CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4875

Heard in Montreal, October 18, 2023

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union alleges that the Company unilaterally abolished two assigned pools in Hornepayne, what was commonly referred to as the split spareboard at Hornepayne, on October 25, 2009 contrary.

JOINT STATEMENT OF ISSUE:

The parties agreed in 1997 to introduce assigned pools (referred to as "split boards") in Hornepayne. This agreement established a "split spareboard" that would protect service in two 12 hour time blocks. Employees occupying such positions were entitled, among other things, to a monthly guarantee of 4300 miles. On or about September 24, 2009, the Company cancelled these split boards effective October 25, 2009.

The Union's Position

The Union submits that it was not open to the Company to simply cancel the agreement governing the operation of the assigned spareboard in Hornepayne, Ontario as it did in October 2009. The Union alleges this violates Article 27.3. The Union seeks to have the assigned board re-established and governed by the agreement put into place in March of 1997 as they were prior to October 2009.

The Company's Position:

The Company does not agree with the Union's position. It is the Company's position that the split boards were cancelled in accordance with the cancellation clause that remained in effect between the parties.

In the alternative, the Company submits that the Union is estopped from continuing to grieve this cancellation post September 2010. The parties since the filing of the first grievance have met and bargained a new collective agreement and this issue was not bargained. (2014)

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Robbins	**(SGD.) V. Paquet**
General Chairperson, CTY-C	Labour Relations Manager

There appeared on behalf of the Company:

A. Borges	– Manager Labour Relations, Toronto
F. Daignault	– Director, Labour Relations, Montreal

J. El Shamey – Senior Labour Relations Manager, Montreal
S. Matthews – Manager, Labour Relations, Toronto
R. Singh – Manager, Labour Relations, Edmonton
D. Jenson – Transportation Manager, Vancouver
I. Muhammed – Manager, Labour Relations, *Observer via Zoom*

And on behalf of the Union:
D. Ellickson – Counsel, Caley Wray, Toronto
J. Lennie – General Chairperson, CTY-C, Hamilton
G. Gower – Vice General Chairperson, CTY-C, Brockville
E. Page – Vice General Chairperson, Burlington
M. Kernaghan – General Chairman, LE-C Trenton
R. Donegan – General Chairperson, CTY-W, Saskatoon
J. Thorbjornsen – Vice General Chairperson, CTY-W, Saskatoon
M. Anderson – Vice General Chairperson, LE-W, Edmonton
P. Boucher – TCRC National President, Ottawa
R. Finnson – Vice President, TCRC, Ottawa

AWARD OF THE ARBITRATOR

Context

1. In 1997, the Parties negotiated a Local Agreement, whereby a split spareboard was created for Hornepayne.

2. The Agreement was in place from 1997 until 2009, when it was unilaterally revoked by the Company. At issue is whether the Company is entitled to rely on a cancellation clause separate from the Agreement.

3. The dispute is complicated by the fact that it relates to agreements made some 25 years ago, with grievances filed some thirteen (13) years ago, with disputes concerning the intention of the parties and no witnesses having testified to shed light on the disputes.

Position of the Parties

4. The Company argues that the referral to arbitration is untimely.

5. The Company submits that both Parties understood that a change was necessary to meet business needs, but that the change was never intended to be permanent.

6. The Company takes the position that it would make no sense for the parties to negotiate a trial period and cancellation clause, which begins with the implementation of the new spareboards some two weeks later, if the February Agreement would become irrelevant on the signing of the March and April Agreements. It relies on the principle that every clause in a collective agreement must have meaning (see AH 647).

7. The Company argues that the Union is estopped from continuing to grieve the cancellation given that multiple collective agreements have been negotiated since 2009 when the Agreement was cancelled. Moreover, it argues that the doctrine of laches applies to any remedy, given that no progress has been made on the grievance since 2014 and multiple recent cases have been heard through the CROA and Ad Hoc processes. It argues that the grievance has, in effect, been abandoned.

8. The Company submits that it has not violated Article 27 of the Collective Agreement and that the crux of the debate is whether the Company had the right to cancel the Agreement. It argues that the employer's right to assign work can only be constrained by explicit language, which does not exist here.

9. The Union argues that the Company is not permitted by CROA Rules to raise timeliness concerns not found in the JSI.

10. The Union argues that the Assigned Pools Agreement of 1997 formed part of the Collective Agreement, and therefore was not subject to unilateral cancellation by either party. The Agreement was a Local Agreement incorporated into the Collective Agreement by article 27.3 of the 4.16 Collective Agreement. It cites numerous cases at paragraphs 28-35 of its Brief concerning ancillary documents which form part of the Collective Agreement.

11. The Union submits that the March and April Agreements make no mention of the cancellation clause found in the February 27 Agreement. It submits that these later Agreements superseded the earlier Agreement.

12. The Union relies heavily on the argument that the Agreement had concessions and benefits to both sides. It pleads that it would be illogical for the Company to be able to unilaterally cancel the Agreement, revert to the previous Pool, but keep the benefit of the permanent elimination of the non-essential brakemen positions.

13. In the alternative, the Union argues that if the February Agreement did apply, by its own terms, it would only apply for the trial period to which it refers. Here, the Agreement applied for twelve (12) years, well beyond any trial period.

14. The Union argues that the elements for a finding of estoppel have not been made out by the Company. It filed multiple grievances and always communicated to the Company that it intended to pursue the matter to arbitration.

Issues

A. Is the Company entitled to argue timeliness?

B. Did the cancellation clause form part of the March/April 1997 Agreement?

C. What are the effects of the 2009 cancellation?

D. What remedy is appropriate?

A. Is the Company entitled to argue timeliness?

15. The Company argues in paragraphs 11-16 of its Brief that the grievance is untimely under article 84.4 of the Collective Agreement, which requires a referral to arbitration within 60 days of a final decision by the Vice-President.

16. The Union argues that this issue was never raised in the JSI or at any grievance step. It submits that Article 14 of the CROA Rules limits the decision of the arbitrator to issues raised in the JSI:

> 14.The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions, which may be arbitrated, to such issues, conditions or questions. The Arbitrator's decision shall be rendered in writing, together with written reasons therefor, to the parties concerned within 45 calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, unless the applicable collective agreement specifically provides for a different period, in which case such different period shall prevail.
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> The decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.

17. I agree with the position of the Union. The Company is not entitled to advance arguments at the Hearing which were not raised in the JSI, as this is contrary to the Agreement between the Parties. In my view, the analysis set out by Arbitrator Hornung in CROA 4744 and 4739 is correct and should be followed.

B. Did the cancellation clause form part of the March/April 1997 Agreement?

18. The February 27, 1997 Agreement appears to be signed by both parties and reads as follows:

> Agreement with respect to the principles of Extended Runs relating to the establishment and operations of the Assigned Pool(s) at the terminal of Hornepayne Ontario.
> It is understood that the parties have agreed to a trial period with respect to the operation of the Assigned Pool(s) at the terminal of Hornepayne. During such trial period either party may, by written notice to the other, cancel the Assigned Pool(s), and related principles, and revert to the assignments which were in place immediately prior to such establishment.
> The trial period shall commence at the time of introduction of the Assigned Pool(s).

19. On March 13, 1997, the Parties signed an Agreement with respect to a split Spareboard:

> 1) Spare Boards, Relief Pools and Non-essential brakeman's positions, where operational, will be discontinued. Assigned Pool(s) shall, by agreement between the proper Officer of the Union and the

> proper Officer of the Company, be established to capture 14 hour time blocks.
>
> March 13, 1997
> Agreement with respect to the principles of Extended Runs relating to the establishment and operation of the Assigned Pool(s) at the terminal of Hornepayne Ontario.
> It is understood and agreed that the establishment of the Assigned Pool shall not constitute a precedent applicable anywhere else on the CN Railway System nor shall any language or concept from this Agreement be used by either party at a future National Contract Negotiations between the parties, unless as mutually agreed. Nor shall any party hereto invoke any or all dispositions of said Agreement as constituting a precedent or as constituting in any way admissions or concessions relative to the general labour negotiations ongoing at anytime at the national level between the parties hereto.

20. The Parties on April 9, 1997, amended the March 13 Agreement to reduce the time blocks from 14 hours to 12 hours.

Analysis and Decision

21. The Company has the burden of proof to establish the existence of and the on-going application of the cancellation clause.

22. The Union argues that the March/April Agreements had become part of the Collective Agreement by the application of article 27.3, such that a unilateral cancellation was not possible. Any change would require negotiations.

23. The Company argues that it retained the right to cancel the March/April Agreements, based on the February Agreement. It argues that the crux of this case is whether that Agreement continued in force.

24. In my view, there is nothing to prevent one party granting the other party a unilateral right, even if it is part of a collective agreement (see AH 647, where unilateral rights were recognized). I agree with the Company that the crux of the matter is whether this unilateral right to cancel was given and retained until 2009.

25. Although the matter is not free from difficulty, I find that the February 27, 1997 Agreement forms part of the March 13, 1997 and April 9, 1997 Agreements.

26. I come to this conclusion on the basis of multiple factors, after weighing those which point in favour and against the on-going existence and application of the February Agreement.

27. Against the existence and application of the February Agreement is the document itself. The original of the February Agreement was not introduced into evidence and has not been found. The Union requested the full letter, rather than what it sees as a partial quote, in October, 2014, as part of the grievance process (see Company Exhibit 3). It was never provided.

28. The fact that neither the Company nor the Union are able to produce an original or complete copy of the February Agreement is not determinative, but it is troubling. If the Agreement was intended to have on-going effect, one would expect both parties to have taken the trouble to preserve a copy of the Agreement.

29. There are, however, multiple factors in favour of the existence and application of the February Agreement.

30. The first is that the same individuals, Mr. Beatty for the UTU and Mr. Hogan for the Company signed both the February and March Agreements. There does not appear to be any signature for the April amendment.

31. The second is that the Agreements are virtually contemporaneous, with the first two Agreements being signed within two weeks of one another.

32. The third is that the February Agreement trial period did not even come into effect until the introduction of the Assigned Pools, created by the March and April

Agreements. Thus, it would appear that the Agreements, from their own terms, were intended to be linked.

33. The fourth is that there is nothing in the much more detailed March and April Agreements which cancels the February Agreement. For experienced labour relations professionals, as these individuals undoubtedly were, if their intent had been to cancel the previous Agreement, they would have said so in writing.

34. The fifth is that the bilateral nature of the March and April Agreements does not preclude the existence of a unilateral cancellation clause. The bilateral nature of the Agreements will have an effect on what happens after the cancellation, to be discussed below, but not on the right to cancellation itself.

35. The sixth is the lengthy labour relations history between the parties. The Union notes that cancellation clauses are commonly included in Local Agreements between the parties (see para. 25, Union Brief).

36. On the balance, I find that the February 27, 1997 Agreement was incorporated into the March/April 1997 Agreements. The CROA jurisprudence supports this view. The Company argues that only the clearest of language should direct an arbitrator to find that management has voluntarily given up its right to assign work. At paragraphs 81-87 of its Brief, it cites numerous CROA decisions to this effect. I agree with this general proposition.

37. The Union argues that if the February Agreement did apply, it continued to apply only during a “trial period”, which could not have been more than six months to a year (see para. 27, Union Brief). The Company argues that “trial periods” of twelve (12) years have existed, when initially foreseen for twelve (12) months (see Company Reply Brief, CROA 1491), and that the trial continued until cancelled in 2009.

38. The February Agreement speaks to a "trial period with respect to the operation of the Assigned Pool(s) at the terminal of Hornpayne". It notes further: "During such trial period either party may …cancel the Assigned Pools…". The Union seeks to infer a permanence to the Assigned Pool(s) by the passage of time alone. I find that such a position is contrary to the plain language of the Agreement itself.

C. What are the effects of the 2009 cancellation?

39. This Agreement deals with more than simply a right by either side to cancel the Agreement. It also speaks to what happens after the cancellation:

> "During such trial period either party may, by written notice to the other, cancel the Assigned Pool(s), and related principles, and revert to the assignments which were in place immediately prior to such establishment."

40. What were the previous assignments? The March/April Agreements speaks to this:

> "Operation of the U.T.U. Assigned Pool
> 1)Spare Boards, Relief Pools, and Non-essential brakeman's positions, where operational, will be discontinued. Assigned Pool(s) shall, by agreement between the proper Officer of the Union and the proper Officer of the Company, be established to capture 14 (12, added in April) hour time blocks."

41. If an officious bystander had asked the Parties shortly after the Agreement was implemented, say in June 1997: "What happens if the February cancellation clause is applied now?", the answer would surely have been: "The Parties revert to the situation which existed prior to the February, March and April Agreements". This would include the reactivation of the abolished brakemen positions. Neither Party would ever have signed an agreement in which one side could unilaterally cancel the Agreement while retaining the benefit which the other side had given up.

42. I find that this was not a simple work assignment, which could later be unilaterally changed by the Company to meet changing conditions. It was a bargain struck with the

Union, whereby the Union gave up 12 non-essential brakemen positions in exchange for a split spareboard and other guarantees. I find the factual underpinnings similar and the reasoning compelling in Eurocan Pulp and Paper Co. v. C.E.P., Local 298, 1998 Carswell BC 3301:

> 23 I have concluded that the instant case must also be an exception to the general rule. I am persuaded to that conclusion based on the subject matter of the Letter of Understanding, coupled with the bilateral nature of the document in form and substance. Under the Letter of Understanding, the union agreed to relinquish its historical claim on security functions as bargaining unit work, in exchange for which the company agreed to have not less than eight First Aid Attendants who would perform specified duties. In short, a diminution of the union's contractual bargaining agency on the one hand, but with a manning commitment by the company on the other hand. In the circumstances, it is unlikely that either party would have assumed the unilateral right to say "The deal is off", or, as here, "My obligation under this reciprocal deal is off" - i.e., without having to raise the matter at the negotiating table in the ordinary way of collective bargaining. Thus, I conclude that the Letter of Understanding did not automatically expire upon delivery by the company to the union of the letter dated December 5, 1996; and neither does the Letter of Understanding automatically terminate, in whole or in part, upon the expiry of the collective agreement now in force. Rather, it is a matter for ordinary collective bargaining.
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> 24 All of that having been decided, the question still remains: whether the company is in violation of the Letter of Understanding by its implementation of the letter dated December 5, 1996. I have concluded that it is. In my view, the intended meaning of the Letter of Understanding, as revealed by its language and by what the parties actually did as the result of it was that: (1) the company would have the right to lift the security functions out of the bargaining unit; but (2) the company would maintain within the bargaining unit not less than eight dedicated First Aid Attendants "... to carry out the First Aid responsibilities" at the Terminal and the Main Gate - "job duties as attached". The company (as well as the union) must have known that the First Aid Attendants would be spending a great deal of the work day simply standing by. This must have been understood by the company as one inevitable consequence of the Letter of Understanding because that is precisely the way the company effectuated it, and because that is precisely how the situation remained for a number of years without anybody questioning it. It is the case that commencing in the mid-1980s, some security functions were restored to the First Aid Attendants working at the Main Gate. And I have no doubt that the reason that was done by the company was to realize certain manpower efficiencies. However, it is one thing for the company to restore to the bargaining unit some of the work previously done by it (while at the same time keeping the dedicated

> security personnel out of the bargaining unit), but quite another thing for the company to alter the nature and character of the First Aid Attendants at the Terminal by transforming them, as I have said, into Power Lift Operators with first aid tickets (with downsizing of the bargaining unit by attrition as the company's intended consequence). In my view, the former circumstance does not block the union from now seeking enforcement of the fundamental give-and-take of the Letter of Understanding.
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> 25 In argument, the company reminded me of the arbitral presumption that management has the right to organize and re-organize its work force, including the right to change existing jobs to meet legitimate business needs; or, more directly to the present point, the arbitral tendency not to construe collective agreements as abrogating that normal management function except in clear cases: see *Re MacMillan Bloedel Ltd. (Powell River) and C.E.P., Loc. 76 (Power Generator Operator)*, January 18, 1995 (Munroe) [summarized 38 C.L.A.S. 81]. However, I think this is one of those clear cases where the company agreed to something which it once considered advantageous; which it now considers unacceptably inefficient; but which continues to bind it. I agree with the company that collective agreements are not static documents; that arbitrators can and should examine them with a modern eye. But were I to find that the changes implemented by the company in December 1996 did not violate the 1976 Letter of Understanding, I would be doing more than simply giving the latter document an up-to-date reading and application, but would effectively be amending it – which I do not have the jurisdiction to do.

43. The Company argues that the Union is estopped from grieving after 2010, as multiple collective agreements have been signed without mention of the Hornpayne Agreements. It argues further that the Union has not been diligent in the scheduling of the arbitration, with multiple cases which post date the grievance having been heard and decided (see Exhibit 10, Company documents).

44. The Union argues that the Company has not made out the necessary elements of estoppel as it clearly contested the cancellation by the Company, and never led the Company to believe otherwise (see paras. 36-39, Union Brief). It states that it is not responsible for the scheduling of CROA cases.

45. I find that the necessary elements of estoppel of a clear and unequivocal representation, on which the other party relies to its detriment, have not been made out

here. Indeed, the Union manifested its intention to contest the decision to cancel the Agreement by the Company.

D. What remedy is appropriate?

46. I find that the Company was entitled to invoke the February 1997 Agreement in 2009 to cancel the Agreement. However, the Company is not entitled, in so doing, to cancel the Assigned Pools and keep the benefits negotiated from the Union in the March/April 1997 Agreements.

47. Accordingly, the Parties are directed to implement the status quo ante set out in the February 27, 1997 Agreement, or to negotiate a new status quo. They should also work out any remedies necessary, from the cancellation of the Agreements to date. Such negotiations should take place within a reasonable time.

48. I retain jurisdiction with respect to the interpretation and implementation of this Award.

November 23, 2023

JAMES CAMERON
ARBITRATOR