CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1280

Heard at Montreal, Thursday, September 13, 1984

Concerning

CANADIAN NATIONAL RAILWAY COMPANY
(CN Rail Division)

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

The Company's notice dated April 12, 1984, issued pursuant to Articles 79 and 139 of Agreements 4.16 and 4.3, respectively.

COMPANY'S STATEMENT OF ISSUE:

On April 12, 1984, the Company served notice on the Union pursuant to Article 79.1 of' Agreement 4.16 and Article 139.1 of Agreement 4.3 that it intended to operate trains and yard transfers without cabooses.

The Union claims, among other things, that the removal of cabooses from train and yard transfers is not an item that properly falls within the terms of Articles 79 and 139 of Agreements 4.16 and 4.3, respectively.

The Company disagrees with the Union's position.

FOR THE COMPANY:

(SGD.) D. C. FRALEIGH
Assistant Vice-President
Labour Relations.

There appeared on behalf of the Company:

A. Giard, c.r.	- General Counsel, CNR, Montreal
M. Delgreco	- Senior Manager Labour Relations, CNR, Montreal
J. B. Bart	- Labour Relations Officer, CNR, Montreal
J. A. Sebesta	- Coordinator Transportation Special Projects, CNR, Montreal
B. H. Lee	- Project Officer, CNR, Montreal

And on behalf of the Union:

H. Caley	- Counsel, UTU, Ottawa

M. Church	- Counsel, UTU, Toronto
R. J. Proulx	- Vice-President, UTU, Ottawa
P. P. Burke	- Vice-President, UTU, Calgary
R. A. Bennett	- General Chairman, UTU, Toronto
D. J. Morgan	- General Chairman, UTU, Winnipeg
W. G. Scarrow	- General Chairman, UTU, Toronto
B. Leclerc	- General Chairman, UTU, Quebec
B. Marcolini	- General Chairman, UTU, Toronto
J. H. McLeod	- General Chairman, UTU, Calgary
C. W. Carew	- Chairman, Ontario Legislative Board, UTU,Sarnia
J. M. Hone	- National Research Director, UTU, Ottawa
Donald Bechamp	- Chairman, Quebec Legislative Board, UTU, St. Basile le Grand.

AWARD OF THE ARBITRATOR

This is an Ex Parte reference to CROA filed by the company requesting a ruling with respect to the trade union's claim that the company's notice of material change dated April 12, 1984 pertaining to its intended "removal of cabooses from train and yard transfers is not an item that properly falls within the terms of Article 79 of Agreement 4.16 and Article 139 of Agreement 4.3". Article 79.1 reads as follows:

> "79.1 The company will not initiate any material change in working conditions which will have materially adverse effects on employees without giving as much advance notice as possible to the General Chairman concerned, along with a full description thereof and with appropriate details as to the contemplated effects upon the employees concerned. No material change will be made until agreement is reached or a decision has been rendered in accordance with this paragraph."

At the hearing of this matter the trade union's counsel made it perfectly clear that the trade union's objection to the applicability of the material change provisions of the collective agreement are based on two grounds. They are as follows:

> (i) The company's notice of April 12, 1984 was premature, academic and accordingly, illegal; and
>
> (ii) The proposed change is not a material change covered under the scope of Articles 79.1 and 139 of the respective agreements.

Because of the manner I have resolved to dispose of item (i) of the

trade union's objection, I do not propose to deal with item (ii).

It is common ground that before the company may proceed with its proposed material change approval must be secured from the Railway Transport Committee, Canadian Transport Commission (hereinafter referred to as the RTC). The company and Canadian Pacific Limited have applied to the RTC for permission to be relieved of Uniform Operating Rule 90A. That rule requires the company to position "trainmen" at the rear of the trains in order "to observe" their safe operation. Accordingly, trainmen presently are required to occupy "cabooses" at the rear of the train in compliance with Rule 90A.

The underlying cause of the proposed material change is the company's intended introduction of new technology referred to as "The End-of-Train Unit" (ETU). This technological innovation allegedly is designed to perform the safety functions hitherto performed during the train's operation by the trainman situated in his caboose. As a result of the contemplated redundancy of the caboose the company intends to reposition the affected trainmen at the front of the train. Several alleged "adverse effects" are said to flow to the employees' prejudice from the implementation of this proposed material change.

There are approximately twenty-two articles contained in the collective agreement that touch upon employee entitlements related to the operation of the caboose. These provisions clearly extend benefits to employees that are attendant upon the continued existence of cabooses. Moreover, so long as these provisions remain a part of the subsisting collective agreement they represent an impediment to the implementation of the comapny's proposed change. Accordingly, the removal of these provisions from the collective agreement is a necessary adjunct to the negotiation of the alleged adverse effects to the employees. Obviously the company's objective is to negotiate their "relaxation" in accordance with the dispute settling mechanism contained in the material change provisions of the collective agreement.

The company clearly concedes that it cannot legally implement its proposed material change without the approval of the RTC. Moreover, "the company has no intention whatsoever of implementing any type of operation which is contrary to statutory regulation". Furthermore, this telling admission is made by the company in its brief:

> "46. Of course, under the Railway Act the RTC may grant or deny the application. Recently, however, the RTC granted relief from Rule 90A on an experimental basis to the Quebec North Shore and Labrador Railway for cabooseless train test purposes. In addition, a number of railroads in the United States have successfully implemented a cabooseless operation. Given these recent developments, the company is optimistic that, in due course, its

application will be granted.

47. In any event, it is up to the Railway Transport Committee to examine the nature and validity of the change itself and to rule accordingly as empowered by the Railway Act. The union's argument concerning the legality of the charge, by its very wording, recognizes
that body to be the proper forum for resolution of this question. For the Arbitrator's information, the RTC has already established a technical committee and will shortly convene public hearings to examine the matter. This brings us to our third point.

48. It has been the company's experience that the acquisition of RTC approval of any alteration or modification to the operating rules is a lengthy process. So, too, are negotiations pursuant to the material change notice...." (Emphasis added)

The company's "outimism" however as expressed in its notice of April 12, 1984 to the trade union does not appear to reflect the realities of its own experience in securing "quick" RTC approval of its request for relief from Rule 90A. That is to say, in its notice is contained a schedule coamencing in October, 1984 for "the phasing in" over a four year period the operational changes that are proposed. For example, the notice reads:

"The changes effective October 1, 1984 will affect approximately 1100 trainmen and 100 yard foremen. The changes effective October 1, 1986 will affect a further 225 trainmen. The changes effective October 1, 1988 will affect approximately another 475 trainmen."

The trade union shares the company's view of "the lengthy process" that is usually entailed in the procedures of the RTC before a result is achieved. In the trade union's opinion it is not appropriate for the parties to meet with the view to negotiating the "adverse effects" of the company's proposal with respect to its members until "the air is cleared". Until the RTC has ruled upon the validity of the company's proposal the prospect of its implementation is at best both speculative and hypothetical. On the one hand, should the RTC decide to engage in its own testing procedures (and I was advised a hearing before the RTC is scheduled for this purpose on November 26, 1984) it may literally take years before a conclusion is reached. For example, reference was made to the application of the Quebec North Shore and Labrador Railway to the RTC for approval of a like proposal some three years ago (March 30, 1981), Notwithstanding its instruction to test one cabooseless freight train per week the RTC "has yet to issue any decision on the application". Moreover, when a decision is ultimately made there is no guarantee that the company's original proposal will be sustained. It could be rejected. Or, conditions might be attached to any RTC direction that might alter the scope and thrust of the company's intended proposal.

As a result, the trade union's "primary" submission is that the

employer's "initiative" requesting the trade union to invoke the negotiation procedures under Articles 79 and 139 is at best "premature" The trade union submits that until the RTC has made a ruling with respect to the company's application the proposal as advanced in its notice of April 12, 1984 remains "illegal" and of no force and effect.

Should the trade union negotiate at this juncture any alleged adverse effects of the company's proposal, it was argued, that this could result in irreparable harm to its membership. Not only can the company not ensure that its proposal for cabooseless trains will be approved by the RTC it might very well at some unforeseen date drastically alter the contents of that proposal. Accordingly, the adverse effects upon the affected employees are presently quite tentative. In other words, without having the detailed information comprising the ultimate proposed material change the efficacy with respect to the negoitation, mediation and arbitration of any adverse effect to its members is at best problematic. In short, a commitment to negotiate might result in an imposed settlement at arbitration that could be irrelevant to the ultimate material change.

The company's response to this submission is that it has not been unprecedented for the parties to negotiate the adverse effects of a proposed material change prior to RTC approval. The company cited "the hump yard" material change as an example. In this regard there was some discussion at the hearing as to whether RTC approval was necessar for the implementation of that particular change. It suffices, for purpose of this case, to state that the RTC is being kept informed of the "hump yard" change and the company would, of course, defer to any intervention by the RTC if that should become appropriate. In light of the hump yard experience the company maintained that, on balance, it served both parties' mutual interests to engage in the negotiation process designed by the material change provisions irrespective of the unknown contingencies that may emanate from the RTC. In short, the company insist that the negotiation process contemplated under Articles 79 and 139 can proceed concurrently with the RTC proceeding to both parties' advantage.

In dealing with the parties' submissions I am satisfied that the trade union's position with respect to the company's allegedly premature invocation of the material change provisions must prevail. It appears clear that not only can the company not ensure that its proposal for change will be approved by the RTC but that proposal might at some unforeseen date in the future be altered substantially from what was originally advanced in its notice of April 12, 1984. Clearly, the trade union might very well be engaging, to its members' prejudice, in a fruitless exercise that may ultimately be irrelevant to the alleged "adverse effects" that flow from the company's original proposal. There are approximately twenty-two provisions of the collective agreement that may require alteration should the company's proposal be approved. Not only is the prospect of agreement on such changes unlikely while the RTC's decision remains outstanding, the trade union, as it has argued, could be causing its mex?ers irreparable harm should it agree at this stage to enter into negotiations. There is no dispute that the trade union's leverage during the negotiation process is in its dealing with the company's request for the "relaxation" of the numerous provisions of the

collective agreement that represent an impediment to the implementation of the company's proposal. Should the trade union agree to a negotiated settlement (or should it be required to go to arbitration for that purpose), it may have made a commitment to a result that may not serve the interests of the employees who may eventually be adversely affected by the approved changes permitted by the RTC.' Accordingly, the trade union may not only have engaged in a waste of manpower resources and time while engaged in the negotiating process, any result achieved might be irrelevant to the final material change. And, in the interim the trade union may have foresaken its bargaining power with respect to the real adverse changes to its members when the RTC decision is finally made.

It must be emphasized that the material change provisions of the collective agreement are designed to serve the interests of the employees in the bargaining unit. And in serving those employees' best interests, the trade union is entitled, so long as the intended purpose of the material change provisions are not abused, to select the appropriate time when the negotiation process should be invoked. Clearly, the employer has admitted its incapacity to implement its own proposal or, indeed, any proposal for cabooseless trains until RTC approval is forthcoming. Accordingly, it will not be until that juncture that the trade union will be in a position to determine its members' best interests for purposes of negotiating any adverse effect. Once the company is mandated or is likely to be mandated by the RTC to introduce a material change for cabooseless trains then at that time it makes good, practical sense to engage in the negotiation process contemplated by the collective agreement.

Nor is the fact that nothing is to be lost by the trade union proceedings in such negotiations on a "without prejudice" basis concurrently with the RTC proceedings material to the appropriateness of the company's notice. I might very well agree with the company's submission in that regard. But, the wisdom of any such course of action is for the trade union to decide and not for the company or, indeed, this Arbitrator. The crux of the company's problem is that it has ?ade a material change proposal that is beyond its control to implement. And until it can deliver on that proposal, the trade union is perfectly entitled to question whether any adverse effect to its members is likely to ever result. Until that contingency occurs any notice extended by the company must be considered "untimely".

As a result, I am satisfied that the company's notice of April 12, 1984 was premature and was therefore inapplicable to Articles 79.1 and 139 of the respective collective agreements.

In light of my conclusion reached above, I do not need to deal with the trade union's alternative submissions.

DAVID H. KATES,
ARBITRATOR.