Union says that the merits of the grievance were conceded by Mr. Larouche for the Employer in its Step III grievance reply dated July 10, 2015. The letter denied a couple of the Union's claims (a violation of Article 85 and harassment) but on the substance of the remaining matters in dispute it said:

> The Union is finally arguing that Addendum 123 is applicable and that a Remedy should be paid. In the instant case, the Company advised the officers involved in the event about our obligations towards Article 7, 11 and 41, and that coupling and shoving the cars onto others cars that were already in MI06 on that day was beyond what should have been asked to Mr. Vickers. (*emphasis added*)

The letter went on to say that:

> Based on the above, the Company considers that it took sufficient steps to correct the situation in the future, preventing reoccurrence. We therefore consider the grievance settled.

The Company is obliged to make such a response under Article 84.2(c). Once made, the Union maintains it is entitled to rely upon that response. Article 84.3 describes when and how a party may submit a matter for arbitration. Notwithstanding the Employer's assertion that it considered its response sufficient to settle the matter, the Union proceeded to arbitration, presumably (from the Joint Statement) because it wished to obtain a remedy beyond what Mr. Larouche's reply provided.

The preliminary question is really – Is the Employer bound by Mr. Larouche's statement that coupling and shoving onto the cars already on track M106 should not have been asked of Mr. Vickers? Had the Union accepted Mr. Larouche's proposed resolution of July 10, 2015, then that might have formed part of a binding settlement. However, it did not and is thus simply part of an unaccepted offer to settle. At best it is an admission against interest. Whether precedent leads to the same result is addressed below.

The Union obtained Mr. Larouche's agreement to a Joint Statement of Issues. This was done some two years ago. Mr. Larouche is no longer with CN. At the eleventh hour, a week or so before the scheduled hearing, CN advised that it wished to revise its position. The matter was adjourned. Discussions ensued about whether the underlying facts in the statement were correct and about whether the parties might agree on an amended joint statement or some other mechanism for focusing the issues. They were unable to do so and this case proceeds on the original joint statement. CN's main concern with the joint statement is that the description of the issue said that the two sets of rail cars on track M106 "were not in connection with [Mr. Vicker's] own train", a matter upon which it wanted the argument to remain open.

The (potentially) competing collective agreement provisions are Articles 41.1 and 11.7. Article 41.1 defines and protects yard work.

> Yard Service Employees' Work Defined
>
> 41.1 Except as provided in Article 12 of Agreement 4.16, the following will apply: switching, transfer and industrial work, wholly within the recognized switching limits, will at points where yard service

> employees are employed, be considered as service to which yard service employees are entitled, but this is not intended to prevent employees in road service from performing switching required in connection with their own train and putting their own train away (including caboose) on a minimum number of tracks. Upon arrival at the objective terminal, road crews may be required to set off 2 blocks of cars into 2 designated tracks.

The Union says the work in this case is to be carried out by yard crews. The Company says it is an integral part of the arriving crew's duty to yard their train; it is "putting [the road crew's] own train away on a minimum number of tracks." The Union says it goes beyond that because it involves coupling onto and moving cars not involving "their own train", and thus it is work that falls to the yard crews. The two person crew provisions read:

> 11.7 Notwithstanding the provisions of paragraph 11.4, trains operating in through freight service may be operated with a conductor but without an assistant conductor provided that:
> …
>
> (d) Notwithstanding the provisions of Article 41, such trains are not required to perform switching in connection with their own train at the initial or final terminal; if switching in connection with their own train is required at the initial or final terminal to meet the requirements of the service, (except to set off a bad order car or cars or lift a bad order car or cars after being repaired), the conductor will be entitled to a payment of 12 ½ miles in addition to all other earnings for the tour of duty.

Although this was in fact a two person road crew, the Employer's arguments about putting their own train away apply equally to two or three person crews.

CN describes the activity involved as follows:

> On arrival at Taschereau Yard, his final terminal, Conductor Vickers placed (yarded) his train in two tracks. Conductor Vickers pulled into track M104, where he left the cars of the tail end of his train. He then took the 87 cars on the head end and shoved those freight cars into track M106. In order to accomplish this, Mr. Vickers was required to

> couple onto two blocks of freight cars already on track M106 in order to ensure all of the cars were clear of the switch and to avoid fouling the tracks.

The TCRC breaks the tasks down into discreet activities, although there is essentially no difference between them as to what actually took place.

> Upon arrival at Taschereau Yard, Conductor Vickers was instructed to switch his train with other cars (stacking) which required the following additional moves:
>
> a. Pulled his train consisting of 127 cars into track M104 which was clear all the way to the north end of the track.
>
> b. Conductor Vickers detrained in order to count down the Locomotive Engineer using his radio and following the list of his train until they approached the 87th car and he instructed the Engineer to stop the train cutting off 50 cars leaving them behind in track M104.
>
> c. Conductor Vickers then closed the angle cock on the train line and pulled pin on the 87 cars from the head end of his train and instructed the Locomotive Engineer to pull ahead to clear the switch for track M106.
>
> d. After lining the switch and checking the switch points to ensure that the switch was properly lined Conductor Vickers instructed the Locomotive Engineer to back up (shove) to couple onto 12 cars that were already at the north end of track M106;
>
> e. Once they coupled onto the cars Conductor Vickers stretched the coupling, connected the air hoses and cut in the train line to release the brakes and before walking approximately 600 feet to the point while checking for handbrakes on the 12 cars on M106.
>
> f. When Conductor Vickers was on the point he instructed the Locomotive Engineer over the radio to shove the cars, which he was riding approximately 60 cars or 3,000 feet in order to make a coupling onto another 15 cars which were already at the south end of track M106;
>
> g. Again, Conductor made the coupling, stretched the coupling, coupled the hose bags (train line) and cut in the air to release the brakes and check for any handbrakes.
>
> h. After completing the coupling, Conductor Vickers was then instructed to make a cut for the crossing in the middle of track M106 while walking towards the locomotive consist.

> i. The Union estimates this process would have taken some 45 minutes or more to accomplish depending on the weather conditions.

Only the underlined activities are in dispute. The rest would have had to be performed in any event. The parties agree that the Company can specify the point of a necessary cut, and that if the arriving train is yarded in such a way that one or both of its segments initially blocks a crossing in the yard the arriving crew is obliged to make further cuts and move the railcars so that each crossing is clear. It is also common ground that the cars in question were all intermodal cars being parked on M106, which is a crane accessible "pad track", where the containers on the flat cars can be unloaded and placed for delivery by vehicle.

The Union does not argue that the Company was having these two blocks of cars on M106 hooked up or moved in order to assemble an outbound train. The Union's argument does not depend in any way on where the cars might later go, only on the fact they were not a part of the inbound train and had to be hooked up, tested and shoved.

The Union says that the entire train could have fit on M104, making the cut, and the need to shove the two blocks of cars, unnecessary. However, this is something, under Article 41.1, the Company is explicitly entitled to direct, and the grievor was paid a designated cut allowance for doing so.

The Company argues that:

> If the grievor were prohibited from coupling on to the two blocks of cars located on M106, he would be forced to leave his train in a position where it was blocking a switch and fouling other tracks.

And that:

> The Union is asserting that any coupling to cars constitutes impermissible switching when yarding a train.

The Union indeed says it is impermissible switching. Its answer to the first point is that it does not require the train to be left foul. Rather, it requires that the steps necessary to avoid that, which it indeed sees as switching, are to be performed by the yard crew and not by the inbound road crew. This might have been done in advance, shoving the two blocks further down M106, or by the yard crew taking over the activity at some point after the train arrived. It should, the Union says, in any event attract the payment the grievor claimed.

The Employer argues further that there is no language in the collective agreement which requires that designed cuts or the set off of two blocks of cars must be on clear tracks.

The Employer argues that the task of coupling on to and shoving cars occupying the track (M106) is not switching at all. It refers to **CROA 941** where Arbitrator Weatherill ruled, in an early and very brief decision:

> The question is whether or not the work performed by the grievors on the occasion in question was work “in connection with their train”. The work involved pushing a string of other cars to clear a switch, so that the grievors could then couple on to other cars, to complete their train. They did not perform “yard passenger switching”, and indeed did no switching at all, in my view. They simply made a very brief movement to push cars clear of a switch, which they needed to clear in the course of assembling their train. That did not constitute “a separate run”, as defined in Article 13.1. The work was in connection with their train, and the grievance is therefore dismissed.

With respect, this appears to have been superceded by the next decision. The most comprehensive CROA award dealing with this issue is Arbitrator Picher's seminal decision in **AD HOC 560** from 2004. It involved similar claims but in Western Canada, and with the UTU, not the successor TCRC. After canvassing an extensive history of dealings between the parties, and their positions, he began with a series of general principles in respect to "conductor only" work under that agreement. These included, at Part IV:

> The Arbitrator is satisfied that certain general principles can be drawn from the language of the agreement, and that it is a useful starting point to examine and outline those principles.
>
> The first question to be examined is the extent to which the conductor only service can be said to be a "hook and haul" operation. The phrase "hook and haul" is not to be found in the language of the conductor only agreement itself, or in the questions and answers. It would nevertheless appear that in the ideal "hook and haul" fairly describes the generally intended method of operation for crews running without an assistant conductor. …
>
> However, "hook and haul" is not an absolute rule. In that regard, particular attention must be paid to the language of article 15.2 (b) (iv) which reads as follows:
>
> > **(iv)** If switching in connection with their own train is required at the initial or final terminal to meet the requirements of the service, (except to set off a bad order car or cars or lift a bad order car or cars after being repaired), the conductor will be entitled to a payment of 12-1/2 miles in addition to all other earnings for the tour of duty;
>
> The foregoing article clearly contemplates situations in which conductor only crews are required to perform switching at initial or final terminals. Firstly, it is paramount that such switching must be "in connection with their own train". They are not to perform switching intended for the purposes of another train or yard movement. Secondly, such switching must be necessary "to meet the requirements of the service", subject to the exceptions expressly enumerated with respect to bad order cars.
>
> After careful consideration, the Arbitrator is satisfied that the phrase "the requirements of the service" can involve some regard for the

> requirements of the Company or of the Company's customers. I am compelled to conclude that the intention of the phrase "to meet the requirements of the service" obviously includes those circumstances where, by legal regulation or otherwise, certain cars or commodities, for example cars containing hazardous goods, must be marshalled at a certain position within the consist of a train. That, however, is not the limit beyond which switching can be performed in relation to their own train. In the Arbitrator's view it is significant that the parties have acknowledged, as reflected in Q&A 11, that it is for the Company to define "requirements of service", and that "present practices" are to continue, bearing in mind that in Western Canada road crews have traditionally performed some switching, for example in relation to misrouted cars, bad order cars or late releases, in respect of their own train in yards where yard crews are on duty.
>
> Thirdly, while the general rule is that a conductor only train strives to operate as a "hook and haul" movement to be yarded at the destination terminal by doubling over into a minimum number of tracks, the agreement does not itself prevent a crew from setting out cars at two or more different yards within a multi-yard terminal at its point of destination. Such an operation, however, is expressly recognized by the agreement as falling under the provisions of article 15.2 (b) (iv). In other words, such a set off or series of set offs is considered to be switching, and is payable at the rate of 12.5 miles in addition to final terminal time, as expressly reflected in Q&A 14 of the agreement.

After these general principles, Arbitrator Picher addressed himself to a select series of scenarios put forward to illustrate the issues in more specific cases. Two of those examples are of assistance here. In relation to movements prior to leaving a yard, he said:

> In the Arbitrator's view in the example of train 119 , the set off of three cars into track IN03 is in violation of the conductor only agreement. The setting off of cars within the initial terminal prior to departure cannot be fairly characterized as work or switching "… in relation to their own train … in the initial … terminal to meet the requirements of the service" within the meaning of article 15.2(d)(iv) of the collective agreement. The "train" of a road crew in through freight service is generally that consist of cars which they carry from the outer switch of the initial terminal to the outer switch of the final terminal. The assembling or disassembling of that consist is work in relation to their own train. The fact that the cars may have been placed in the Intermodal Yard for furtherance on another train does not bring the movement within the purview of the provisions of the conductor only agreement as they are not cars "in connection with their own train".

That scenario is similar but involves pre-departure activity. The principle appears to be consistent. In respect to the post-arrival situation he said:

> Tab 12 of the Union's examples book concerns train 356 from Jasper final terminalled at Edmonton on November 2, 2001. The crew was directed to pull their train into Bissel Yard and set off twenty-one cars to track BS02, while holding onto ten cars. They then placed those head end ten cars into track BS01 before re-coupling onto the twenty-one cars in BS02. They then proceeded to Walker Yard where they pulled through track CS56. Finally, they backed into track CS57, coupling to cars already in that track. In the Arbitrator's view the setting off of ten cars at Bissel Yard involved switching in connection with their own train within the contemplation of the conductor only rules. However, requiring the crew to couple onto cars already in track CS57 in Walker yard involved work which is not in connection with their own train. That work was therefore in violation of the conductor only agreement. (*emphasis added*)

This ruling appears directly on point in respect to the situation at hand.

I have also reviewed the decisions in **CROA 3082**, **3182**, **4025**, **4406**, **4425** and **AD HOC 606**.

The most recent decision relied upon by the Union is **CROA 4469**. Arbitrator Flynn described the facts as follows:

> Conductor Vanderwey was ordered from Belleville to Toronto on train Q107. When the Grievor arrived at the Brampton Intermodal Terminal ("BIT"), he was told to set off his cars into two separate tracks.
>
> He was instructed to pull into track Y203 and cut after a designated 80th car holding onto the DTTX 620029 (cut#1). After that, he was instructed to set out 44 cars into track Y204 holding onto the DTTX 655970 (cut #2). Mr. Vanderwey was then instructed to couple the remaining 36 cars onto the cars already present on track Y201 to push them further down Y201 to fit the remaining cars in said track.

The Union grieved that the coupling of the remaining cars on Y201 and pushing them down the track was not pertaining to the grievor's train and should have been conducted by yard service employees.

She too reviewed **AD HOC 560** and ruled as follows:

> … having Conductor Vanderwey couple the remaining cars of his train to a set of cars already in track Y201 and move the latter clearly was not "[…] switching required in connection with his own train" as the Company claims. In that situation, either the yard crew should have completed the coupling or the conductor should have been compensated for this additional workload.
>
> The question of whether the yard was congested or that there was insufficient space to put away the Grievor's train is in this case irrelevant. Any situation where a road service crew comes to work on someone else's train within a yard switching is forbidden by article 41, since it is not work pertaining to his own train.

The Company argues that **AH 560, CROA 4469** are "distinguishable", although the argument comes perilously close to "wrongly decided". It suggests that Arbitrator Flynn was influenced by the Union's claim that the coupling in that case was ordered "for its convenience and cost saving reasons". It goes further to say "the inference from Arbitrator Flynn's comments is that the coupling was for the purpose of constructing a new train. Both these arguments ignore her very particular reliance on the passage from **AD HOC 560** quoted above. The Company's reading of **CROA 4469** is too revisionist to be persuasive. I similarly find unpersuasive the argument here that the coupling and shoving of the cars was necessary to yard the train when in **AD HOC 560** it was not, drawing a distinction between "opererational efficiency" and "operational necessity". It ignores the fact that yard crews were available to eliminate any "necessity". The necessity

argument is also suspect, since the entire inbound train could have in any event been accommodated on track M104.

The Employer further argues that a 2006 Union circular from the UTU (and not the TCRC) supports its position. It says that Arbitrator Flynn did not consider this document, which reads:

> It was the action of shoving down to couple onto cars at the far end which Arbitrator Picher ruled was not work in connection with their own train and therefore a violation of the Conductor Only Agreement.
>
> If the cars had been at the east end, the crew would have been required to couple onto them and shove clear. That would not have been a violation.
>
> Simply put, if there is room to make the set off without coupling to cars in the track and you are instructed to couple on – it is a violation. <u>If there is insufficient room we are required to couple on and shove to clear.</u>

The Employer says this was "not available" to Arbitrator Flynn. Had it been seen as relevant at the time it could have been put before her. However, I accept that not only did it involve the UTU and not the TCRC, it referred to the Western Canada agreement, which has somewhat different provisions and practices.

The Employer also seeks to rely upon a comment by this arbitrator in **CROA 4560**.

> I find that what was required of Conductor McDonald falls within the contemplation of Article 7.9(b) and does not encroach on the work of yard employees under Article 4.12. All the work was in respect of the grievor's own locomotive power. There was no picking up or dropping off of other cars or locomotives, just the direction to set off their own locomotives at an eligible yard within the terminal. I do not see that aligning with and coupling to train X321 makes a difference to the basic analysis.

The work involved in that case was minimal, and primarily in relation to the locomotive being parked. While I understand the Employer's use of it as an analogy, the comment was not intended to alter the well-established jurisprudence set out above.

Having reviewed all the prior awards cited in detail, and particularly the seminal **AD HOC 560** and the very recent and virtually identical ruling in **CROA 4469**, I am persuaded that:

- The work involved in coupling onto and shoving the two sets of cars in M106 was yard crew work under 41.1, and

- The work involved was not work that could be assigned (at least not without extra payment) to the two person road crew under Article 11.7(d) as it was not required "to meet the requirements of service" nor was it "in connection with their own train".

I direct that the Employer cease and desist from directing such work in this manner and instead have it performed by a yard crew, or in some other manner provided for in the agreement. I uphold the grievance and reserve jurisdiction on any remaining remedial questions the parties cannot resolve between themselves.

April 19, 2018

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ANDREW C. L. SIMS, Q.C.
ARBITRATOR