AH721

IN THE MATTER OF AN AD HOC RAILWAY ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

RE: LACOLLE SUBDIVISION AND US CREWS

Date: April 7, 2021
Arbitrator: Graham J. Clarke

Appearances

TCRC:

K. Stuebing	Counsel, CaleyWray, Toronto
W. Apsey	General Chairperson CTY East – Smiths Falls
E. Mogus	General Chairperson LE East - Oakville
D. Psichogios	Vice General Chairperson CTY East - Montreal
J. Dunsmore	Local Chairperson LE Div 258 - Montreal
C. Yeandel	Local Chairperson LE Division 689 - Montreal

CP:

M. Tremblay	Counsel, BLG, Montreal
D. Pezzaniti	Director, Labour Relations - Calgary
T. Gain	Legal Council Litigation - Calgary
B. Serena	VP Operations Eastern Region - Toronto

Heard on March 18, 2021 via videoconference with supplementary written submissions completed on April 1, 2021.

TABLE OF CONTENTS

Award

INTRODUCTION

1. This arbitration concerns two 2014 grievances[1] alleging that CP violated its collective agreements with the TCRC by using US crews to operate trains into and out of Montreal on the Lacolle Subdivision (LCS). The TCRC also claimed that CP's actions violated the Canada Industrial Relations Board's (CIRB) certification order[2].

2. CP argued that US crews had traditionally operated into and out of Montreal with a predecessor railway pursuant to interdivisional run agreements (IDRs). After CP purchased that railway, it noted that the TCRC and its predecessors[3] had dealt with the US crew issue in various negotiated settlements and agreements. CP further maintained that the TCRC never had any exclusive bargaining rights over the disputed work[4].

3. On October 5, 2017, a Canadian Railway Office of Arbitration (CROA) arbitrator found in the TCRC's favour in *CROA 4574*[5]. The Quebec Superior Court[6] (QSC) later quashed that award. The Quebec Court of Appeal (QCA) refused the TCRC's request for leave to appeal[7].

4. The parties jointly appointed the arbitrator to rehear this matter.

5. For the reasons which follow, the arbitrator dismisses the TCRC's grievances. The TCRC did not demonstrate, given the various settlements, other agreements, and the collective agreements, that its members had the exclusive right to operate trains on the LCS to the exclusion of the US crews.

---

[1] CP Exhibits Tabs 1-2.
[2] Ex-1, TCRC Brief, paragraph 6.
[3] The defined term TCRC includes its predecessors where contextually appropriate.
[4] Ex-3, CP Brief, paragraph 5
[5] *CROA 4574*
[6] *Canadian Pacific Railway Company c. Flynn*, 2020 QCCS 983
[7] *Teamsters Canada Rail Conference c. Canadian Pacific Railway Company*, 2020 QCCA 729

FACTS

6. The arbitrator will first review the QSC decision which provided a succinct summary of the facts. Secondly, as the QSC required, the arbitrator will examine the key Exhibits.

7. The parties do not dispute that US crews for the Delaware and Hudson Railway (D&H) had operated trains into Montreal. D&H's Canadian Subsidiary, the Napierville Junction Railway (NJR), assisted these operations on what is now called the LCS. The US crew operations into Montreal continued after CP purchased D&H.

QSC judicial review decision

8. The QSC ordered a new arbitrator to "reconsider the matter with the benefit of the Court's reasons"[8]. The QSC described how D&H, with the NJR, had operated across the Canada-US border. It then considered CP's purchase and subsequent operations (footnotes omitted):

> [2] Up to 1991, the Delaware and Hudson Railway (D&H) operated trains between Saratoga Springs, New York and the Côte-Saint-Luc or Lachine container yard. This included a segment owned by the Napierville Junction Railway (NJR) between Delson and Rouses Point.
>
> [3] Given that this line crosses from the US into Canada and that this could entail substituting Canadian crews to US crews at Rouses Point, New York just before the border crossing, interdivisional run agreements were entered into (IDRs), allowing for US crews to operate trains (but not to carry out switch or lifting work) from Saratoga to the Côte-Saint-Luc yard or Lachine container yard.
>
> [4] In May 1991, CP acquired D&H. In this context, litigation ensued regarding the presence of the US D&H crews operating on the line. A settlement was entered into which put an end to all litigation (the 1991 Settlement). The locomotive engineers and controllers were given the option to either leave CP with a settlement package or continue working at the conditions set out in the settlement agreement. In 1996, the employees who chose to remain were integrated into the existing CP collective agreements and given seniority rights (the 1996 Integration Agreement).

[8] Paragraph 90

> [5] During the 1990's, trains could not operate at full speed on the Lacolle subdivision in light of the state of the tracks. Hence, the US crews operating the trains could exceed the ten hour regulatory maximum allowance when operating a train from Saratoga to Côte-Saint-Luc. Therefore, an agreement was entered into to manage the working conditions of Canadian crews who "rescue" the US crews. This Memorandum of Agreement referred to as the 304 Pool Agreement sets out the conditions at which these Canadian crews will operate (the 2000 Pool Agreement). A new 304 Pool Agreement is signed in 2007 adding further modalities (the 2007 Pool Agreement).
>
> [6] Between 2010 and 2013, no US crews operated trains on the Lacolle subdivision. The practice was however resumed in late 2013, and this generated the grievances at the heart of the Award.

9. The QSC quashed[9] *CROA 4574* in part because the award did not fully consider the parties' evidence or submissions:

> [41] The Court agrees with CP that despite the great deference it must show to the Arbitrators finding of facts, **the Award is not based on the evidence and on the general factual matrix before the Arbitrator, namely the IDRs, the 1991 Settlement, the 1996 Integration Agreement and the 2000 and 2007 Pool Agreements. As a necessary corollary, the Award therefore does not take into account CP's submissions, nor, for that fact, TCRC's submissions.** In addition, the Arbitrator, relied on evidence and drew inferences from collective agreements and local agreements which were not before her. All these flaws set against the backdrop of the very succinct reasons, render the decision unreasonable.
>
> (emphasis added)

10. The QSC focused on the IDRs and concluded that *CROA 4574* had failed to deal with the parties' arguments about them:

> [42] The Arbitrator sets the IDRs aside stating that CP "asserted or assumed" that the IDRs were binding, but did not "demonstrate" that this was the case.
>
> [43] With respect, the Court finds this statement to be unreasonable. **Indeed, the burden which the Arbitrator placed on CP to demonstrate that the IDRs were binding is unreasonable. Furthermore, she did not examine if the**

[9] See paragraph 88

1991 Settlement, 1996 Integration Agreement and the 2000 and 2007 Pool Agreements evidenced that the IDRs continued to apply.

[44] If CP claims that the IDRs grant it rights to use US Crews, it bears the burden of proof to adduce evidence in this regard. Filing the agreements which were entered into by the parties or their predecessors in law, is sufficient under the fundamental rules of evidence for this purpose.

[45] To force a party to demonstrate that an agreement has not been terminated or has not expired is tantamount to forcing it to prove a negative claim. It is for this reason that article 2803 of the Civil Code of Quebec apportions as follows the evidentiary burdens:

…

[46] CP makes the proof that it has a contractual right to use US Crews as a result of the IDRs by filing and interpreting the agreements. The IDRs have no provision limiting their term. If TCRC in turn wants to demonstrate that the rights under the IDRs are extinguished or inapplicable, it has the burden to do so.

[47] **TCRC did in fact make submissions that these agreements were not binding because they were not entered into by the parties to the Grievances. The IDRs were, according to TCRC, signed by the US Union and as such are not binding upon it.** At the hearing, they therefore argued that the CROA&DR did not have jurisdiction to deal with the IDRs.

…

[51] **It is not for the Court to determine whether TCRC is correct that the parties to the Grievance were not signatories of, or otherwise bound by, the IDRs. This is a finding of fact which must be made by the Arbitrator, and not the Court.** The fact that TCRC's argument was not dealt with however further evidences the unreasonableness of the decision.

(Emphasis added)

11. The QSC concluded that *CROA 4574* ought to have interpreted the various agreements to determine whether the IDRs remained in force:

[52] **The Award also does not deal with CP's submissions that the 1991 Settlement, the 1996 Integration Agreement and the 2000 and 2007 Pool Agreements all evidence that the IDRs are still in effect and perpetuate its effects.**

[53] **Indeed, in the 1991 Settlement explicitly deals with the impacts of the IDRs on NJR and CP employees**.

…

[57] **This 1991 Agreement should therefore have been dealt with by the Arbitrator in determining whether the IDRs are still in place**.

[58] Furthermore, in 1996, it is agreed that the NJR engineers and the controllers and brakemen who were operating the trains between Rouses Point and Delson would be governed by one of the two collective agreements entered into by CP with either the Canadian Counsel of Railway Operating Union (CCROU-BLE) or the Canadian Counsel of Railway Operating Union (CCROU-UTU). The seniority of those employees is recognized. No mention is made in this agreement that the IDRs are terminated. **It is unreasonable to not address the 1996 Integration Agreement as it appears to provide CP a contractual right to operate with US Crews.**

…

[75] Hence in demonstrating respectful attention to the Arbitrator's expertise and with due sensitivity to CROA&DR's administrative context, **the Court finds that the failure to deal with the IDRs and all the subsequent agreements and the general reference to agreements which were not produced into evidence are substantial flaws which render the Award unreasonable.**

(Emphasis added)

12. The QSC commented further on the obligation of the current arbitrator:

[84] TCRC may be right that the IDRs were not signed amongst the parties or their legal predecessors and that they therefore are not binding on TCRC and its members. Perhaps they are right that the signing of new collective agreements after 1991 by the parties, both in principle, as well as upon reading of its terms, may have set aside any existing IDRs.

[85] However, these questions must be analyzed by the arbitrator and reasons must justify the decision process and the outcome.

Key documents

13. The QSC ordered the arbitrator to examine various documents. The parties' Exhibits[10] include those legal agreements and other relevant documents.

The 1990 IDRs (Interdivisional Run Agreements)[11]

14. Prior to CP's purchase of D&H in May 1991, the latter had entered into IDR agreements with the US-based Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU).

15. In a December 17, 1990 agreement, D&H and the BLE's General Chairman located in Ghent, New York agreed on an IDR from Saratoga to Montreal. An IDR agreement allows trains to have extended runs. Otherwise, the trains would have had to stop at Rouses Point, New York which is located just before the Canadian border.

16. On November 9, 1990, the UTU and D&H entered into a similar understanding pursuant to their US collective agreement.

17. The arbitrator agrees with the TCRC that the Canadian UTU and BLE were never parties to the US IDR agreements. It would have been surprising if they had been given that D&H remained an independent US railway at that time. Following CP's purchase of D&H, the BLE and UTU in Canada, and their successors, became involved in all subsequent agreements.

18. The record contains no evidence whether the 1991 purchase led to any labour board proceedings about the scope of CP's bargaining units or any other potential consequences arising from the CP-D&H sale of business and the IDRs. Instead, the parties negotiated multiple agreements over the years to address US crews operating trains into and out of Montreal.

[10] It is not always clear from the parties' documents which ones were simply drafts and which constituted formal agreements. The arbitrator has reviewed all the documents and concentrated on those the QSC and the parties accepted as being in force.
[11] CP Exhibits Tabs 12-13

Four May 1991 Settlement Letters with Canadian UTU and BLE[12]

19. At around the time of CP's purchase of D&H, the TCRC's predecessor trade unions raised certain concerns about the impact on its members from US crews operating trains into Montreal. This resulted in 4 settlement agreements.

20. Letter 1, dated May 21, 1991 between CP and the BLE's General Chairman located in Smiths Fall, Ontario starts:

> This refers to the various discussions concerning the operation of D&H crews over the Naperville Junction Railway and over CP Rail into Montreal.

21. The BLE had concerns about any adverse effects on its members resulting from CP-NJR-D&H efforts to improve efficiency when going to Montreal. The parties agreed to settle those concerns:

> **Notwithstanding the above remarks, we have mutually agreed that in order to finalize this matter and settle all outstanding claims or grievances on behalf of CP employees concerning D&H crews operating into Montreal, one separation opportunity shall be provided to BLE-represented employees on the Quebec Division Seniority District (Master List) with first rights to employees who hold prior rights on the former Farnham Seniority District.** This separation shall entail a lump sum payment in accordance with the terms and conditions of the non-ops Job security Agreement with CP Limited, and shall be bulletined within two weeks of the signing of this letter, to be effective at the earliest possible date following the award.
>
> (Emphasis added)

22. The agreement also mentioned how CP engineers might be used to augment NJR employees:

> In addition, it is agreed that CP engineers may be utilized under the CP agreement to augment NJ employees when required, and without affecting their status on CP Rail, as no further hiring is contemplated on the NJ.

[12] TCRC Exhibits Tabs 2-5; CP Exhibits Tab 15

23. Letter 2 between the same parties, also dated May 21, 1991, mentions what will happen to Canadian employees who had been working on the NJR track segment between Delson, Quebec and Rouses Point, NY:

> This will confirm that it is the Company's intention to integrate NJ employees into the Quebec Division of CP Rail when all legal matters are finally settled. We foresee the CP collective agreement then having application, with NJ employees being provided a February 1, 1991 seniority date on CP while retaining their prior rights to work on the former NJ until all employment reverts to CP through attrition.

24. Letter 3, dated May 9, 1991, between NJR and the UTU General Chairman located in Scarborough, Ontario, also concerned trains travelling to Montreal:

> This refers to our various meetings concerning the running of D&H crews over the lines of the Napierville Junction Railway into Montreal.

25. The parties negotiated certain benefits for a specific group of NJR seniority employees. The parties agreed the letter settled all disputes:

> 6. This agreement shall settle all outstanding claims and grievances on behalf of Napierville Junction Railway employees concerning D&H crews operating into Montreal.

26. Letter 4 also dated May 9, 1991 provided further clarifications on the terms of the settlement[13].

[13] See also the May 13, 1991 letter between these parties settling CP rail employees' grievances arising from US crews going to Montreal, including by offering various "separation opportunities": TCRC Exhibits, Tab 3.

1993 Certification of CCROU[14]

27. The BLE and the UTU decided to delegate their authority to a Council. On August 9, 1993, under section 32(1) of the *Code*[15], the Canada Labour Relations Board certified the Canadian Council of Railway Operating Unions (CCROU) as the bargaining agent for a consolidated bargaining unit of running trades employees at CP.

28. In 2004, the TCRC replaced the CCROU, *infra*.

May 15, 1996 Integration Agreement for NJR employees[16]

29. CP and the CCROU signed this agreement to bring NJR locomotive engineers and trainmen into the CP collective agreements. The agreement "grandfathered" 6 NJR employees to maintain their priority for certain work.

30. Paragraph 20 of the agreement noted it constituted a full and final settlement:

> This Memorandum of Agreement constitutes the full and final settlement of all outstanding issues and grievances between the parties, as concern the Napeiervill Juntion Railway (sic) employees, as of the date of signing and fully integrates the NJR employees named herein into CPRS-Canada and into the Collective Agreements governing trainmen and locomotive engineers employed in Canada by CPRS (IFS). The former NJR collective agreement will no longer have any force or application.

June 30, 2000 Pool Agreement[17]

31. The parties[18] entered into this agreement for "relief, rescue or other train services…" on the LCS:

---

[14] Order No. 6283-U
[15] *Canada Labour Code*, RSC 1985, c L-2
[16] CP Exhibits Tab 16
[17] CP Exhibits Tab 17
[18] The employer named in this agreement is the "St-Lawrence & Hudson Railway". Local Chairman signed the agreement on behalf of the BLE and UTU.

> It is agreed that, on a without precedent or prejudice basis to any of the signatory parties, relief, rescue or any other train service provided on the Lacolle Subdivision by train service employees with home terminal in Montreal, shall operate subject to the following: …

32. That agreement established various standards for Montreal based crews when they worked on the LCS, such as the Crew Consist:

> Montreal based crews manning trains between Montreal terminal and Rouses Point, New York, shall consist of not less than one (1) conductor and one (1) locomotive engineer. Crew consist will be as prescribed in the collective agreement for required positions.

33. The agreement further contemplated the possibility of Montreal crews taking trains deeper into the US:

> In the event Canadian employees are required to operate trains south of Rouses Point (Mile 189), it is understood that all employees covered by this agreement will be qualified under NORAC rules at Company expense.

34. The TCRC noted that senior employees occupied these highly desirable positions in the pool which allowed them to make their maximum monthly miles in a relatively streamlined fashion[19].

March 25, 2004 Certification Order[20]

35. The TCRC succeeded the CCROU for the same bargaining unit:

> 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."

[19] Ex-1, TCRC Brief, paragraph 33.
[20] 8600-U. This Order replaced the earlier 6283-U.

36. The CIRB would have the relevant records about the parties' certification history, including that for the BLE and UTU before the CCROU and TCRC certifications.

March 23, 2007 Pool Agreement[21]

37. CP and the TCRC negotiated an amended pool agreement for "relief, rescue or any other train service provided on the Lacolle Subdivision by train service employees with home terminal in Montreal".

Events leading to the grievances

38. From 2010 to 2013, CP used only Canadian crews on the LCS. During this period, US and Canadian crews exchanged trains at Rouses Point, New York[22]. The TCRC saw the number of employees in its pool agreement double[23].

39. The 2010-2013 changes arose because the US crews could not complete their LCS route within the newly mandated 12 hours required by US legislation[24]. During that 2010-2013 period, CP upgraded the LCS track and infrastructure. This later allowed it to resume using US crews[25].

40. The TCRC grieved CP's use of US crews in late 2013 which had caused a reduction in its members' pool work[26].

ANALYSIS AND DECISION

41. The arbitrator noted in the introduction that this award dismisses the TCRC's grievances. The reasons below explain why.

[21] CP Exhibits Tab 18
[22] Ex-1, TCRC Brief, paragraph 38; TCRC Exhibits Tab 24
[23] Ex-1, TCRC Brief, paragraph 40
[24] TCRC Exhibits, Tab 10
[25] Ex-3, CP Brief, paragraphs 51 and 130; Ex-6, CP Reply, paragraphs 7 and 37.
[26] Ex-1, TCRC Brief, paragraphs 50-51

General Conclusion

42. As the QSC directed, the arbitrator has reviewed the key documents, *supra*. That review leads to the following factual matrix:

> **IDRs**: Neither CP nor the TCRC were parties to these US agreements when originally negotiated. D&H, before CP purchased it, negotiated them with the US-based BLE and UTU. CP, as the purchaser, might have stepped into D&H's shoes after the sale. But neither the TCRC nor any Canadian trade union was a party to them. Nonetheless, the IDRs form the essential backdrop against which to interpret the later CP-TCRC settlements and other agreements.
>
> **The 4 1991 Settlement Agreements**: These agreements with the Canadian arms of the BLE and the UTU settled issues arising from US crews bringing trains into Montreal. For example, Letter 1 with the BLE states that it would "settle all outstanding claims or grievances on behalf of CP employees concerning D&H crews operating into Montreal"[27]. The TCRC might have acted differently had it been there in 1991, but that does not impact the binding nature of these settlements.
>
> **1996 Integration Agreement**: This agreement provided "grandfathering" protection for 6 NJR employees doing specific work who would be added to the CP collective agreement.
>
> **2000 Pool Agreement**: The arbitrator interprets the phrase "relief, rescue or any other train service provided on the Lacolle Subdivision" as demonstrating that Montreal based employees would provide these services to US crews. The arbitrator cannot ignore that the parties placed the terms "relief" and "rescue" before the more general phrase "any other train service". The parties' own drafting supports the interpretation that the agreement sets out the entitlements for any Montreal employees who provide relief or rescue to the US crews on the LCS. If the TCRC had the exclusive right to perform LCS work, as was suggested in argument, then why negotiate this agreement?
>
> **2007 Pool Agreement**: The parties' continued use of the same ""relief, rescue or any other train service" terminology reinforces the interpretation given to the previous 2000 Pool Agreement. The US crews continued operating trains into Montreal as they had since the 1990 IDRs and the parties had agreed on relief and rescue services. TCRC crews could also operate trains from Montreal to Rouses Point, NY and possibly beyond.

[27] Letter 3 with the UTU has similar wording: "This agreement shall settle all outstanding claims and grievances on behalf of Napierville Junction Railway employees concerning D&H crews operating into Montreal": CP Exhibits, Tab 15. See also TCRC Exhibits Tab 3 for CP employees' claims re US crews.

43. For a layperson, it might appear curious that US crews can operate trains into or out of Canada. But the record contains no suggestion of any legal impediment. International undertakings like airlines, railways and trucking may benefit from special rules when performing cross-border work. The arbitrator notes the 2000 and 2007 Pool Agreements, *supra,* contemplated the possibility of Canadian crews working deeper into the US.

44. CP persuaded the arbitrator that US crews have for many years operated trains into and out of Montreal. The TCRC acknowledged this in its factum before the QSC[28]. Moreover, the pool work would not have doubled in 2010-2013 had US crews not being doing this work up to that point.

45. Following CP's purchase of D&H (NJR), certain labour relations issues arose due to the operations of the US crews. The various settlement documents and other agreements with the TCRC confirm the parties' clear knowledge and acceptance of these ongoing US crew operations.

46. The passage of time, by itself, does not terminate these settlements and agreements. CP is entitled to the benefit of its bargain(s). In ***AH690***[29]***,*** the arbitrator found that the TCRC was entitled to the benefit of the 1995 bargain it had negotiated pursuant to which CN had to obtain its consent before using extended runs:

> 41. But the need to adapt and improve efficiency remains subject to employment and labour legislation and, for the specific purposes of this case, the parties' collective agreements. Those agreements balance efficiency and other metrics with the essential employment bargain the TCRC has negotiated on behalf of its members.
>
> 42. In this case, the arbitrator's focus is not on how best to run a railway, a subject which would clearly fall outside any presumed expertise. Instead, the arbitrator must examine the parties' binding legal agreement contained in the PER. Evidently, the greater that CN can demonstrate compliance with the PER,

[28] CP Exhibit 28: Paragraph 10 of the TCRC's QSC facum reads: "Since the purchase by CP in 1991, US crews have been operating trains on the Lacolle Subdivision — that is, they have brought trains from Saratoga, NY to the Montreal Terminal. US crews have also departed from the Montreal terminal with trains prepared by Canadian crews".

[29] Canadian National Railway Company v Teamsters Canada Rail Conference, 2020 CanLII 66692

> the higher the likelihood an arbitrator would find any TCRC refusal to consent unreasonable.
>
> 43. The TCRC does not have a blanket objection to all PER changes. For example, the parties successfully negotiated an extension of hours for a different subdivision in August 2013, without any need for arbitration. The parties have also attempted to arrive at local agreements to address ITD and FTD. But, before giving its consent, the TCRC does insist on the benefit of the bargain which accrued to it under the PER.

47. The same principle applies in the instant case. For both scenarios, bargaining remains the forum to address concerns arising from longstanding agreements[30].

48. The arbitrator emphasizes that this award deals solely with US crews operating trains on the LCS. They have no right to perform other train related tasks such as switching, lifting or the setting off of cars and equipment[31]. CP does not dispute this point[32]. The arbitrator retains jurisdiction if any switching etc issues remain.

49. The arbitrator will expand upon two additional issues which arose in this case. First, what is an arbitrator's role in federal jurisdiction "scope" disputes? Secondly, did the TCRC demonstrate that it had the exclusive right to do the LCS work?

What is an arbitrator's role in federal jurisdiction "scope" disputes?

50. Given the parties' legal arguments about the concept of "scope", the arbitrator asked them for additional comment about their explicit or implied references to the CIRB's certification order[33].

51. During oral argument and in its written Brief[34], the TCRC suggested that CP had violated the CIRB's certification order by changing its scope unilaterally. It made several references to *Code* violations which presumably arose from the CIRB's order[35].

---

[30] Ibid. paragraph 71
[31] QSC decision at paragraph 7
[32] Ex-3, CP Brief, paragraphs 43 and 53
[33] Emails with the parties' legal counsel dated March 17-18, 2021
[34] Ex-1, TCRC Brief, paragraph 6
[35] Ex-1, TCRC Brief, paragraphs 105-106 and 110

52. The TCRC[36] and CP[37] agreed the collective agreements contained no "scope clause". In the absence of a scope clause, CP argued that the TCRC had to show that the collective agreement gave it the exclusive right to perform the disputed LCS work[38].

53. The arbitrator asked for the parties' assistance because a nuance exists between the treatment of labour board certification orders in various provinces when compared with the *Code*'s federal jurisdiction. In various provinces, labour board certification orders are generally considered "spent" after being issued. The parties can then negotiate scope issues during collective bargaining.

54. Federally, however, the *Code* grants the CIRB a continuing role over the scope of its certification orders[39]. The CIRB, and the CLRB before it, have used the *Code*'s review power[40] both to interpret and/or modify bargaining unit orders[41]. As a result, depending on the "scope" dispute, federal parties may take their issue to the CIRB for resolution.

55. For example, the CIRB has decided that a seemingly open-ended bargaining unit order description did not apply to a business in a different province[42]. In another case, a trade union asked the CIRB to confirm that certain outside individuals were performing work which fell within its bargaining unit[43].

56. The Board keeps historical certification material on file to assist it with bargaining unit scope disputes. In a recent case, the CIRB examined the original certification file[44] to conclude that the phrase "all field technicians" applied only to one part of an employer's business[45]. The CIRB had not held a vote before certifying the trade union. Based on the membership evidence and the absence of a vote, the CIRB concluded the original panel could not have certified the trade union for the broader bargaining unit it now claimed.

---

[36] Ex-1, TCRC Brief, paragraphs 125-131
[37] Ex-3, CP Brief, paragraph 116
[38] Ex-3, CP Brief, paragraph 118; Ex-6, CP Reply, paragraph 63
[39] *Oceanex (1997) Inc.*, 2000 CIRB 83
[40] *Code*, s.18
[41] *Buckmire*, 2013 CIRB 700
[42] Garda Cash-In-Transit Limited Partnership, 2010 CIRB 503
[43] Avant-Garde Sécurité Inc., 2014 CIRB 728
[44] Parts of a certification file regarding union support remain confidential and unavailable to the parties.
[45] LTS Solutions 2019 CIRB 896. See paragraphs 90 and 109.

57. Parties' agreements on "scope" do not bind the CIRB. The parties cannot split a CIRB certification order into three and then negotiate three separate collective agreements[46]. Similarly, a trade union violates its duty of fair representation if it agrees with the employer no longer to represent certain employees who the CIRB had expressly included in its bargaining certificate[47].

58. Given the CIRB's continuing oversight of its certifications, the *Code* further grants it the power to merge multiple bargaining units[48] which can help rationalize a bargaining structure that has become inappropriate over time[49].

59. The CIRB has commented on the role of labour arbitrators in this area[50]. The *Code* itself references the differing roles of the CIRB and federal labour arbitrators[51]. Not surprisingly, the dividing line is not always clear.

60. In sum, while "scope" issues in a province may start and end with the collective agreement, a nuance exists in the federal jurisdiction because the CIRB remains master of its certification orders, of which there are roughly 3850 publicly available on its website[52].

61. Some scope issues require an application to the CIRB. Other scope issues can be resolved by arbitrators interpreting the collective agreement. But an arbitrator cannot resolve any and all federal scope disputes simply by interpreting the collective agreement. This federal difference led to the arbitrator's request for the parties' comments.

62. As noted above, beyond the 1993 and 2004 certification orders, the record contains no information about any CLRB or CIRB proceeding involving the 1991 sale of business or raising the scope of the Boards' certification orders.

---

[46] Matthews, 1999 CIRB 40
[47] Spragg, 2011 CIRB 610
[48] *Code*, s.18.1
[49] Société Radio-Canada, 2015 CIRB 763; Viterra Inc., 2009 CIRB 465
[50] *Avant-Garde*, *supra* at paragraph 238 and following.
[51] *Code*, s.65
[52] Based on a recent search.

63. In their supplemental submissions[53], CP and the TCRC both confirmed that they were not requesting the arbitrator to interpret the CIRB's order. Rather, the issue concerned whether the LCS work "constitutes work that is the exclusive responsibility of the bargaining unit"[54].

64. This award is accordingly restricted to the issue(s) as clarified by the parties in their supplemental submissions. It does not interpret the scope of the CIRB's certification order.

Did the TCRC demonstrate that it had the exclusive right to do the LCS work?

65. The TCRC suggested CP might raise an argument based on estoppel or past practice[55]. CP pleaded that this is not an estoppel or past practice case. Instead, the issue concerned whether CP could assign LCS work to US crews. The answer in CP's view depended on whether the TCRC could demonstrate that LCS work constituted exclusively bargaining unit work under the collective agreement.

66. Parties remain free to negotiate provisions which limit the ability of others to do certain work performed by bargaining unit members. A no contracting out clause is one example. No such clause exists in this case. The TCRC pointed to seniority clauses in the applicable collective agreements[56] and argued that these created a geographic scope within which US crews cannot perform any of the disputed work[57].

67. Arbitrators have accepted that argument in other situations, *infra*. But those cases did not have the series of settlements and other agreements relating to US crews that exist in the instant case.

68. When collective agreements are not explicit whether only bargaining unit members can perform certain work, arbitrators have examined the concept of

[53] Ex-7 TCRC supplemental submissions (en liasse); Ex-8 CP supplemental submissions
[54] Ex-7, TCRC March 30, 2021 supplemental submissions at page 2.
[55] For those issues involving collective agreements, see generally International Brotherhood of Electrical Workers Council No. v Toronto Terminals Railway Company, 2019 CanLII 29083 at paragraphs 42-47.
[56] TCRC Exhibits Tabs 29-30.
[57] TCRC Brief, paragraph 115.

exclusivity. If bargaining unit members have done the work exclusively, then arbitrators may prevent an employer from using other individuals to perform that work[58].

69. While the parties filed many arbitral awards examining "exclusivity", the arbitrator will comment on the railway awards they submitted.

70. The TCRC urged the arbitrator to follow the reasoning of Arbitrator Stout in the *Thief River*[59] award which also involved US crews. In that case, Arbitrator Stout concluded that CP could not use the material change provisions in the collective agreement to start assigning bargaining unit work to US crews when Canadian crews had always done the work exclusively:

> [41] The Company cannot ignore the rights and the commitments found in the Collective Agreements and just assign work in Canada, that has been previously **exclusively performed** by Canadian crews represented by the Union, to American crews working for their subsidiary Soo Line.
>
> (Emphasis added)

71. The *Thief River* award examined a different factual situation. Fortuitously, Arbitrator Stout made explicit reference to CP's purchase of D&H (NJR) and noted how that sale impacted the TCRC:

> [47] The only example somewhat similar to the situation before me is the Delaware and Hudson Railway, which uses the Company's rail lines between Saratoga Springs, New York and Montreal, Quebec. The Delaware and Hudson Railway is a subsidiary of the Company that was purchased in 1991. **The Delaware and Hudson Railway utilized the Company's lines prior to being purchased and the Union's members did not perform the work in question. In fact, the Union indicated that they actually were provided more work as a result of the Delaware and Hudson Railway purchase. The situation was stable until most recently when the Union filed a grievance alleging that the Company has begun assigning bargaining unit work to Delaware and Hudson's American crews.**

[58] For a consideration of this "exclusivity principle" in the Ontario context, see Metroland Media Group Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 87-M, 2010 CanLII 59824 at paragraph 43.
[59] Canadian Pacific Railway v Teamsters Canada Rail Conference, 2015 CanLII 82083

> [48] **The situation before me is much different as it involves the Company reassigning work that has been *exclusively performed* by the Union's members for decades**. I agree with the Union that in the matter before me, the Company is in effect using non-bargaining unit employees operating Company trains on the Company's Canadian lines. Such conduct violates the Union's exclusive bargaining rights as well as the terms of the Collective Agreement.
>
> (Emphasis added)

72. The instant case is not one where TCRC members had been performing the LCS work *exclusively* for decades. Rather, the US crews, albeit not exclusively, had for decades operated trains on the LCS. The TCRC and CP entered into various settlements and agreements arising from the use of those US crews. *Thief River* and the instant case therefore differ fundamentally on the facts.

73. The TCRC also relied on Arbitrator Picher's decision in *Canadian National Railway* v. *Teamsters Canada Rail Conference*[60], which held that CN could not rely on the material change provisions to use employees on routes which fell outside their negotiated territories in the collective agreements. In that decision, the parties had negotiated geographic exclusivity into the various collective agreements.

74. Arbitrator Picher did note, however, that the parties could negotiate an arrangement for "trans-territorial work assignments"[61] to deal with the situation. The current case involves the parties' explicit settlements and agreements which distinguishes it from the one Arbitrator Picher decided.

75. In *CROA 3177*[62]*,* Arbitrator Picher commented on the need for exclusivity before a trade union gains a proprietary right to certain work:

> The fundamental weakness of the instant grievance arises, in the Arbitrator's view, from the fact that the Brotherhood cannot demonstrate exclusive jurisdiction with respect to the work in question. **Even if it is accepted that the facts disclose the transfer of a portion of work previously performed by Calgary based TPMAs to conductors, the evidence is categorical that work of that kind has been regularly performed within the Company's**

[60] 196 LAC (4th) 207
[61] Ibid. at paragraph 36
[62] CROA 3177

> **operations by persons other than members of the bargaining unit.** Specifically, managers and non-scheduled employees at Montreal have, for some time, performed the very functions which are the subject of this dispute. **In these circumstances it is not open to the Brotherhood to claim more than concurrent jurisdiction with respect to the work in question. That is especially so where, as in the instant case, it can point to no provision of the collective agreement which confers exclusive work jurisdiction upon employees in the TPMA classification.**
>
> (Emphasis added)

76. TCRC members benefited significantly during the 2010-2013 period when their number in the pool doubled. But did CP's change provide the TCRC with the exclusivity the case law requires? The answer is no.

77. First, as the settlements and other agreements demonstrate, the parties had been acting for decades with the common understanding that US crews operated on the LCS. Second, the TCRC did not provide a legal basis explaining why the 2010-2013 period nullified its previous settlements and agreements.

78. Third, both parties were aware that changes in US regulations had impacted the ability of US crews to complete their routes on the LCS. Fourth, the TCRC did not dispute CP's position that LCS track and infrastructure improvements during 2010-2013 later allowed US crews to resume and complete their work within the mandatory 12-hour period.

79. In hindsight, it might have been useful for CP to discuss with the TCRC the reasons for the change in 2010-2013. That change resulted in the doubling of pool work for TCRC members. One can appreciate why the later loss of this additional work led to the grievances and multiple legal proceedings. To be fair to the parties, however, the need to research the decades-long history going back to the IDRs only arose following the filing of the TCRC's grievances.

80. But the TCRC did not persuade the arbitrator that the parties' silence during the 2010-2013 period nullified their past settlements and agreements regarding US crews. These agreements, even if one considers the 2010-2013 period in isolation, confirm that the TCRC never had the exclusive right to do the LCS work.

81. Accordingly, CP can use US crews to operate trains on the LCS as it has been doing since 1991.

DISPOSITION

82. The arbitrator has decided to dismiss the TCRC's two grievances. As noted, this award expressly does not interpret the CIRB's certification order.

83. The arbitrator concludes that CP and the TCRC, including its predecessors, have negotiated settlements and agreements arising from US crews operating trains into and out of Montreal. The TCRC has never had the exclusive right to perform this work on the LCS.

84. While the TCRC did benefit from an increase in work when US crews did not operate on the LCS from 2010-2013, this did not create exclusivity. Instead, both parties remained bound by the various settlements and agreements they had negotiated over the years.

85. The grievances are dismissed.

SIGNED at Ottawa this 7th day of April 2021.

Graham J. Clarke
Arbitrator