CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5087

Heard in Montreal, October 8, 2024

Concerning

CANADIAN PACIFIC KANSAS RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The issue in dispute is the use of Managers for a training exercise with CMQ employees while a TCRC Locomotive Engineer was rested and available.

JOINT STATEMENT OF ISSUE:

On May 15, 2020 Manager Dino Dimaurizio and rules instructor David Montmarquette performed a training exercise with three CMQ employees on a training train in the Flat yard in Montreal. TCRC Locomotive Engineer Claude Lafreniere was available for this call and was not used.

The Company maintains it is not considered work which belongs to bargaining unit members of the TCRC.

The Union's position is that it is work which belongs to bargaining unit members of the TCRC.

Union Position:

The Union maintains its right to object to any new positions brought forth.

The Union contends the Company violated Canadian Industrial Review Board Files: 30114-C, 748NB, wherein they chose to use Management personnel in lieu of available bargaining unit employees to train fellow unionized CP employees. This we contend is work which rightfully belongs to bargaining unit members of the TCRC.

For the foregoing reason and those adduced in the earlier appeal which are herein adopted, the Union seeks the Company abide by board file 30114-C, 748 NB, and cease and desist calling Managers when bargaining unit employees are available. The Union further seeks that Mr. Lafreniere be made whole in the amount of $333.79 as claimed on 20/05/15.

Company Position:

The Company disagrees and denies the Union's request.

The referenced event was two management employees providing a training demonstration to CMQ employees for training purposes.

Anything that may have occurred during the time in which the management employees were with the CMQ employees was in no way considered work, and certainly not work that any TCRC represented employee would be entitled to perform.

As provided in the step 2 grievance response by the Superintendent at the time (Ross McMahon), tasks were completed as part of a demonstration for purposes of training, and it was not actual work performed that was taken away from a bargaining unit employee. Mr. McMahon goes on to state that no revenue traffic was handled during the training exercise.

Regarding the Union's request for "cease and desist", there are no provisions in the Collective Agreement for submission of a grievance encompassing a request for the Company to "Cease and Desist". The MOS establishing CROA&DR clearly indicates that a dispute must be progressed through the grievance process and CROA 4557 case law supports that position. The Union's allegation of a cease and desist is a further attempt to seek relief for an allegation of multiple disputes without progressing each through the grievance process.

The Union's attempt to achieve a blanket award for all instances—future and present—would be grossly inappropriate given that the nature of each occurrence is unique to the individual circumstances at the time of the alleged violation. The Company objects to the Union's request for a cease and desist order.

Based on the foregoing, the Company maintains the matter in dispute was handled appropriately. The Company maintains that there was no violation of the CIRB review board file 30114-C, 748 NB as alleged by the Union and there is no entitlement to any additional wages to Engineer Lafreniere. The Company requests the arbitrator be drawn to the same conclusion and deny the Union's request.

For the Union:	**For the Company:**
(SGD.) E. Mogus	**(SGD.) A. Cake**
General Chairperson, LE-E	Manager Labour Relations

There appeared on behalf of the Company:

F. Billings	– Director Labour Relations, Calgary
S. Oliver	– Manager, Labour Relations, Calgary

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
J. Bishop	– General Chairperson, LE-E, Toronto
D. Psichogios	– General Chairperson, CTY-E, Montreal
J. Hnaituk	– Vice General Chairperson, CTY-W, Vancouver
A. Diagnault	– Staff Representative, USW-1976, Montreal
N. Lapointe	– President, USW-1976, Montreal

AWARD OF THE ARBITRATOR

Context and Issues

1. In May 2020, a CP manager and a CP Rules Instructor did a training exercise in St. Luc Yard in Montreal with three trainees from the Central Maine and Quebec Railway Canada Inc. ("CMQ"). In dispute is solely the work performed by the CP manager on the locomotive. The Union contends that this work should have been performed by TCRC Locomotive Engineer Lafrenière, who was available to perform the work.

2. The United Steel Workers, Local 1976 (“USW”), who represents the trainees, initially intervened with respect to the training function. As a result of extensive discussions and submissions, it became clear that this function was not in issue in the instant case. Consequently, the USW did not participate in the hearing. All Parties agreed that the bargaining rights of the USW are not affected by this decision.

3. At issue is whether the work performed was bargaining unit work of the TCRC, or whether it lies outside, as a training exercise involving a separate company’s employees.

Position of the Parties

4. The Union submits that the work performed is bargaining unit work. It relies on its CIRB certification, the scope clause in the Collective Agreement, CIRB decisions dealing with similar training sessions and CROA decisions dealing with the use of managers when bargaining unit employees were available. It notes the lengthy history of disputes between the Parties concerning these issues (see Union Brief, paragraphs 36-59) and seeks a Cease and Desist Order here.

5. The Union rejects the Company argument that this is non-revenue traffic, involving the training of non TCRC members as irrelevant in the circumstances, given the statutory, contractual and jurisprudential support for its claim to the work.

6. The Company submits that TCRC has no work ownership of work performed by CMQ employees or to the training of employees. It points out that other railways, such as the Quebec Gatineau Railway also use the St Luc Yard, and that the TCRC has no jurisdiction over their work either.

7. The Company submits most broadly that the TCRC is not entitled to do training work, even for CPKC employees, let alone for employees of another company, such as the CMQ Railway.

8. It argues that there was no need to call out LE Lafrenière, as he has no claim to the work.

9. It argues that the Company is in no way in violation of the Board Order with respect to TCRC work jurisdiction and reviews the Order in detail (see Company Brief paragraphs 48-59). It argues that the Board Order was in relation to management replacing a previously scheduled unionized crew, as is the case with many of the CROA decisions cited by the Union (see **CROA 2169, CROA 3976**).

10. It submits further that the Union is limited to arguing about the applicability of the Board Order, as a Collective Agreement breach is not mentioned in either the grievance or the JSI. It argues that CROA Rules must be applied, as was done in **AH 243**, and the Union limited to its previous arguments.

11. Finally, the Company submits that a Cease and Desist Order is not appropriate in the circumstances, and that such a blanket order should not be given.

Preliminary Objection

12. The Company objects that the Union raises arguments based on: “the Collective Agreement, Canada Labour Code and common law”, when their arguments in the grievance process and JSI were limited to allegations of a violation of the CIRB Board file 30114-C and Board Order 748-NB. The Company pleads that this is contrary to the CROA Rules, and that previous CROA cases have found that such arguments need to be raised during the grievance process or JSI, or are otherwise excluded (see **CROA 4856**).

13. The Union replies that in the JSI it had relied on arguments “adduced in the previous appeal”, namely the matter which led to the Board decision and Order, which included references to the scope clause of the Collective Agreement and provisions of the Canada Labour Code.

Analysis and Decision

14. CROA Rules and jurisprudence clearly require Parties to advance issues and facts on which they rely during the grievance process and JSI at the risk of having new issues and facts excluded at arbitration (see **CROA 3292, CROA 4744 and CROA 4856**).

15. However, as Arbitrator Clarke pointed out in **AH 810**, the Rules prohibit new facts and issues from being advanced, but not necessarily new arguments:

> 44. Second, the JSI does not require the parties' arguments, only the facts and the issues:
>
> > 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.
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> 46. Third, the difference between issues and arguments is not always clear. Railway arbitrators will prevent unfairness in situations where one party has expanded the issue and caused prejudice to the other. For example, an improper expansion may occur when a party raises a new issue that had not previously been candidly explored between the parties. This occurred in AH689:
>
> > 31. The arbitrator agrees with the sentiments expressed by these experienced railway arbitrators. The situation may well be different in regular arbitration where the parties have not negotiated the types of procedures which exist in this expedited regime. A regular labour arbitration system can also take many

16. The rationale behind the Rules and jurisprudence is based both on fairness and efficiency. It would not be fair to the other Party to be able to advance brand new facts or issues at arbitration, when the opportunity to lead contrary evidence would have been lost. Providing additional time to do so, as would typically happen in a regular arbitration, would cause efficiencies to be lost in the expedited CROA process.

17. The same concerns are not necessarily present with respect to a new argument, when neither the underlying facts nor the central issue have changed. Here both Parties agree as to the underlying facts and the central issue, namely whether a CPKC manager performed work which should have been done by an available TCRC member, Mr. Lafrenière. In addition, the scope clause Collective Agreement language mirrors that of the Certification, as is set out below.

18. In these circumstances, while I agree with the Company that the Union position in the JSI was less than explicit, I do not think the Company is prejudiced by the Union reference to the Collective Agreement scope clause.

19. Accordingly, the preliminary objection of the Company is dismissed.

Analysis and Decision on the Merits of the Case

20. I deal firstly with the statutory and jurisprudential context of this matter.

21. The CIRB certified the TCRC as the bargaining agent for the following class of employees:

> “All running trades employees designated as locomotive engineer, conductor, baggageman, brakeman, car retarder operator, yardman, switchtender, yardmaster, assistant yardmaster, locomotive fireman (helper) working on the Canadian lines of Canadian Pacific Limited and its subsidiaries and leased lines."

22. The Parties have recognized in the scope clause of their Collective Agreement that the TCRC is the exclusive bargaining agent for, amongst others, locomotive engineers:

> The Company recognizes the Teamsters Canada Rail Conference (the "Union") as the sole and exclusive bargaining agent for all of its employees classified as Locomotive Engineer, Conductor, Assistant Conductor, Baggageperson, Brakeperson, Car Retarder Operator, Yard Foreman, Yard Helper and Switchtender.

23. The CIRB in its decision above has ruled on whether the practice by the Company of replacing TCRC members by Company management to teach locomotive driving skills to other managers infringed on TCRC bargaining rights:

> [31] With respect to the specific matters complained of by the TCRC, the Board finds as follows:
> a. Cases in which managers operated trains when bargaining unit personnel were ready and available to do the work
> In general, the use of managers to perform bargaining unit work on a regular or frequent basis threatens the security of the bargaining unit and a union’s exclusive bargaining rights, and thereby constitutes a violation of sections 36(1)(a) and 94(1)(a) of the Code. However, the parties in this case have recognized a limited exception to this general rule. Their June 8, 2011 protocol contemplates that managers may be used to perform bargaining unit work when no unionized crews are available. Although it is

> common ground between the parties that the protocol was negotiated to deal with specific issues that had arisen in Western Canada, the evidence indicates that it has also been followed in Eastern Canada.
> The employer has admitted that instances have occurred in which this protocol has been breached. However, the Board has been persuaded that the breaches are not as prevalent as the union suspects. Nevertheless, the Board finds that when unionized crews are available and the employer uses managers to perform bargaining unit work, it violates sections 36(1)(a) and 94(1)(a) of the Code.

24. It is noteworthy that the CIRB ruled on a factual situation wherein managers replaced TCRC members on assignments they would normally have done:

> 31. With respect to the specific matters complained of by the TCRC, the Board finds as follows:…
>
> b. Cases in which bargaining unit personnel were scheduled to work and were replaced by management personnel in training
>
> While the Board recognizes that the employer's interest in having managers qualified to operate trains, this interest must be balanced against the union's interest in the integrity of its bargaining unit. In the Board's view, the employer's practice of relieving unionized crews of their assignments in order to train managers contravenes the recognition of bargaining unit work embodied in the union's certification order and violates sections 36(1)(a) and 94(1)(a) of the Code. The employer is hereby directed to cease this practice.
>
> This does not mean that the employer cannot train its managers; the Board is confident that CP Rail is capable of finding efficient ways to provide managers with the road experience they require to qualify as conductors and engineers without displacing union members from bargaining unit work. (underlining added)

25. Other CROA decisions have dealt with similar conflicts, where work previously performed by TCRC members was transferred to non-union employees or managers. Such reassignment of work has repeatedly been rejected by CROA arbitrators, where the work had previously been consistently and uniformly performed by TCRC members (see **AH 516, AH517, CROA 2169, CROA 3976**).

26. I now turn to the instant matter. This case has a few benchmarks on which the Parties are in agreement and an issue which they dispute.

27. The TCRC would be highly unlikely to argue that a training exercise done by CMQ managers to CMQ employees on a CMQ locomotive would involve their bargaining unit.

28. The CIRB has determined that CP managers teaching CP managers on a CP locomotive were performing TCRC bargaining unit work, when the managers were replacing TCRC members.

29. At issue here is whether a CP manager driving a CP train during a training exercise for CMQ employees infringes TCRC bargaining rights, when no TCRC member was assigned.

30. In the present matter, the Union clearly has the burden of proof to establish that the work of its bargaining unit has been infringed. For the reasons that follow, I find that the Company has not infringed bargaining unit rights, in the particular circumstances of this case.

31. Firstly, no TCRC member was previously scheduled to work on this movement. As the Company submits, there was no assignment number or schedule created, from which Mr. Lafrenière was removed. This clearly distinguishes this matter from the Board decision referred to above, where TCRC members were removed from their assignments and replaced by CP managers.

32. Secondly, there was no evidence led that the work done by the CP manager in driving the locomotive, in training outside company employees, was customarily done by TCRC members.

33. Thirdly, there was no evidence led, with the exception of the Board decision, of the role of TCRC members in a training situation. The operation of training trains is clearly a live issue between the Parties (see Minutes of Settlement, CIRB Board File #036444-C, Tab 12, Union documents).

34. I do not accept the Company argument that the fact this was a non-revenue movement is determinative of the matter. There are many movements, as the Union has pointed out, that do not generate revenue, but are nonetheless essential to the Company's operations, such as work or positioning trains.

35. At issue, however, is whether this form of a training situation is customarily performed by TCRC members. I have no evidence to that effect.

36. Fourthly, the certification and the scope clause in the Collective Agreement refer to "all running trades employees designated as locomotive engineer … working on the Canadian lines of Canadian Pacific Limited". This is not the case of the transfer of all or most of the job functions of Locomotive Engineer from the bargaining unit to a manager, as was the case in **AH 516** when the functions of four traffic controllers were assigned to management personnel and their positions abolished, or in **CROA 2169**, where service manager positions were eliminated and their functions given to management. The CP manager who worked in this training exercise is a Trainmaster. The duties performed in this particular training function would be at best an ancillary portion of his usual functions. It was not contended by the Union that the position of Mr. Lafrenière is in any danger of elimination.

37. Even some of the cases cited by the Union recognize that occasional assignments of some of the work normally done in the bargaining unit have been permitted by CROA arbitrators. The case law calls for an analysis of the particular facts of the case and whether "a line has been crossed" with respect to protecting the integrity of the unit and the agreement. In **CROA 2169**, cited by Arbitrator Picher in **AH 516**, it was noted:

> "A governing principle is that management cannot, simply by assigning the core functions of a bargaining unit position to a person outside the bargaining unit effectively eliminate the application of the collective agreement to the work in question. That sentiment is reflected in the following passage of the award of Arbitrator Freedman in the North West Company case at p. 169:
>
> > That analysis is compelling, and one which I adopt. For the concept of the Bargaining unit to be meaningful, and for the bargaining unit to have integrity, both of which are necessary conditions to a meaningful collective agreement,

> it must be acknowledged that (absent express language so stipulating) the Company has not reserved to itself the right of assign in a material way work to non-unit members that is normally and regularly done by unit members.
> Were that not so, then the sanctity of the bargaining unit, and indeed the value of the collective agreement would be fragile and greatly limited at best. That result would be inconsistent with the labour relations regime in this province and country, and could not be sustained without clear language in the Agreement.

Further, at p. 171 Arbitrator Freedman says the following:

> Many authorities may be cited which discuss this general concept. These authorities deal with bargaining unit work, which is work normally and customarily performed by unit members, being performed by non-unit members, and engage in a consideration of the "extent" question. What we are dealing with here is a question of fact. Perhaps the issue may be quantitatively determined, or perhaps it is best understood from a qualitative perspective.

It must be recalled that what we are dealing with in this case and in others like it is a question of the preservation of the integrity of the bargaining unit and the related collective agreement. If on an analysis of what has been done by the non-unit member it can be fairly and reasonably concluded that the integrity of the unit and agreement is likely to have been impaired by management's performing of work, then it must be found that the line, difficult though it may be to discern, has been crossed, and that the "extent" issue must be resolved in favour of the Union."

The same approach has been acknowledged in the awards of the Canadian Railway Office of Arbitration. In CROA 2169, a grievance which involved the elimination of an on-board services bargaining unit position, and the re-assignment of the same duties to a management person who held the title Manager, Guest Services, the grievance was allowed and the following comments appear:

> A consistent line of decisions in this Office has confirmed the position pleaded by the Corporation that the instant collective agreement does not confer upon the Brotherhood a right of exclusive property in all of the tasks assigned to bargaining unit members. Consequently, the occasional assignment of some of the work performed by members of the bargaining unit to members of other bargaining units and on occasion to members of management has been deemed to disclose no violation of the terms of the collective agreement. By the same token, however, this Office has consistently expressed the view, reflected in the arbitration awards cited above, that it is not open to the Corporation to disregard the collective agreement by effectively assigning all of the work of a position established within the collective agreement to a non-bargaining unit employee or to a

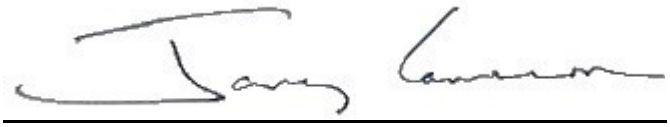
> member of management. If that should occur, the conclusion to be drawn is that the person holding the newly established assignment is in fact performing bargaining unit work and must be treated as falling within the bargaining unit. (underlining added)

38. Fifthly, the recent matter of **CROA 4856**, decided by this arbitrator and cited by the Union, is in my view distinguishable. In that matter, the work commonly and routinely done by Mr. Bobier was given to a manager. There was no dispute between the Parties as to the nature of the work; the issue was the "availability" of Mr. Bobier. Here the dispute clearly lies with respect to the nature of the work performed.

39. Accordingly, I find that the Company did not infringe bargaining unit work, in the particular circumstances of his matter. As such, there is no need to discuss a Cease and Desist Order.

40. The grievance is therefore dismissed.

41. I remain seized for any questions of interpretation or implementation of this Award.



November 25, 2024

JAMES CAMERON
ARBITRATOR