CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4599-M

Heard via Video Conference and in Ottawa, Ontario, January 11, 2022

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company instructed Conductor Stride to yard his train in three separate tracks even though his train would have fit into two tracks. The Company further instructed Conductor Stride to couple onto cars that did not pertain to his train.

JOINT STATEMENT OF ISSUE:

Conductor Stride was ordered on train Q149 on December 28, 2014 Belleville to Toronto with a total length of 10440 feet.

Upon arrival at BIT Yard, Conductor Stride was instructed to yard his train into track Y201 and hold onto 4000 feet of traffic. He was then instructed to put the cars into Y214 and couple onto cars already in Y214 and shove them into the approximately 2500 feet and make another cut. Conductor Stride was then instructed to shove the remaining 1500 feet into track Y210.

Conductor Stride filed a grievance in this matter and the Company's Step III responded by stating that: "In the instant case, the Company advised the officers involved in the event about our obligations towards Article 41, and that the required tasks on that day were beyond what should have been asked to Mr. Stride".

The Union's Position:

The Union submits that the Company has violated Articles 7.9, 11.7, 41, 49, 56, 61, 85, 85.5 which the Company acknowledged in the Step III response.

As a result of the acknowledged violation and blatant, continued and deliberate violation of the 4.16 Collective Agreement, the Union is seeking a significant remedy given that the Company has educated all its managers on the application of Article 41.

The Union contends that the Company has violated arbitral jurisprudence in relation to Conductor-only operations and Article 41 governing the work of Yard Service employees.

The Union further contends that the Company has, in addition to violating the terms of the 4.16 Collective Agreement that the Company is also in violation of the arbitral jurisprudence and CIRB 315.

Given the blatant, continued and deliberate violations of the 4.16 Collective Agreement, the Union is seeking a significant remedy in accordance with Addendum 123 of the Collective Agreement in this instance as the Company continues to violate the Collective Agreement.

The Company's Position:

The Company disagrees with the Union's contentions and declines the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Robbins	**(SGD.) D. Larouche**
General Chairperson	Labour Relations Manager

There appeared on behalf of the Company:

T. O'Hearn Davies	– Counsel, Norton Rose Fullbright, Toronto
V. Paquet	– Manager, Labour Relations, Toronto
M. Boyer	– Senior Manager, Labour Relations, Montreal
F. Daignault	– Senior Manager, Labour Relations, Montreal
J. Torchia	– Director Labour Relations, Strategy Ops, Edmonton
C. Trolley	– General Manager Eastern Region
G. Etheir	– Retired CN Supervisor, Toronto
B. Adams	– Senior Safety Manager Intermodal East, Toronto

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, Sarnia
G. Gower	– Vice General Chairperson, Belleville
E. Page	– Vice General Chairperson, Toronto

AWARD OF THE ARBITRATOR

1. The main issue in this case is whether a road service employee was directed to do the work of yard service employees, in breach of Collective Agreement 4.16 (the "Eastern Agreement").

2. The grievance also raises issues about whether the Employer can amend its position and/or rely on an *Ex Parte* Statement of Issues ("EPSI"), which it filed after the

grievance was referred to this Office and after the Parties had signed and submitted a Joint Statement of Issues ("JSI").

The Facts

3. The facts are not in dispute. The Grievor is a road service employee, who was working in a conductor-only service on December 28, 2014. He was operating train Q149 from Belleville to Brampton Intermodal Terminal. The train was a total length of 10 440 feet.

4. When the Grievor arrived at Brampton Intermodal Terminal, the Employer instructed him to take the following steps:

a. Pull the entire length of his train—10,292 feet—into track Y201.

b. Make a designated cut, leaving 5,460 feet of the train in Y201.

c. Pull the balance of his train out of Y201 and into Y210.

d. Make a second designated cut, leaving 3,167 feet of the train in Y210.

e. Move the remaining block of cars on to Y214.

f. As several cars from another train were already positioned in Y214, the Grievor was instructed to couple his train onto the pre-existing cars and shove the entire coupled train clear of the switch.

5. As I describe in more detail below, the main issue in dispute is whether the final manoeuvre – the act of coupling with another train and shoving to clear the switch -- is work in connection with the Grievor's own train and putting his own train away.

History of Proceedings

6. The Union filed the grievance on January 6, 2015. On July 7, 2015, the labour relations manager provided the following Step III response on behalf of the Employer:

> In the instant case, the Company advised the officers involved in the event about our obligations towards Article 41, and that the required tasks on that day were beyond what should have been asked to Mr. Stride.
>
> Based on the above, the Company considers that it took sufficient steps to correct the situation in the future, preventing reoccurrence. We therefore consider the grievance settled.

7. The Union submits that the Employer has acknowledged breaching the Collective Agreement. It states that this concession is binding on the Employer and, as a result, remedy is the only outstanding issue between Parties.

8. The Union referred the matter to this Office and the Parties signed and agreed to a JSI, which is reproduced in the style of cause, above. The Office received the JSI in November 2015 and the matter was scheduled for hearing in 2017.

9. In advance of the 2017 hearing, the Union sought to remove the grievance from the CROA docket and engage in settlement discussions, alleging that the matter was *res judicata*. The Employer subsequently contested the arbitrability of the grievance, taking the position that the Union had withdrawn the grievance with prejudice.

10. A hearing on the preliminary issue took place in 2017. Arbitrator Clarke rejected the Employer's objection: **CROA 4599-PO**. The Quebec Superior Court dismissed the

Employer's application for judicial review: *Canadian National Railway Company v. Clarke*, 2020 QCCS 1442.

11. On June 15, 2020, the Employer submitted an *EPSI* to this Office, seeking to add the following language to the JSI:

> The Company disagrees with the Union's position. When in the process of yarding their train, it is the Company's position that coupling onto and/or shoving cars already in the track for the sole purpose of clearing the switch to make room for the cars of his train is incidental in putting their train away. Jurisprudence supports the Company's position. The Company does not agree that the Collective Agreement was violated or that Addendum 123 is applicable. In addition, the Company relies on past practice, as well as the Union's internal correspondence to further support its position.

12. The grievance was scheduled for hearing before me on January 11, 2022. The Parties agreed that the matter would proceed on the merits. The Parties made oral arguments and submitted extensive briefs and books of documents.

13. On January 12, 2022, counsel for the Union wrote to me and to counsel for the Employer. He indicated that he had neglected to respond to one of the Employer's points and he provided brief written submissions on that issue. Counsel for the Employer objected to these further submissions from the Union or, in the alternative, requested an opportunity to respond.

14. I convened a telephone conference call on January 14, 2022. Following a discussion with counsel, I indicated that I would consider the Union's additional written submissions. The Employer was given an opportunity to respond, which it did, providing

brief written submissions on January 17, 2022. I have considered all of this material in rendering this award.

Analysis

Can the Employer Amend its Position?

15. The circumstances of this case are similar to those in **CROA 4575**. In both matters, the labour relations manager indicated at Step III of the grievance process that (a) the tasks assigned to the grievor were beyond what was permitted; and (b) sufficient steps had been taken to address the situation. However, at the hearing in **CROA 4575**, the Employer denied any breach of the Collective Agreement.

16. In **CROA 4575**, Arbitrator Sims described and addressed the issue as follows:

> The preliminary question is really – Is the Employer bound by Mr. Larouche's statement that coupling and shoving onto the cars already on track M106 should not have been assigned to Mr. Vickers? Had the Union accepted Mr. Larouche's proposed resolution of July 10, 2015, then that might have formed part of a binding settlement. However, it did not and thus [it is] simply part of an unaccepted offer to settle. At best it is an admission against interest.

17. For the reasons expressed by Arbitrator Sims, I conclude that the Employer was not bound by the labour manager's statement at Step III of the grievance. In this case, as in **CROA 4575**, the Union did not accept the manager's proposed resolution and it instead referred the matter to arbitration.

18. It is also significant that the JSI signed by the Parties refers to the Employer's disagreement with the Union's position. Applying **CROA 4575** and given the language of

the JSI in this case, I find that the Employer has reserved its right to argue that the Collective Agreement was not breached.

Can the Employer File an EPSI?

19. When the Employer noticed what it describes as the former labour relations manager's "error," it sought to amend the JSI. When the Union objected to the proposed amendments, the Employer filed an EPSI. The Employer submits that an EPSI was needed to correct factual errors contained in the JSI and to clarify the Employer's position in light of those corrected facts.

20. To the extent that there was any dispute or error concerning the facts, this was resolved at the hearing. Both Parties confirmed that they agree with the events and their sequence, as described in paragraph 4 of this award.

21. For the reasons provided, I accept that the Employer has retained the right to argue that the Collective Agreement was not breached. As Arbitrator Picher noted in **CROA 2099**, an employer may plead at arbitration whatever terms of the Collective Agreement it deems appropriate, provided it complies with the requirements of the Collective Agreement and the rules governing this Office.

22. Importantly, the Memorandum of Agreement Establishing the CROA&DR ("MOA") sets out rules regarding the submission of a JSI or an EPSI. This process is particularly important because the arbitrator's jurisdiction is limited to matters raised in the statements

of issues. The Employer's unilateral filing of an EPSI, without the permission of the arbitrator and after the Parties had submitted a JSI is inconsistent with the MOA and the purpose it was designed to achieve.

23. Accordingly, it was not appropriate for the Employer to unilaterally provide an EPSI. This proceeding is based on the JSI, as submitted by the Parties.

Was there a Violation of the Collective Agreement?

24. The scope of work for road and yard service employees has been the subject of considerable litigation between the Parties. The main point of contention in this case, and in much of the jurisprudence, is what constitutes work in connection with a grievor's own train and putting his own train away. The amount of litigation on this issue seems to arise out of the seemingly infinite variety of ways in which a train may be positioned when it arrives at the terminal.

25. In general, the applicable principles were set out by Arbitrator Picher in the seminal case of **AH 560**. That matter was decided under a different collective agreement (the "Western Agreement"). However, the Union has specifically agreed that AH560 also applies to the Eastern Agreement and there is considerable jurisprudence from this Office interpreting the Eastern Agreement in light of the principles in **AH 560**.

26. The key provisions of the Eastern Agreement are Articles 7, 11, and 41. Article 41.1 specifies what work can be done by road service employees and what work is reserved to yard service employees. It states:

> 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. [Emphasis added.]

27. In interpreting Article 41.1, it is important to consider articles 11 and 7, which provide additional information about what work can be assigned to road service employees. Paragraph 7(d) states:

> In the application of the provisions of Article 41, when employees in road service are instructed to yard their train in a particular track at a terminal and such track will not hold the entire train, they will double over surplus cars or a designated cut of cars to another yard track. In cases of yard congestion where there is insufficient room to double over all cars to one track it will be necessary to double over to more than, in the manner described above, to effectively yard the train. Employees (including those working in a conductor only operation) required to double over designated cuts of cars will be paid 12½ miles in addition to all other earnings for the tour of duty.
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> […]
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> NOTE: Except as provided in sub-paragraph 7.9 (d), employees will not be required to marshall trains upon arrival at terminals (e.g.: setting over 10 cars for one destination to one track, and 10 cars for another destination to another track).

28. Article 11.7 concerns the use of reduced freight or conductor-only crews. It states:

> 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:
>
> […]
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> (c) At the final terminal, doubling is limited to that necessary to yard the train upon arrival (sic) account yard tracks being of insufficient length to hold the train.

29. Significantly, the facts in this case are identical to those in **CROA 4469**, which was also decided under the Eastern Agreement. In **CROA 4469**, the grievor was instructed to follow the same sequences of maneuvers as in this case. As a final step, the grievor in **CROA 4469** was directed to couple the remaining cars of his train onto the cars already present on track Y201. He was then required to the shove the coupled train further down Y201 to fit the remaining cars in the track.

30. In **CROA 4469**, Arbitrator Flynn considered the above-mentioned articles of the Eastern Collective Agreement as well as Arbitrator Picher's decision in **AH560**. Based on this, she concluded:

> It is clear that having a road crew perform work on another train within switching limits is not considered to be "switching required in connection with their own train" or "putting their own train away". As such, it is forbidden by article 41.
> […]
> The question of whether the yard was congested or that there was insufficient space to put away the Grievor's train is in this case irrelevant. Any situation where a road service crew comes to work on someone else's train within a yard switching is forbidden by article 41, since it is not work pertaining to his own train.

31. The Employer submits that the present case should be distinguished from **CROA 4469** because Arbitrator Flynn did not have the benefit of a 2006 Union circular, which was placed in evidence before me. This circular was authored by Bryan Boechler, the General Chairman operating in Western Canada. It was addressed to "all local chairpersons" and its purpose was to clarify the application of **AH 560**. The circular includes the following statement:

> If there is room to make the set off without coupling to cars in the track and you are instructed to couple on - it is a violation. If there is insufficient room we are required to couple on and shove to clear.

32. According to the Employer, this is an acknowledgement by the Union that employees may be required to couple on to other trains and shove clear of switches, where there is otherwise insufficient room to yard their train on the designated track. The Union disagrees. It explained that Mr. Boechler, then General Chairman of the Western Operations, had no say over the administration of the Eastern Agreement or vice versa.

33. The jurisprudence provides considerable support for the Union's position. The relationship between the Eastern and Western Agreements was discussed in some detail by Arbitrator Picher in **AH609**, where he wrote:

> The trade unions which have traditionally represented Canadian railway industry do not generally operate through units referred to as "locals". Rather, as has particularly been the case within the running trades, collective agreements are negotiated and administered by units of national or international unions generally referred to as General Committees of Adjustment or GCAs. Historically, the operations of the instant Company in respect of running trades have involved separate units for the purposes of collective bargaining both by territory and by craft. Consequently, the craft of locomotive engineers has evolved to be represented by separate General Committees of Adjustment, for the Company's Eastern Lines and for the Company's Western Lines. Each

> of those GCAs holds its own separate agreement for its respective territory and administers the terms of those agreements in a relatively independent fashion. […]
>
> In recent years there have been changes in the designation of the collective bargaining agent. In the result, a single international trade union now holds the certificates as bargaining agent for all of the running trades employees of the Company. It also appears that under that framework the bargaining for the running trades occurs at a single table, albeit separate collective agreements emerge from that process. In the result, the concept of the GCA has been preserved. With respect to locomotive engineers the GCA for Western Lines is involved in the negotiation and the exclusive administration of collective agreement 1.2, the GCA for Eastern Lines is involved in the negotiation and exclusive administration of collective agreement 1.1. With respect to the conductors' trade the GCA for Eastern Canada exercises the same authority for collective agreement 4.16 while the GCA for Western Lines does the same in respect of collective agreement 4.3.
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> There is, it must be stressed, a resulting collective bargaining structure which, although it has been subject to changes in the identity and structure of bargaining agents over the years, has preserved an extremely long-standing institutional framework for the bargaining of collective agreements and the administration of those agreements during their term, based on geographic and craft divisions. While the collective agreements east and west may be similar, they do have some distinct and different provisions.

34. The 2006 Union circular was issued by the General Chairman of the Western Operations in relation to the Western Agreement. Under the collective bargaining structure, this circular is not binding on the General Chairman of the Eastern Operations, nor does it assist in the interpretation of the Eastern Agreement.

35. Indeed, the Eastern and Western Agreement are two separate collective agreements. They contain different provisions and language concerning the scope of yard and road service work. For example, the Employer submits that the Western equivalent

of 41.1 is article 102.1. In comparing the two provisions, it is significant that the actual language they use is very different:

Western Agreement **102.1**	**Eastern Agreement** **41.1**
Yard service employees will do all transfer, construction, maintenance of way, and work train service exclusively within switching limits, and will be paid yard rates for such service. Switching limits to cover all transfer and industrial work in connection with termination. This paragraph shall apply only at locations which are listed in paragraph 112.6 of article 112.	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.

36. In considering the 2006 circular, I note that the situation is quite different from the internal Union communications around the applicability of **AH 560**. Although that was a Western Case, the General Chairman of the Eastern Operations issued a circular indicating that it applied to the Eastern Collective Agreement as well. The General Chairman of the Eastern Operations issued no such communication adopting Mr. Boechler's 2006 circular.

37. In sum, the 2006 Union circular pertains to the Western Agreement and it does not assist me in interpreting articles 41, 11 or 7 of the Eastern Agreement. Particularly given the collective bargaining structure, described in **AH 609**, there is no basis to conclude that the 2006 circular is binding on the Eastern General Chairman or that it is a relevant interpretive aid to the Eastern Collective Agreement: see also **CROA 4575.** Accordingly, the 2006 Union circular is not a basis to distinguish this matter from **CROA 4469**.

38. In interpreting the relevant provisions of the Collective Agreement, it is important to consider the language of the provisions in their full context. Generally speaking, the Collective Agreement provides that switching within the yard is work that must be assigned to yard service employees. Road service employees may be assigned yard work in limited circumstances, as set out in articles 41.1, 11, and 7.

39. There is no dispute that, pursuant to articles 7 and 11 and subject to providing appropriate compensation, the Employer could properly direct the Grievor to double his train and make designated cuts. The issue in dispute is whether it could also require him to couple to another train and shove that train into the clear.

40. Article 41.1 states that road conductors may perform switching (which can include coupling) only where this is required “in connection with their own train and putting their own train away.” The use of the word “and” is significant: it requires that both conditions be met.

41. In other words, the work assigned to the Grievor must both (a) be in connection with his own train; and (b) be for the purpose of putting his train away. The Employer cannot require a road service employee to perform switching in connection with his own train unless it is for the purpose of putting his train away. Similarly, in directing a road service employee to put away his train, an employer cannot require him to perform work that is not in connection with his own train, including coupling to another train and shoving it to the clear.

42. I agree with Arbitrator Flynn's reasoning and her conclusions in **CROA 4469**. Coupling to another train is not work that is in connection with the Grievor's own train. Under article 41.1, it is not permissible to require a road service crew to work on someone else's train, even when in the process of putting their own train away. I agree with Arbitrator Flynn that the existence of other cars on the track is not relevant: it does not change the fact that coupling to another train is work that is not in connection with the Grievor's own train and, therefore, impermissible.

43. The Employer alleges that there is a longstanding past practice, where conductors have been required to couple to other trains and then shove to a clearing point. The Union objected to this argument, in part because it was not raised in the JSI.

44. It is not clear to me that the issue of past practice has been properly raised or that the Employer has provided sufficient evidence to support a finding on this issue. In any event, in the circumstances, I could not give weight to this alleged past practice. As of at

least November 3, 2016, the date **CROA 4469** was issued, any such practice that relates to the fact of this case would have been incompatible with an arbitral award.

Conclusion

45. For the reasons set out above, the Employer breached the Collective Agreement when it directed the Grievor to couple to another train and shove the coupled train into the clear. That work ought to have been assigned to yard service employees.

46. The Grievance is upheld. The issue of remedy is remitted to the Parties. I remain seized regarding the interpretation and application of this award and in the event the Parties are not able to reach an agreement on remedy.

January 26, 2022

MICHELLE FLAHERTY

ARBITRATOR