CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4694

Heard in Montreal, July 11, 2019

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Grievance regarding the disputed wage claim (OA) submitted by Conductor R. Glabb for being withheld from his regular position to protect work as a Locomotive Engineer.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On March 19, 2018 Mr. Glabb was withheld from his regular Conductor's position in order to later protect work as a Locomotive Engineer on an ad-hoc trip and his Conductor's turn ran with a spare employee as per the LEEB agreement and calling rules.

March 20, 2018 Mr. Glabb was ordered to work as a LE on train 420-18 to Cartier and train 113-19 returning him to his home terminal. During the time that he worked as a Locomotive Engineer his turn as Conductor worked trains 101-18 and 420-18 by Mr. Brian Byce and trains 421-19 and 420-20 by Mr. Matt Burns.

Mr. Glabb submitted an "OA" claim for the earnings his regular position (Conductor) made as per his CBA.

This claim was denied as well as the Union's grievances.

Union Position

The Union contends that Collective Agreement (Article 76, and the 2007 MOS) as it pertains to the Locomotive Engineer Extra Board (LEEB) directs withheld employees to be compensated not less than the earnings they would have made on their regular position.

The Company states, "The Company maintains that the Grievor's claim was correctly declined on March 29, 2018 as the Grievor's compensation for this ad hoc tour was higher than his original assignment. Furthermore, Trains 421-19 and 420-20 were not part of the original assignment, cannot be considered as "lost wages." Accordingly, the Company denies this grievance."

This has no bearing, the language of Article 76 and the 2007 MOS is clear; "(6) If it becomes necessary to withhold a qualified Locomotive Engineer not working as such from their regular position in order to protect work as a Locomotive Engineer for an ad hoc trip, **they will be paid not less than the earnings they would have made on their regular position**, whether or not they are used." (*emphasis added*)

Mr. Glabb's regular position as a Conductor earned the amount it earned while he worked an ad hoc LE trip.

The Union seeks a finding that the Company has violated the Collective Agreements as indicated above and an order that the Company cease and desist its ongoing breaches as described.

The Union is seeking an order that the Company pay all outstanding claims for our grievances and recognition that these claims are justified under the terms of the Collective Agreement and/or other appropriate provisions. The Union is also seeking any further relief the Arbitrator deems necessary in order to ensure future compliance with the Articles in question.

The Company disagrees and denies the Union's request.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On March 19, 2018, Mr. Glabb was held from his regular Conductor's position in order to protect work as a Locomotive Engineer (LE.) His Conductor's turn ran with a spare employees as per the LEEB agreement and calling rules.

March 20, at 0550, Mr. Glabb was ordered as a Locomotive Engineer on train 420-18 to Cartier He returned home on 113-19 the morning of the 21. He booked off at 0450 the morning of the 21.

During the time he was working and/or was held as a Locomotive Engineer, Mr. Glabb's conductor turn went out with Brian Byce on train 101-18 on March 19, 2018 (0805) and returned on 420-18 on March 20 at 0618.

On March 20, the conductor turn went out a second time with Matt Burns on 421-19 (0845) returning on 420-20 on March 21 (1740.)Mr. Glabb then submitted a claim for both Conductor trips. The Auditor declined the claim stating "NO LOSS OF WAGES OR MILES OCCURRED." The amount in dispute is $585.00.

Company Position

Preliminary Objection: The Union has expanded their argument on the doorstep of arbitration. Absent from any past grievance correspondence is a request for the Company to "cease and desist." Additionally, the Union is seeking an order that the Company pay all outstanding claims for the Union's grievances. Again, this has not been brought forth previously. Not only is this expansion inappropriate, it is the Company's position that the nature of these claims require each and everyone to be evaluated on its own merits.

The Company respectfully requests that the Arbitrator find the Union has inappropriately added matters at the doorstep of arbitration contrary to CROA Rules and arbitral jurisprudence and that the Arbitrator rule that the Union's arguments be excluded from consideration for the purposes of this grievance.

Notwithstanding the aforementioned, the Company cannot agree with the Union's position. There has been no violation of the LEEB language from the 2007 MOS or Article 76 of the Collective Agreement.

Further, prior to the Union's submission of the Joint Statement of Issue, the relief requested was to compensate the Grievor the balance of wages owed. As communicated to the Union, the contended claim has been paid on a without precedent and prejudice basis, in accordance with the relief requested.

The Company therefore considers the grievance closed.

Union Position

The Union has filed their own Ex Parte Statement of Issue.

FOR THE UNION:
(SGD.) W. Apsey
General Chairperson

FOR THE COMPANY:
(SGD.) S. Oliver
Manager, Labour Relations

There appeared on behalf of the Company:

J. Bairaktaris	– Director, Labour Relations, Calgary
D. E. Guerin	– Senior Director, Labour Relations, Calgary

And on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, Calgary
D. Fulton	– General Chaiperson, Calgary
D. Edward	– Vice General Chairperson, Calgary

AWARD OF THE ARBITRATOR

In this grievance, the Union seeks payment to the grievor of the difference between his earnings from his work on an ad hoc trip as a Locomotive Engineer and the amount he would have made in his regular Conductor's position. The Union also sought the following relief: 1) an order that the Company cease and desist its "ongoing breaches" and an order that the Company pay all outstanding claims and recognition that such claims are justified under the terms of the collective agreement.

The Company raised a preliminary objection to the hearing of the claims noted above, except for the grievor's claim for payment further to the ad hoc trip. At the hearing of this matter, the Union indicated that it was not proceeding with the claims which were objected to. Accordingly, those matters were not dealt with. It was also noted that the company had paid the grievor's claim on a without-prejudice basis. The question now to be decided is whether or not the claim was well-founded.

The facts are not in dispute. The grievor, whose regular position is as a Conductor, is also qualified as Locomotive Engineer. On March 19, 2018, he was

withheld from his regular Conductor's position in order to protect work as a Locomotive Engineer on an ad hoc trip. This was in accordance with the Locomotive Engineer Extra Board Agreement and the calling rules. On March 20 he was ordered to work as a Locomotive Engineer on Train 420-18 to Cartier and Train 113-19 returning to his home terminal, and he carried out those duties. The grievor's earnings during the period he was held from his Conductor position and worked as an Engineer totalled $843.12.

During this period, the grievor's "conductor turns" are said to have been filled by two employees, one working Trains 101-18 and 420-18 and the other Trains 421-19 and 420-20. The total amount earned by these two employees was $1428.12. The difference between the grievor's earnings, and the earnings of the other two employees during the period when the grievor was held off his regular position is $585.00.

This matter is governed by Article 113 of the consolidated collective agreement, "Locomotive Engineer Extra Board". Article 113(6) is as follows:

> *If it becomes necessary to withhold a qualified Locomotive Engineer not working as such from their regular position in order to protect work as a Locomotive Engineer for an* ad hoc *trip, they will be paid not less than the earnings they would have made on their regular position, whether or not they are used. Payments made under the provision of this clause will be used to make up any guarantee to which an employee may be entitled. Earnings, converted to miles, are chargeable for the purpose of calculating a maximum monthly mileage.*

It is the Union's contention that the grievor is entitled to be paid the difference between what he earned as an engineer and what the other employees earned while he

was held off that position, that is, “not less than the earnings [he] would have made on [his] regular position”. The question is, what earnings would the grievor have made had he not been held off his regular position? In its response at Step 2 of the grievance procedure the Company argued the following:

> *Since [the grievor] made his engineer trip during which time his conductor turn went out as well, [the grievor] is not entitled to excess monies while he himself was currently working under the AFHT. Regardless if a turn went out again while he was working as an ESB.*

The second sentence of this reply is, I think, not necessarily correct. The question is what work the grievor would have done had he not been held out. The Union refers to the grievor’s “turn” as including both of the away-and-return runs taken by the two other employees. These runs did not overlap in time, and it would have been at least theoretically possible for the grievor to have taken them both (there is no question as to his entitlement to the first – Trains 101-18 and 420-18). The Company asserts that the second run was not part of the grievor’s regular assignment. There appears to be no doubt that the grievor would have been entitled to any difference between the earnings of that regular assignment and the grievor’s earnings as an engineer (although in this case, that difference was in the grievor’s favour).

As well as arguing, in effect, that the grievor’s regular assignment or regular position was on Trains 101-18 and 420-18, and that Trains 421-19 and 420-20 were not his regular position, the Company argued that the grievor would not have, or very likely would not have taken out trains 421-19 and 420-20. That is because, in the Company’s view, experience showed that the grievor usually booked a lengthy period of rest at the end of a trip, and since less than three hours’ rest was available between the arrival of

Train 420-18 and the departure of Train 421-19, it would not be expected that the grievor would in fact have made that second run, so that the earnings he would have made had he not been required to protect work as a Locomotive Engineer would not include earnings from that second trip.

The Union's response to this argument was to point out that under the collective agreement the Company would not be entitled to enforce rest on an employee. The Company's argument, however, was based on what it considered to be the probabilities of the situation – experience suggesting the grievor would probably have booked a substantial period of rest. In my view, however, while there may be circumstances where an employee in the grievor's situation (for example, where the employee is held for a protected period of time), loses a second trip to which he is clearly entitled, so that he would indeed properly count the earnings of that second trip as part of the earnings he would have made had he not been held out, the question is whether there is in fact such a clear entitlement.

The grievor's regular position was in the Conductor Pool for Engine Service Brakemen. As such, it is not questioned that he would have worked on Trains 101-18 and 420-18, had he not been withheld to protect the Locomotive Engineer position. It is not necessary to decide whether or not the grievor "would have" worked the second position which came up during the period he was held out of his regular position, because it has not been established that the grievor would in fact have been entitled to work that second position (Trains 421-19 and 420-20).

There are two conflicting assertions before me. The Union refers to each of the two trips taken by the other employees as “his Conductor’s turn”, referring to the grievor, and to the two trips as the grievor’s “first Conductor turn” and “second Conductor turn”, as well as to his “regular Conductor tours of duty”. The Company, however, asserts that the second “turn” – Trains 421-19 and 420-20 – were not part of the grievor’s original assignment.

The onus is on the Union to show that, on the balance of probabilities, the grievor would have worked on the second turn had he not been held for other service. There is no evidence before me to support either party’s assertions in this regard: no indication, for example, of a successful bid, or of a place on a calling list or a dispatcher’s record. It may be said that it is unlikely the grievor would have worked the second turn, and it has not been shown that he was entitled to it.

For the foregoing reasons, the grievance is dismissed.

July 23, 2019

J. F. W. WEATHERILL
ARBITRATOR