CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4699

Heard in Edmonton, September 17, 2019

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

A time claim grievance progressed on behalf of Locomotive Engineer G. Mann, of Prince George, B.C. on April 12, 2014, alleging a violation of Articles 11, 12, Addendum No. 51 when the Company declined payment for terminal time for being transported to her personal vehicles after going off duty.

JOINT STATEMENT OF ISSUE:

On July 4, and on July 12, 2013 the Company issued notices, CATS Broadcast Message #184928 and General Notice No. OPR:62 respectively, to their running trade employees, which directed that upon arriving at the final objective terminal(s) crews were to go off duty at the yard office of bunkhouse(s) located at that location.

The Union's position is that this message was a change of policy directed solely at the Away from Home Terminal crews arriving at Prince George in order to have these crews go off duty prior to being transported to the Company provided rest facility. The Company's position is that this message applied to all crews arriving at Prince George.

As a result of the Company's instruction, Prince George Locomotive Engineers were required to go off duty at the designated yard, without any compensation when they were transported to their original reporting location, where their vehicles were located.

On April 12, 2014, Ms. Mann arrived at her home terminal of Prince George on train A46052-12 and registered off duty at the Prince George South Yard office as compelled to do. Ms. Mann was then transported to the Prince George North Yard location, where she had commenced her outbound tour of duty. Ms. Mann claimed 20 minutes at through freight rates, using the "IP" process for the time occupied travelling between the South Yard and the North Yard. The time claim was declined.

The Union contends that the application of the new Policy, is improper, unreasonable, and is in conflict with the Collective Agreement. It is further the contention of the Union that this action by the Company is a violation of Article 11 and 12 of the Collective Agreement 1.2 and contrary to many years of past practice. The Union's position in this matter is Ms. Mann should remain on final terminal time until she had been returned to her original starting point where her vehicle was located.

The Union's further position is that the Company unilaterally changed the long-standing interpretation of Article 11 and 12 dating back to 2005 to compel Prince George home terminal

crews arriving back at their home terminal, to go off duty at a location stipulated by the Company, which was not the location that the employees started at, on the previous tour of duty.

Moreover, it is the position of the Union that the change in Company policy as set forth in the instructions contained in the aforementioned Broadcast Message and General Notice are a radical departure from long-standing historical past practices, and are in this respect a violation of Addendum No. 51 of Collective Agreement 1.2.

In the alternative, and without prejudice to the Union's aforementioned position, it is the position of the Union that the principal of estoppel is applicable in these circumstances and the Company is estopped from implementing this change.

The Company's position is that Collective Agreement 1.2 does not provide any right for home terminal crews to go off duty at specific yards within a terminal. In addition, the Company maintains that Collective Agreement 1.2 does not provide for compensation in such circumstances.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) K.C. James	**(SGD.) D. Crossan** (for) **K. Madigan**
General Chairperson	Senior Vice President, Human Resources

There appeared on behalf of the Company:

D. Crossan	– Manager, Labour Relations, Prince George
V. Paquet	– Manager, Labour Relations, Toronto
S. P. Paquette	– Director, Dispute Resolutions and Labour Standards, Montreal
S. Blackmore	– Senior Manager Labour Relations, Edmonton

And on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
M. King	– Senior Vice General, Chairmon, Edmonton
K. C. James	– General Chairman, Edmonton
K. Ilchyna	– Local Chairman, Winnipeg
D. Reeves	– Local Chairman, Edmonton

AWARD OF THE ARBITRATOR

This matter has a protracted history. Grievances were filed by both the LE and CTY groups and were heard before this Office several years ago; however, no decision was rendered and the Arbitrator was subsequently declared *functus.*

The cases were then re-scheduled to be heard at the April 2019 CROA hearings before Arbitrator Moreau. The facts, the Company's past practice, and the matter grieved, were the same in all material respects as between the two groups. While the

Collective Agreement provisions and arguments differ somewhat, the Union – as pointed out in its Submission - continues to rely upon the exhibits, argument, caselaw, and past practices contained in the CTY brief and materials filed with this Office. Although there was insufficient time to present the LE case before Arbitrator Moreau, he did render a decision **(CROA 4678**) in the CTY matter.

A reading of that case reveals that the material facts therein are identical to the case at issue. This conclusion is critical in that Arbitrator Moreau - based on the same material facts which are before me now - concluded that the Union had established that the Company's past practise estopped it from:

> "… *not paying terminal time for the time it takes to transport employees to the location where they reported on the outgoing tour of duty and registered off duty until such time as the parties return to the bargaining table to renew the current collective agreement.*

The parties' submissions and Joint statement of Issue make it apparent that the material facts in this case are identical to the following facts found by Arbitrator Moreau in **CROA 4678**:

> *In February 2006, as a result of changes to the yard-to-yard agreements, CN permitted trains that would otherwise have stopped at the South Yard to be directed through on to the North Yard, where they were secured. The crew would then taxi back to the South Yard, which was their original reporting location, where they would perform the necessary reporting in the CATS system, book rest and return home. Similarly, crews whose original reporting location was the North Yard and were required to take their trains back to the South Yard would follow a similar check-out routine once they were transported back to the North Yard. The Union points out that this practice continued for almost nine years; that is, the crews would be returned to the location that they originally reported for duty (where typically their lockers, street clothes and vehicles were located) and book off in the CATS system at that location. They were compensated for terminal time for this entire period. The past practice has been consistent to the benefit of both*

> *crafts. The adverse impact of the Company's change in the past practice on all crew has some similarities. Those include a loss of contractual and statutory rights.*

A matter, raised in this case, which did not arise in **CROA 4678,** is the material fact that during the 2015 round of negotiations, the Union proposed an amendment to add a "new" Article to the Collective Agreement provision as follows (**Company Tab 15**):

> *"Item 19 – Designate Point for Going on and Off Duty – Road Service*
>
> *Add a new article to Collective Agreement 1.2 and former BCR.*
>
> *Locomotive Engineers shall have a designated point for going on duty and a designated point for going off duty as governed by local conditions. A Locomotive Engineer shall be released from duty at the point from where he went on duty at the home terminal."*

The Company argues that the Union's attempt to negotiate a new provision in the Collective Agreement - which specifically addressed the issue at play in the present case – confirms the fact that there was no existing practise from which estoppel could flow. The Union (through Mr. James and Mr. King) submits that it tabled the proposal in attempting to resolve the existing grievance in the present dispute and withdrew it, without prejudice, when it failed in order to await the results of the grievance at arbitration. The Union says that its intention in that respect is corroborated by the fact that it did not raise the proposal again in the 2017 round. The Company (through Mr. Torchia) asserts that the proposal was turned down at the 2015 round but was not withdrawn on a without prejudice basis.

It is not an uncommon practise for parties to attempt to resolve existing grievances while at the collective bargaining table. Often, they succeed. On other occasions – where they do not - they resort to their rights as they perceive them under their existing Collective

Agreement. In the circumstances – especially having regard to the conflict in the evidence which I am unable to resolve in the absence of *viva voce* testimony – I conclude that the Union's tabling of the proposal constituted an attempt to resolve the issue on the basis I have described. In any event I am unable to draw the inferences suggested by the Company so as to materially affect the factual conclusions drawn in **CROA 4678.**

Having determined the facts as he did, Arbitrator Moreau addressed the estoppel argument and concluded as follows:

> *In the alternative, the Union submits that the Company's action of paying the conductor until they reach the yard where they reported for duty, as opposed to the yard they delivered their train, is a long-standing practice. The past practices and representations of the Company over this extended period, and the Union's detrimental reliance on the Company's representations, estops the Company from altering the CROA&DR 4678 – 5 – practice in question. The Union also alleges a breach of Addendum 36 that states "questions of interpretation" required consultation with the appropriate General Chairman, which did not occur in this case.*
>
> *…*
>
> *The Company points out in that regard that conductors are paid on a minute-by-minute basis, pursuant to article 24.3, from the time the engine passes the outer switch until the conductor registers off-duty. Article 24.4 reinforces that the outer switch is the "switch normally used in heading into the yard." The Company notes that the Union is unable to point to any provision in the collective agreement that states crews must be permitted to go off duty at the same location where they started their trip.*
>
> …
>
> *I disagree with the Union's interpretation that a reading of article 24.3 can only be reasonably interpreted to mean the terminal from which the employee departed; that is where they start and end their day. The word "terminal" does not in the context of article 24 preclude a finding that it includes the BCR South Yard simply because the BCR South Yard was once treated as a distinct territory. The qualifying word "final" (i.e. "final terminal") also does not lead to the conclusion that it refers to the yard point where the tour began. That a terminal can contain one or more "yards" is not unusual and occurs in a number of major centres in Western Canada, including Edmonton and Winnipeg. The Company's position is that article 24 is not ambiguous because it states*

that the conductor is required to register off duty after passing the outer switch heading into the yard.

In my view, the word "final terminal" is capable of more than one interpretation in the context of the two Prince George yards and for that reason creates an ambiguity. In order to resolve the ambiguity, the principles of interpretation permit a review of past practice in order to determine whether there is an evidentiary foundation for an estoppel.

I note the comments of Arbitrator Picher in CN v. Teamsters Canada Rail Conference (2010) 196 L.A.C. (4th) 207 where he discusses at paragraph 36 the principle of estoppel in a case involving an allegation by the Union that the Company wrongfully utilized the material change provisions of the collective agreement to effectively compel employees to work outside the scope of the territories governed by their collective agreements. In upholding the grievance, he comments as follows on the application of the doctrine of estoppel:

> *If I am incorrect in my interpretation of these collective agreements and the limitations of the Company's prerogative with respect to implementing a material change with trans-territorial consequences, I would also be inclined to accept the Unions' submission with respect to the operation of the doctrine of estoppel…More significantly, notwithstanding that it has implemented many changes system wide for decades, the Company has never previously asserted that it can assign employees from Eastern Lines to work on Western Lines or vice versa. At a minimum, its actions and practice over many years must, I think, be taken as a representation by conduct that even if the material change provisions of the collective agreements can be properly interpreted as allowing trans-territorial assignment, it has effectively represented to the Union that it would not make any such assignment, whether in the implementation of extended runs or otherwise.*

For years, employees in this case remained on duty while accessing Company appointed transportation and then went off duty at the location where they originally started their outbound tour. As the Union pointed out in their grievance dated May 25, 2014: "This arrangement continued without dispute for over eight years". I also note Mr. Meaney's comment in his investigation at Q/A 13 where he states in response to a question about his knowledge of the General Notice of July 13, 2013: "I've worked at the railway for over 30 years and always tied up where I went on duty". Similar to the facts in the case cited above, even if the Company is correct that the collective agreement does not say that crews must be permitted to go off duty at the same location where they started their trip, that is effectively what the Company has represented to the Union since 2005. The Company through its conduct beginning with the purchase of BC Rail has accepted that employees are to be paid through to the point where they first reported for duty. The Union has relied on that conduct and continued to submit claims for time required to reach the location in the

> *yard where they started their trip. It does in my view make some sense for the Employer to have accepted these claims for transportation time over the years given that these are the yard points where the employees parked their cars and then used their assigned lockers from that location to change into their work clothes.*
>
> *The grievance is upheld. The Company is estopped from not paying terminal time for the time it takes to transport employees to the location where they reported on the outgoing tour of duty and registered off duty until such time as the parties return to the bargaining table to renew the current collective agreement.*

What weight is to be attributed to Arbitrator Moreau's decision?

The prevailing view in that regard is set out in the oft quoted comments of Arbitrator Laskin (as he then was) In *Re: Brewers' Warehousing;* 5 L.A.C.1797; at 1798:

> "*It is not good policy for one Board of Arbitration to refuse to follow the award of another Board in a similar dispute between the same parties arising out of the same Agreement where the dispute involves the interpretation of the Agreement. Nonetheless, if the second Board has the clear conviction that the first award is wrong, it is its duty to determine the case before it on principles that it believes are applicable."*.

As discussed in *Westfair Foods Ltd. and U.F.C.W., Local 401; (2001), 99 L.A.C. (4th) 117*,

> *Most Canadian Arbitrators ascribe to the view that while there is no operative doctrine of stare decisis, prior awards in similar cases should be given substantial persuasive weight. However, in assessing the precedential effect of these decisions, arbitrators generally distinguish between the binding effect of past awards under the same agreement between the same parties and the impact of awards of other arbitrators in like circumstances.*

In the present case, although the Union is different, all the parties are intricately connected from a labour relations perspective. The Employer is the same corporate entity; the same Yards are used by all employees affected; the same CATS Broadcast messages equally affected the employees of both Agreements; and, the bargaining

structures for both parties are similar. Furthermore, the decision in **CROA 4678** is based on findings of fact which affect both Agreements equally. While the determination in **CROA 4678** is not strictly binding upon me, Arbitrator Moreau's decision represents a prior award stemming from identical circumstances where the operative language of the collective agreements has the same effect and the interpretational issues are equally identical.

The Company provided a comprehensive and compelling submission urging me to conclude that estoppel neither existed nor applied in the circumstances before me. However, the facts and issues raised therein are nevertheless largely identical to those addressed by Arbitrator Moreau in **CROA 4678**, upon which he concluded that estoppel applied. For those reasons his award represents a compelling prior award that must be given substantial persuasive weight in the circumstances.

While there is no operative doctrine of *stare decisis,* for the CROA Model to operate as intended it is critical that decisions rendered by Panel Arbitrators must be both consistent and regarded as compelling precedents particularly with regard to grievances where the facts, issues and the interpretational considerations are identical.

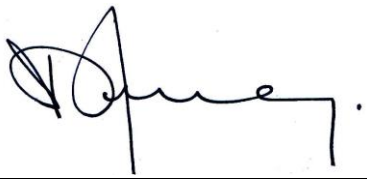
With respect, while I fully understand the Company's arguments surrounding both the provisions of the Collective Agreement and estoppel, the issues raised by the present grievance have already been addressed and answered by the decision in **CROA 4678.**

Accordingly, I adopt the decision in **CROA 4678** and, based on the determinations and conclusions arrived at therein, find that:

> *The Company is estopped from not paying terminal time for the time it takes to transport employees to the location where they reported on the outgoing tour of duty and registered off duty until such time as the parties return to the bargaining table to renew the current collective agreement.*

The Grievance is allowed.

I shall remain seized with respect to the application, interpretation and implementation of this award.



October 31, 2019

RICHARD I. HORNUNG, Q.C.
ARBITRATOR