CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4895

Heard in Montreal, January 11, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The appropriate Remedy in accordance with Article 85 and Addendum 123 of the 4.16 for the agreed violations of Articles 11.7 and 41 on September 9, 2015.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On January 4, 2016 the Union filed a grievance on behalf of Conductor Jones ordered in conductor only service on train A43431 09. When Conductor Jones arrived he discovered his train was in more than the "minimum number of tracks at the London Yard.

Conductor Jones was instructed to assemble his train at the initial terminal, from three (3) tracks (CL04, CL01 and CL05). Conductor Jones was also required to set off 19 cars into track CL04, claiming a violation of Article 11.7 b) and 41 of the 4.16 Agreement.

The Company is in agreement that given the circumstances of the case a Remedy was warranted, however, the Parties could not agree on an appropriate Remedy.

Union's Position:

The Union contends that the Company admitted to the violation of Articles 11.7, 41 and 85 and agrees that a Remedy is applicable in accordance with Addendum 123.

The Company and Union have failed to reach an agreement in accordance with Addendum 123 of the 4.16 Collective Agreement on the appropriate Remedy.

The Union seeks to have Conductor Jones made whole in this instance. The Union further seeks to have the TCRC CTY London Division made whole and paid for the two lost work opportunities on September 9, 2015 as a result of the violation of Article 41.

The Union is also seeking a significant Remedy as a result this admitted violation of Article 11.7, 41 and 85 and arbitral jurisprudence in accordance with Addendum 123.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Dispute:

The Company's alleged failure to have Train A43431 09 on the minimum number of tracks at the initial terminal on September 9, 2015.

Exparte Statement of Issue:

Conductor Jones was ordered in conductor-only service on train A43431 09 at 1545 on September 9, 2015. When Conductor Jones arrived, he discovered his train was in more than the "minimum number of tracks" at the London Yard.

Conductor Jones was instructed to assemble his train at the initial terminal, from three (3) tracks (CL04, CL01 and CL05). The train was a total of 2661 feet including the engine.

The Union filed a grievance directly at step 2 claiming a violation of Articles 11.7 b) and 41 of the 4.16 Agreement.

The employee requested and was paid a PI under article 11.7d.

The Company indicated that it would accept to settle the claim, however, the Parties could not agree on an appropriate amount.

The Company's Position:

The Company first considers the grievance to be inarbitrable given that the Union did not follow the steps of the grievance procedure by failing to file a grievance at Step One of the grievance procedure in accordance with the 4.16 Collective Agreement.

In the alternative, the Company denies the Union's contentions and disagrees with the Union's position. The Company denies that the Company blatantly and indefensibly violated the agreement. In the instant case the requirement to assemble the train from multiple tracks falls within the definition of switching "to meet the requirements of service" as the work assigned was in connection with the grievor's train and based on the circumstances leading up to the start of the assignment, the Company disagrees that this was a violation of the Collective agreement. Additionally, the London terminal did not have any yard assignments at the time of this assignment. The agreement 4.16 provides for a 12.5-mile payment, which the grievor claimed and was compensated. Lastly, the traffic came into the yard shortly before the Grievor's tour of duty began which is a clear exception to the minimum number of tracks for a conductor only crew.

In the further alternative, the Company's without prejudice offer of a 100-mile settlement consistent with applicable caselaw and past practice was unreasonably declined by the Union. An appropriate remedy in this matter, should it be ordered, is the equivalent of 100 miles.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Robbins	**(SGD.) K. Chapados**
General Chairperson	Specialist Director, Employee Relations

There appeared on behalf of the Company:

W. Hlibchuk	– Legal Counsel, Norton Rose Fulbright, Montreal
A. Borges	– Labour Relations Manager, Toronto
F. Daignault	– Director Labour Relations, Montreal
A. Cummings	– Senior Manager Labour Relations, Montreal – Observer

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chaiperson CTY-C, Hamilton
G. Gower	– Vice General Chairperson, CTY-C, Hamilton
E. Page	– Senior Vice General Chairperson, CTY-C, Hamilton
R. Donegan	– General Chairperson, CTY-W, Saskatoon
M. Anderson	– Vice General Chairperson, CTY-W, Edmonton
M. Kernaghan	– General Chairperson,Trenton

AWARD OF THE ARBITRATOR

Context

1. The dispute between the Parties arises from Agreements made concerning Conductor Only Freight trains. Essentially, the number of train crew was reduced, subject to certain yard service restrictions, with the restrictions themselves being subject to certain exceptions. Since the signing of the original Agreement in 1989, the application and implementation of the Agreements has been a source of considerable litigation, both before CROA arbitrators and before the Canadian Industrial Relations Board.

2. The present dispute involves a Conductor ordered to do certain yard service work to assemble his train, and whether that work infringes the Agreement, or is saved by one of the exceptions.

Issues

A. Is the present matter arbitrable?

B. Does the order given to the grievor infringe the Agreement?

C. What is the appropriate remedy?

A. Is the present matter arbitrable?

Position of the Parties

3. The Company takes the position that the matter is not arbitrable, as the Union failed to file a Step 1 grievance. It submits that the purported time slip filed by the Union at Tab 14 of its documents is in fact a Company document made in November 2023 to retract a previous payment made to settle the present matter. Moreover, the Step 2 grievance found at Tab 15 of the Union documents has the same claim and violation date. The failure of the Union to proceed according to the agreed upon grievance process has precluded the Company from making a proper decision at the outset of the dispute.

4. The Union submits that the grievor did file a Step 1 claim in the CATS system. It submits that if there are any technical problems with its filing, the arbitrator has the authority under s. 60 of the Code to cure any defects. This approach has been upheld by the Ontario Court of Appeal in Blouin Drywall Contractors Ltd v. CJA, Local 2486 8 OR (2d) 103.

Analysis and Decision

5. I agree with the Company's submissions that the Union began the grievance process at Step 2. The "History Details" on the Claim Form (see Union Tab 15) shows Thomas Redgrift "Submit Claim" on September 9, 2015, the same day that the grievor did the work in question.

6. However, I do not agree that the Company lost any opportunity here to properly investigate or to make a proper decision. Both sides were well aware of the facts of the case. Local management and Mr. Redgrift had been directly involved in the decision to assign the work to the grievor and to contest that decision. Another situation could give rise to a different outcome, but here the facts call out for an application of arbitral discretion, as permitted by s.60 of the Code, and encouraged by the Court of Appeal in Blouin.

7. Accordingly, I find this matter to be arbitrable.

B. Does the order given to the grievor infringe the Agreement?

Position of the Parties

8. The Union argues that the Company has clearly and knowingly infringed the Memorandum of Agreements concerning Conductor Only freight train operation. The Union notes that the Agreement was the product of a trade-off for train crew reductions for assurances concerning the limitation of yard service work. It notes that the Agreement initially only permitted crews to set over excess cars to another track and was later broadened to permit the Conductor to set out two blocks of cars from his train to two designated tracks, for which he would be paid an additional 12.5 miles.

9. At paragraphs 39-48 of its Brief, the Union sets out the work that the grievor was ordered to undertake, involving multiple movements of cars on three separate tracks and pleads that this work was a clear infringement of the limited yarding foreseen by the Agreement.

10. The Union further submits that the order is not saved by an exception to the general rule, namely “to meet the requirements of service”.

11. The Company argues that there is no Yard Service in London and the Road Service crew was busy on their own train and ninety (90) minutes behind schedule, and as such, having the Conductor perform minimal switching meets the test of “the requirements of service”.

12. The Company notes that the last portion of the grievor’s train only entered the London Yard some ninety (90) minutes prior to the beginning of the grievor’s service and the jurisprudence has held that such late arrivals are an exception to the general rule concerning limited switching to be performed by Conductor Only crew.

13. Finally, the Company argues that the Agreement foresees the possibility of limited switching for which the Conductor receives additional pay. Here the grievor claimed and received the additional payment of 12.5 miles.

Analysis and Decision

14. This dispute requires an analysis of articles 11.7 and 41 of the Collective Agreement, which read as follows:

> **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:
>
> **(a)** Such trains are operated without a caboose;
>
> **(b)** At the initial terminal, doubling is limited to that necessary to assemble the train for departure account yard tracks being of insufficient length to hold the fully assembled train;

(c) At the final terminal, doubling is limited to that necessary to yard the train upon arrival account yard tracks being of insufficient length to hold the train;
(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 12½ miles in addition to all other earnings for the tour of duty.
(e) Such trains are designed to make no more than three stops en route (i.e., between the initial and final terminals) for the purpose of taking on and/or setting out a car or group of cars together;
NOTE: (This NOTE: is only applicable to the First Seniority District). For the purposes of clarity, the taking on or setting out of cars at a yard (other than the yard in which the train originates or terminates) at terminals where there are a series of yards (such as Halifax and Montreal) will not count as a stop in the application of sub-paragraph 11.7 (e). However, the payment set out in paragraph 2.5 will be payable when cars are taken on or set out at such yards in a conductor-only operation.
(f) Such trains are not required to perform switching en route (i.e., between the initial and final terminal) except as may be required in connection with the taking on or setting out of cars as, for example, to comply with the requirements of rules and special instructions governing the marshalling of trains;

ARTICLE 41
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.
41.2 At points where yard service employees are employed and a spare list of yard service employees or a joint spare list from which yard service employees are drawn is maintained, yard service employees if available, will handle work, wreck, construction, snow plow and flanging service other than that performed continuous with a road trip in such service, and be paid at yard rates and under yard conditions.
(Refer to Addendum No. 37)

15. As a starting point, it is clear that the grievor was ordered to perform tasks which ordinarily would fall outside the duties of a Conductor Only crew. Normally these tasks would be done by Yard Service crews, if in place, or Road Service crews, if not.

16. When the grievor began work, he was asked to assemble his train from three separate tracks. The fact that the cars were on three separate tracks, CL 01, CL 04 and CL 05, infringes article 11. 7 (b) of the Collective Agreement: "doubling is limited to that necessary to assemble the train for departure account yard tracks being of insufficient length to hold the assembled train". Here, the assembled train was 2441 feet. Any one of the tracks were long enough to hold the assembled train, with CL 01 at 3440 feet, CL 04 at 2970 feet and CL 05 at 3195 feet.

17. The situation is not dissimilar to that discussed in **AH 606**, where Arbitrator Picher found:

> The rule in article 11 of the collective agreement is, in my opinion, clear. Presumptively, at the initial terminal cars are to be placed in the minimum number of tracks for departure. The limitation is to the number of tracks necessary, to be limited only by the possible insufficiency of track length to hold the fully assembled train. In the case at hand there was clearly no insufficiency of track space to accommodate the train of Conductor Stevenson, or the train of Conductor Griffin, from being contained in two tracks. Nor, for the reasons touched upon above, can I find that any switching was required to meet the requirements of the service within the exception provided in subparagraph (d) of article 11.7.

18. He was also ordered to make multiple cuts and switching in order to assemble the train. The switch list found at Tab 13 of the Union documents, together with the helpful schematic of the London Yard and required movements found at Tab 12 of the Union documents, demonstrate the cutting and switching required to assemble the train. This was in no way a "hook and haul" operation.

19. The Company argues, however, that article 11.7 (d) permits switching on the Conductor's own train, for which he is paid 12.5 miles, when it is "necessary to meet the requirements of the service".

20. At issue, then, is were the facts such that the work was "necessary to meet the requirements of the service"? For the reasons that follow, I find that it was not.

21. This phrase has been considered many times by arbitrators, the CIRB and the Courts (see for example, **AH 560**, **AH 606**, **CROA 4425**, **4561, 4575**, **UTU** v. **CNR 2005 CIRB 315, CNR** v. **TCRC 2017 NSSC 117**).

22. It is clear that "requirements of the service" is not a universal panacea permitting the Company to ignore the spirit and letter of articles 11 and 41. The articles must be read as a whole and the phrase must be interpreted in harmony with the articles. The article serves as an exception to the general rules found in articles 11 and 41 and as such, needs to be interpreted restrictively (see **CROA 4559**).

23. Here, the Company notes that there is no Yard Service in London and that the Road Service crew was otherwise occupied, and indeed behind, on assembling its own train. However, it was a Company decision to abolish Yard Service. It was also a Company decision to have a limited number of road crews and to assign them the work that they had that day, effectively removing them from being able to assemble the Conductor Only train. There was no evidence led that the situation was the result of a sudden emergency or an event which planning could not have prevented.

24. The Company further argues that the arrival of the last portion of the Conductor Only train was only 1h28 prior to the arrival on duty of the grievor. It argues therefore that **AH 583** applies, as the time constraints fell under the ninety minutes approved by Arbitrator Picher and well below the 155 minutes found to be unreasonable in the Gaborieau scenario.

25. However, each case must be decided on its particular facts, as indeed noted by multiple arbitrators (see **CROA 4115**). Here, as set out in the Company Brief at paragraphs 18-23, train 584 arrived at 01:36 and their cars were put on track CL 05 at

11:00. There is no explanation given why the cars arriving with train L509 on CL 01 at 12:52 could not have been assembled by the Road Service crew at that time on a single track. The arrival of the last cars on train M330 at 14:17 on CL 04 and the final assembly of the Conductor Only train could have been made expeditiously, if the previous work had been done.

26. The Company clearly respected the Conductor Only requirements of trains L509 and M330. Unfortunately, its planning did not result in an assembled or near-assembled train waiting for the grievor. It was not argued that the situation was the result of a statutory requirement, or an unforeseen event which required an override of the article 11.7 (b) requirements. It cannot be the case that the additional payment foreseen in 11.7 (d) is a license to ignore 11.7 (b). If it were, the concessionary nature of the article would be ignored (see **CROA 4559**).

27. Accordingly, I find that the Company has infringed article 11.7 (b).

C. What is the appropriate remedy?

Position of the Parties

28. The Union argues that this is a clear breach of the Agreement, to which the Company has admitted liability. It points to the Step 3 Response of the Company, where the Company states:

> **"**As the Union is aware, due to the downturn in traffic, several changes have been made to the operation out of London. As it appears, the transition did not go as expected and some adjustments were required. Since the filing of this grievance, the Company has taken steps to ensure that the Supervisors in London fully understand the provisions of Article 11.7 (b) and that the terms of the collective agreement are complied with. The Company has also followed up with the Local Chairman in this regard."

29. The Union points to many arbitral decisions, together with CIRB and Court decisions which show that the Company has routinely failed to respect the Agreement. It argues that Addendum 123 should apply in the circumstances.

30. It seeks 200 miles at Yard Rates to the grievor and the Road Switcher Crew.

31. Under Addendum 123, it seeks $5000 to the London Division Local and $15,000 to the Central Committee for the costs associated with repeated violations of the Collective Agreement.

32. The Company argues that Addendum 123 does not apply.

33. It argues further that each case must be decided on its own factual merits and that there is no support for a remedy which exceeds 50 miles.

Analysis and Decision

34. Addendum 123 was added to deal with “repetitive violations of the Collective Agreement”. It reads as follows:

> Addedum123
> During the current round of negotiations the Council expressed concern with respect to repetitive violations of the Collective Agreements. Although the Company does not entirely agree with the Council's position, the Company is prepared to deal with this matter as follows.
> When it is agreed between the Company and the General Chairperson of the Union that the reasonable intent of application of the Collective Agreement has been violated an agreed to remedy shall apply.
> The precise agreed to remedy, when applicable, will be agreed upon between the Company and the General Chairperson on a case-by-case basis. Cases will be considered if and only if the negotiated Collective Agreements do not provide for an existing penalty.
> In the event an agreement cannot be reached between the Company and the General Chairperson as to the reasonable intent of application of the Collective Agreement and/or the necessary remedy to be applied the matter may within 30 calendar days be referred to an Arbitrator as outlined in the applicable Collective Agreements.
> NOTE: A remedy is a deterrent against Collective Agreement violations. The intent is that the Collective Agreement and the provisions as contained there In are reasonable and practicable and provide operating. Flexibility. An agreed to remedy is intended to ensure the continued correct application of the Collective Agreement.

35. The Addendum envisages agreement between the Company and the General Chairman that "the reasonable intent of application of the Collective Agreement has been violated" and an agreed to remedy, although there is provision to a referral to arbitration on either of these issues. The intent of the remedy is "intended to ensure the continued correct application of the Collective Agreement".

36. In **CROA 3310**, Arbitrator Picher considered the application of Addendum 123. He finds that the Addendum is intended to apply to violations which were "blatant and indefensible":

> It does appear to the Arbitrator that the parties intended the letter to apply to situations where a violation of the collective agreement was blatant and indefensible, and clearly should not have been committed by local management. It is in that context that the deterrent character of the remedy is to be understood. The letter is an agreement between the parties to establish a disincentive to violations of the collective agreement being resorted to simply as a means of doing business, ensuring that violations of the collective agreement to not pay.

37. Arbitrator Picher also considered whether the Union must show a pattern of repetitive collective agreement violations:

> Not is the Arbitrator persuaded by the Company's argument that the Union must first show a pattern of repetitive collective agreement violations before invoking the provisions of Addendum 123. Careful examination of the language or Mr. Dixon's letter confirms that, as a matter of background, repetitive violations of the agreements gave rise to serious concerns on the part of the Union. The substantive provisions of the letter, however, do not require repetitive violations as a condition precedent to the application of the remedy portion of the parties' agreement.

38. Whether one agrees with Arbitrator Picher about the need for repetitive violations as merely context rather than as a condition precedent or not, it would appear clear that repetitive findings of violations would make subsequent violations more "blatant and indefensible" and a lack of repetitive findings would make them less so.

39. In London, the current grievance does not appear to be part of any pattern of violations and the Company notes that this is the sole such grievance in 2015 (see Tab

2, Company Reply documents). The “pattern of violations” which the Union alleges (see Tab 31, Union documents) remain grievances, rather than decisions.

40. In **CROA 4425** (see Tab 25, Union documents) Arbitrator Silverman dismissed the Union claim for Addendum 123 damages because the Company had “an arguable basis” for their decision.

41. In **AH 760**, Arbitrator Stout dismissed an Addendum 123 claim on the basis that the “While the Company’s conduct was unreasonable and in some ways negligent, I agree with them that their conduct was not blatant and indefensible”.

42. Here, while the Company has been found to be wrong in their order to the grievor, I do not find that the order was “blatant and indefensible”. A future case with a different fact pattern could result in a different outcome.

43. However, even if the extraordinary remedy of Addendum 123 is not available to the Union in these circumstances, I clearly have the jurisdiction to award damages where appropriate (see cases cited at Union brief, Tabs 32-42).

44. Given the concessionary nature of article 11 and the importance of deterring breaches of it, I find that damages are appropriate to those directly involved and award 100 miles to be paid to the grievor. I also award the same amount to be paid to the London Local to be distributed for lost work opportunities. I decline to award damages to the London Local itself, or the Central Committee, given that the Company’s actions have been found to be wrong but not indefensible.

45. I retain jurisdiction to deal with any issues of interpretation or application.

February 20, 2024

JAMES CAMERON
ARBITRATOR