CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5013

Heard in Montreal, March 12, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Alleged violations of Articles 2.16, 11.7, 41, 56, 61, and 85 of the 4.16 Collective Agreement for the work performed by Conductor Adam Smith at the arrival terminal on train Q149 on December 3, 2015.

JOINT STATEMENT OF ISSUE:

On December 3, 2015 Conductor Adam Smith was ordered Conductor Only Belleville to Toronto on Train Q14921-03.

Upon his arrival in Brampton Intermodal Yard, Conductor Smith yarded his train as instructed. Conductor Smith was instructed to pull his train into track Y199 and then set the remaining cars into track to Y198.

Conductor Smith was then instructed by GST MF to tie back onto Y199 and lift 21 cars, and set the traffic over to Y204 coupling onto car number DTTX 620762 already in Y204.

UNION'S POSITION

The Union submits the Company is in violation of Articles 2.16, 11.7, 41, 56, 61, 85, 85.5 of the 4.16 Collective Agreement. The Union further submits that the Company is in violation of arbitral jurisprudence, CIRB 315 and the supplemental May 5, 2010 agreement.

The Union asserts that having Conductor Smith couple onto the cars already in Y204 resulted in a violation of the Collective Agreement and arbitral jurisprudence.

The Union once again seeks an order that the Company cease and desist from the practice of having Conductors in road service perform work not in connection with their own train at the final terminal.

It further seeks to have Conductor Smith made whole and paid as claimed for the work performed which was not in connection with his own train.

Additionally, given the violations of the Collective Agreement, that a Remedy, under the provisions of Addendum 123, be applied.

COMPANY'S POSITION

The Company disagrees. The work performed by Conductor Smith, including the two (2) designated cuts, was in compliance with Article 7.9 d) and 11.7 b) of Agreement 4.16.

In addition, simply tying onto cars for the purpose of filling a track does not constitute marshalling, nor is it considered work which is not in connection with the employee's own train. Past practice also confirms that such work has been performed in the past, so estoppel applies.

The Company also denies any Article 85 violation as the Union did not plead any facts to support its allegation.

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

There appeared on behalf of the Company:

W. Hlibchuk	– Counsel, Norton Rose, Montreal
A. Borges	– Manager, Labour Relations, Toronto
S. Matthews	– Manager, Labour Relations, Toronto
G. Doyle	– Officer Hump Process Systems, Toronto
R. Smith	– Counsel, Norton Rose, Montreal
S. Fusco	– Senior Manager, Labour Relations, Edmonton
R. Signh	– Manager, Labour Relations, Vancouver
A. Hernandez-Gutierrez	– Associate, Labour Relations, Edmonton

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, CTY-C, Hamilton
G. Gower	– Vice General Chairperson, CTY-C, Brockville
E. Page	– Vice General Chairperson, Hamilton
M. Kernaghan	– General Chairperson, LE-C, Trenton
J. Bedard	– General Secretary Treasurer, Montreal

AWARD OF THE ARBITRATOR

Context

1. This is another "Conductor only" matter. What differentiates this case from many others, is that the merits of the case are only faintly contested by the Company. The primary focus of the Company's case was procedural, whether the matter had been settled, and with respect to the proper remedy.

2. **Issues**

A. Is the matter arbitrable?

B. If so, has the Company breached article 11.7 of the Collective Agreement?

C. If so, what is the appropriate remedy?

A. Is the matter Arbitrable?

Position of the Parties

3. The Company argues that the matter is not arbitrable, as it was settled as a result of negotiations with the Union concerning a global settlement of all "stacking" cases filed prior to the Vickers Award (**CROA 4575**) in 2018 (see Tab 9, Company documents).

4. The Union strongly disagrees, noting that the current matter was not included on the list attached to email produced at Tab 9, there was no signed agreement with respect to the matter and there is no indication of a settlement payment.

Analysis and decision

5. For the reasons that follow, I find that there was no settlement and that consequently, the matter is arbitrable.

6. Firstly, the plain terms of the email relate only to those cases mentioned:

> Maud,
> Attached is a list of the cases at CROA which are related to the CROA 4469, 4575 and 4599 cases which were filed prior to the release of the CROA 4575 award, and we are proposing to settle all the files on the attached list for 100 miles at Yard Foreman Rates of pay.
> Please let me know if the Company agrees to settle these files as proposed,
> Thanks
> Jim Lennie
> General Chairperson
> TCRC Central CTY (underlining added).

7. Secondly, the list of cases provided does not include the current grievance.

8. Thirdly, the proposal of the Company "to settling all active stacking grievances" was never agreed to by the Union (see Tab 2, Union documents).

9. Fourthly, both Parties agree that there is no signed settlement document with respect to this grievance.

10. Lastly, there is no evidence that the grievor ever received any payment as a result of the grievance.

11. Accordingly, I find that the matter is arbitrable.

B. If so, has the Company breached article 11.7 of the Collective Agreement?

Position of the Parties

12. The Company argued in it's Brief that the JSI should be altered to change the number of movements and cuts performed by Conductor Smith. It argued that the task performed by the grievor "was in no way excessive and only took the Grievor about 15 minutes" (see para 20, Company brief).

13. In its Reply Brief, the Company stated that: "In its brief, the Company did not contest the merits of this case, but instead focused on the fact that the matter ought to be considered settled … (and) does not merit a remedy" (see para 5, Company Reply Brief).

14. The Union argues that after Conductor Smith had yarded his train in tracks Y199 and Y198, he was then instructed to perform additional movements and cuts involving other trains:

> 45. Conductor Smith was then instructed by the Mac Yard GST to go back to track Y199, couple back on, make a cut on car number DTTX 746002 and pick up 21 cars from track Y199 and then switch those 21 cars into to track Y204, a third track, coupling them onto the first car at the North end of track Y204, car number DTTX 620762 which was not part Conductor Smith's train that he operated between Belleville and Toronto. It cannot be said that this was work in connection with his train.
> 46. After this Conductor Smith was instructed to shove the all the cars, including the cars already in Y204 southward into the clear in track Y204.
> 47. The "stacking" of the cars on top of the cars already in Y204 was switching not pertaining to Conductor Smith's train. This move was not for any regulatory requirement but rather it was done for the convenience of the Company, the Union contends this work should have been performed by yard service employees as it was not work in connection with his train as confirmed in arbitral jurisprudence.

15. The Union argues that this was work which should have been performed by Yard Service and Road Switcher employees, who are available around the clock to perform train assembly work.

16. The Union argues that this work breaches article 11.7 of the Collective Agreement.

Analysis and decision

17. The Company advances an argument that the JSI must be modified to reflect fewer movements of Conductor Smith's train. While the Company may be correct, my jurisdiction is limited by the CROA Rules which obliges me to rely on the facts and issues set out in the JSI (see Rule 14). It is more than problematic for the Company to advance new facts at this late date, and in contravention of the JSI which it signed in 2016.

18. Accordingly, I accept the facts as set out in the JSI.

19. The issue is whether article 11.7 was respected. The article reads as follows:

> 11.7 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:
> a) Such trains are operated without a caboose;
> b) At the initial terminal, doubling is limited to that necessary to assemble the train for departure account yard tracks being of insufficient length to hold the fully assembled train;
> **c) At the final terminal, doubling is limited to that necessary to yard the train upon arrival account yard tracks being of insufficient length to hold the train;**
> **d) Notwithstanding the provisions of Article 41, such trains are not required to perform switching in connection with their own train at the initial or final terminal; if switching in connection with their own train is required at the initial or final terminal to meet the requirements of the service, (except to set off a bad order car or cars or lift a bad order car or cars after being repaired), the conductor will be entitled to a payment of 12½ miles in addition to all other earnings for the tour of duty.**
> e) Such trains are designed to make no more than three stops en route (i.e., between the initial and final terminals) for the purpose of taking on and/or setting out a car or group of cars together;
> NOTE: (This NOTE: is only applicable to the First Seniority District). For the purposes of clarity, the taking on or setting out of cars at a yard (other than the yard in which the train originates or terminates) at terminals where there are a series of yards (such as Halifax and

> Montreal) will not count as a stop in the application of sub-paragraph 11.7 (e). However, the payment set out in paragraph 2.5 will be payable when cars are taken on or set out at such yards in a conductor-only operation.
> f) Such trains are not required to perform switching en route (i.e., between the initial and final terminal) except as may be required in connection with the taking on or setting out of cars as, for example, to comply with the requirements of rules and special instructions governing marshalling of trains; (Emphasis added)

20. The Company was correct in not contesting the merits of the case. The work done by Conductor Smith did not involve simply yarding his train, but rather involved additional marshalling, including stacking portions of his train onto other trains (see para 14 above as to the movements performed). This has been repeatedly found to be a contravention of article 41 (see **AH 560**).

21. Accordingly, I find that the Company has breached article 11.7.

C. If so, what is the appropriate remedy?

Position of the Parties

22. The Union argues that the Company should pay a substantial penalty, given the repeated "Conductor only" violations and the lengthy arbitral and Court history on the issue (see Tabs 2-11, Union documents). It seeks the following remedy:

a. That the Company cease and desist from any further violations in relation to the instant matter.

b. That the Company pay $1500 to Mr. Smith as well as the available Road Switcher crew.

c. That the Company pay to the TCRC CTY Belleville Division be awarded $2,500 under the provisions of Addendum 123.

d. That the Company pay to the TCRC Central Committee is awarded $5,000 under Addendum 123 for the repeated violations of the Collective Agreement and the costs associated with the constant pursuit to have the Company comply with the Collective Agreement.

23. The Company argues that many of the cases related to stacking were only decided after the incident giving rise to the present grievance. It argues that these cases should not be applied retroactively, such that the violation is seen as being part of a pattern.

24. The Company argues further that Addendum 123 should not apply here, as there was no agreement that a violation had occurred, and nor was the decision "blatant and indefensible".

Analysis and decision

25. In **CROA 4895**, I dealt with the interpretation of Addendum 123:

> Analysis and Decision
> 34. Addendum 123 was added to deal with "repetitive violations of the Collective Agreement". It reads as follows:
>
> > Addedum123
> > During the current round of negotiations the Council expressed concern with respect to repetitive violations of the Collective Agreements. Although the Company does not entirely agree with the Council's position, the Company is prepared to deal with this matter as follows.
> > When it is agreed between the Company and the General Chairperson of the Union that the reasonable intent of application of the Collective Agreement has been violated an agreed to remedy shall apply.
> > The precise agreed to remedy, when applicable, will be agreed upon between the Company and the General Chairperson on a case-by-case basis. Cases will be considered if and only if the negotiated Collective Agreements do not provide for an existing penalty.
> > In the event an agreement cannot be reached between the Company and the General Chairperson as to the reasonable intent of application of the Collective Agreement and/or the necessary remedy to be applied the matter may within 30 calendar days be referred to an Arbitrator as outlined in the applicable Collective Agreements.
> > NOTE: A remedy is a deterrent against Collective Agreement violations. The intent is that the Collective Agreement and the provisions as contained there In are reasonable and practicable and provide operating. Flexibility. An agreed to remedy is intended to ensure the continued correct application of the Collective Agreement.
>
> 35.The Addendum envisages agreement between the Company and the General Chairman that "the reasonable intent of application of the Collective Agreement has been violated" and an agreed to remedy,

> although there is provision to a referral to arbitration on either of these issues. The intent of the remedy is "intended to ensure the continued correct application of the Collective Agreement".
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> 36. In CROA 3310, Arbitrator Picher considered the application of Addendum 123. He finds that the Addendum is intended to apply to violations which were "blatant and indefensible":
>
> > It does appear to the Arbitrator that the parties intended the letter to apply to situations where a violation of the collective agreement was blatant and indefensible, and clearly should not have been committed by local management. It is in that context that the deterrent character of the remedy is to be understood. The letter is an agreement between the parties to establish a disincentive to violations of the collective agreement being resorted to simply as a means of doing business, ensuring that violations of the collective agreement to not pay.
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> 37. Arbitrator Picher also considered whether the Union must show a pattern of repetitive collective agreement violations:
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> > Not is the Arbitrator persuaded by the Company's argument that the Union must first show a pattern of repetitive collective agreement violations before invoking the provisions of Addendum 123. Careful examination of the language or Mr. Dixon's letter confirms that, as a matter of background, repetitive violations of the agreements gave rise to serious concerns on the part of the Union. The substantive provisions of the letter, however, do not require repetitive violations as a condition precedent to the application of the remedy portion of the parties' agreement.
>
> 38. Whether one agrees with Arbitrator Picher about the need for repetitive violations as merely context rather than as a condition precedent or not, it would appear clear that repetitive findings of violations would make subsequent violations more "blatant and indefensible" and a lack of repetitive findings would make them less so.

26. Ultimately, I found that the situation in the London grievance did not amount to a "pattern of violations". I also found that the decision, while wrong, was not "blatant and indefensible", such that Addendum 123 did not apply. However, I did exercise discretion in order to award damages to the grievor and to the Local.

27. Here, the Union points to a list of some 390 cases which were settled related to "Conductor only" violations related to stacking (see Tab 2, Union Reply document). It argues that this should be evidence of a "pattern of violations". I have some difficulty with that proposition. It may well be evidence of a problem or dispute, but the settlement does

not necessarily indicate that there was a violation. Settlements frequently occur without prejudice or precedent, merely to close files which are not worth the fight.

28. Better evidence of a "pattern of violations" are decided cases. The Company argues that the stacking cases of **CROA 4469, 4575** and **4599** were all decided after the present grievance was filed. It argues that it should not be blamed retroactively for a 2015 decision, when the stacking cases were decided later. It is noteworthy, however, that **CROA 4469** and **4599** both cite with approval and follow **AH 560**, decided by Arbitrator Picher in 2004. Indeed, all of the cases cited by the Union at Tabs 6-11 with respect to "Conductor only" matters were decided in 2004 and 2010, well before the current grievance.

29. In **AH 560**, Arbitrator Picher dealt with a situation very similar to the current matter. He found a violation of the Conductor only rules, based on requiring the crew to couple onto cars which were not part of their own train:

> **They then proceeded to Walker Yard where they pulled through track CS56. Finally, they backed into track CS57, coupling to cars already in that track.** In the Arbitrator's view the setting off of ten cars at Bissel Yard involved switching in connection with their own train within the contemplation of the conductor only rules. However, **requiring the crew to couple onto cars already in track CS57 in Walker yard involved work which is not in connection with their own train. That work was therefore in violation of the conductor only agreement.**
> (**Tab 8**, page 20, emphasis added)

30. Based on the jurisprudence cited by the Parties, it is clear that there is a significant problem with the Company failing to respect articles 11.7 and 41 of the Collective Agreement. This can be addressed through a cease and desist order and damages.

31. It is less clear, however, that the requirements for the application of Addendum 123 have been met. The Addendum requires an agreement between the Company and the General Chairperson of the Union: "When it is agreed between the Company and the General Chairperson of the Union that the reasonable intent of application of the Collective Agreement has been violated an agreed to remedy shall apply". I have been

presented with no evidence of such an agreement. The Company expressly denies such an agreement in their Reply Brief.

32. Accordingly, I find that the requirements of Addendum 123 have not been made out.

Conclusion

33. Given the finding that the Company has breached article 11.7 of the Collective Agreement, has done so in the face of long standing CROA jurisprudence and the need to recognize the concessionary nature of article 11 (see **CROA 4895**), I find that a cease and desist order is appropriate, together with damages to the grievor and to the available Road Switcher crew.

34. Accordingly, I order the following:

i. That the Company cease and desist from any further violations in relation to the instant matter;

ii. That the Company pay $1500 to the grievor and $1500 to be paid to the Union, to be split between the available Road Switcher crew.

35. I remain seized with respect to any questions of interpretation or application of this Award.

May 22, 2024

JAMES CAMERON
ARBITRATOR