

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ALGOMA CENTRAL RAILWAY
(Hereinafter called the "Company")

and

ASSOCIATION OF RAILWAY UNIONS-ACR
(Hereinafter called the "Union")

GRIEVANCE RELATING TO PBIP
(Hereinafter called the "Grievance")

ARBITRATOR: W. B. Rayner

APPEARANCES:

For the Union: Glenn witty

For the Company: William McMurray

Hearing held at Sault Ste. Marie, the 7th day of April, 2004.

AWARD

The parties to this dispute which centers on the calculation of the payout of the Profit Based Income Plan, hereinafter referred to as the PBIP, are Algoma Central Railway and the Association of Railway Unions at Algoma Central. Before I turn to the provisions of the collective agreement and the precise nature of the dispute I need to outline briefly the corporate history of the Company as well as the history of the PBIP.

Originally a private railway company, Algoma was acquired by Wisconsin Central

Railway in 1995. On 9 October, 2001 CN Rail effectively acquired control of Wisconsin Central and Algoma Central. When Algoma was controlled by Wisconsin employees at Algoma participated in the PBIP payout made by Wisconsin to its employees. Between 1995 and 2000 the payout varied from a low of 3.1% to 8%. In the year 2001 the payout was 6%. The custom was to make a partial payout in December of the year in question with an announcement of the final figure in January of the subsequent year and payment in February.

For the 2001 year Algoma employees had spent three quarters of the year working under Wisconsin before the acquisition by CN. Hence CN decided to use the Wisconsin figures for the final 2001 payout.

In 2002 the payout under the PBIP made by Algoma to its employees was 5.95%. This calculation was based on a formula explained by letter from the Superintendent of Algoma, Mr. Wolnairski to the Union and to each employee. The letter was sent on August 16, 2002. It clearly states that the formula to be used was as follows: 25% of the "bonus" was to be based on the performance of CN as a whole as Algoma employees now had one full year under the CN umbrella. 75% of the amount to be paid out was to be based on the Eastern Division "scorecard". Although the meaning of "scorecard" is loosely described in the letter the precise definition is not important to the issue before me. What is important is that the Algoma employees were now included in the Eastern Division and not as part of Wisconsin Central. In 2002 the Wisconsin Central PBIP came in at 7% and thus the Union claims that the PBIP for Algoma employees should have been based on the Wisconsin standard. It seeks payment to the employees of the 1.05% difference.

In order to support its claim the Union relies on two letters of understanding which form part of the collective agreement. Letter #1 is longstanding and was originally entered into by Wisconsin Central. It states in part that the employer agrees to provide to each employee a "Profit Based Income Plan" in accordance with its usual practices. The second letter, letter #31, is more recent and states in part that "With respect to Letter of Understanding #1, the Profit Based Income Plan will continue as per the statement of CN President P. Tellier for calendar year 2002, thereafter gainsharing, bonus or incentive programs may be implemented by the ACR at its discretion."

The Union says that it entered the present collective agreement on the understanding that the PBIP would continue and that it would be based on the same formula as the Wisconsin Central employees. Both sides agree that the Union was concerned that the PBIP continue as it is more profitable than other CN incentive plans. However the Company does not agree that there was any suggestion by it that the calculation would be based on the Wisconsin figures. Indeed Mr. McMurray argues with some force that the purpose of any incentive plan is to encourage employees to contribute to the financial success of the company and that it makes no sense to tie the incentive to the performance of the Wisconsin Division that is separate from the employees in Algoma Central as those employees cannot affect the performance of the Wisconsin Division. It is clear that Algoma Central has been placed in the Eastern Division (see the August 16th letter referred to earlier) and it is also clear that under the managements rights provision of the agreement, Article 3, the Company had the right to organize its divisions as it saw fit unless there was some promise made to the Union which prevents it from so doing.

The Union says that there was such a promise made by Mr. Tellier during a question and answer session with employees at Wisconsin Central during the acquisition period. One must remember that at that time the Algoma employees were part of Wisconsin Central. I agree with Company counsel that, when looked at as a whole, the tenor of the comments was that various programs would continue but that those programs would be changed or adapted where necessary. The only comment of Tellier that might assist the Union is in response to question 11 which asks his intention with respect to Algoma Central. His response was that Algoma "...operates as a separate unit within the WC network. There are no plans at this time to change that. Should this change and employees be affected, applicable Canadian severance benefits will be available"

The Company argues that the grievance is untimely in that the grievance was not filed until after the Wisconsin PBIP figure became known in February, 2002, and that the Union knew or ought to have known as early as August 16, 2002 that Algoma was to be included in the Eastern Division which is the real dispute between the parties. Secondly it argues that the Union is barred from proceeding because of the principle of laches. Because of my conclusion on the merits of the case I do not need to deal with either of these arguments. However I would point out that the Union, while waiting to see whether the Wisconsin Central payout was smaller or greater than the payout announced by the Company, could hardly be seen to have slept on its rights so as to trigger the doctrine of laches. There certainly is no estoppel created as I can see no detriment suffered by the Company by the Union not grieving in August, 2002. I make no comment on the timeliness issue.

When I turn to the merits, I am unable to find anything in Tellier's comments that would support the Union's position. While it is true that he said that there were no plans to change the operation of Algoma within Wisconsin he also indicated that things could change. There is no specific mention of PBIP anywhere in his comments. While Letter of Understanding #31 makes it clear that PBIP will continue for 2002 there is nothing in that Letter which requires that Algoma stay within Wisconsin Central for the purposes of calculating PBIP. Certainly Tellier never promised that in his comments. Moreover I have found that the Company could have been placed in the Eastern Division without a violation of the agreement and was in fact so placed. It makes sense that with that placement the calculation of the employees' PBIP should be governed by the performance of the Division in which they are placed and whose performance their efforts can influence.

Accordingly the grievance is dismissed.

Dated at Grand Bend, the 14th day of April, 2004.

A handwritten signature in black ink, appearing to read 'W. B. Rayner', is written over a horizontal line.

W. B. Rayner