

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2394

Heard at Montreal, Thursday, 16 September 1993

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Time claim dated April 17, 1990 on behalf of Conductor A.W. Nadon

and Trainman G.S. Goulet claiming 100 miles pursuant to articles

9.10, 90.4(b) and 90.5 of agreement 4.16

JOINT STATEMENT OF ISSUE:

On April 17, 1990, Conductor Nadon and Trainman Goulet operated

Train 215 from MacMillan yard to South Parry. On this date the

grievors were required to load a Sensory Braking Unit (SBU) on their

train and install it on Train 217 which was operating ahead of their

train with a defective SBU. The grievors subsequently submitted a

claim for 100 miles as Extra Service pursuant to article 9.10. the

Company declined payment.

The Union contends that the grievors are entitled to the mileage

claimed pursuant to article 9.10 and that the claim is further

supported by the provisions of articles 90.4(b) and 90.5 of agreement 4.16.

The Company declined the appeal for payment of the time claim.

FOR THE BROTHERHOOD:
(SGD.) M. P. GREGOTSKI
GENERAL CHAIRMAN
LABOUR
RELATIONS

FOR THE COMPANY:
(SGD.) M. HEALEY
for: ASSISTANT VICE-PRESIDENT,

There appeared on behalf of the Company:

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| L. F. Caron Officer, Montreal | - System Labour Relations |
| D. W. Coughlin Relations, Montreal | - Manager, System Labour |
| J. Vena Montreal | - Coordinator, Special Projects, Transportation, |
| J. B. Dixon Officer, Montreal | - System Labour Relations |

And on behalf of the Union:

| | |
|-------------------------|----------------------------------|
| M. P. Gregotski | - General Chairman, Fort Erie |
| L. H. Olson Edmonton | - National Vice-President, |
| G. Binsfeld | - Secretary/Treasurer, Fort Erie |

AWARD OF THE ARBITRATOR

This grievance involves, apparently for the first time, the interpretation and application of articles 90.4(b) and 90.5 of the collective agreement, and their relation to a wage claim made under article 9.10. Article 90 of the collective agreement concerns cabooseless operations and the duties and responsibilities of employees in respect of the installation, testing and removal of all or part of the Train Information and Braking System (TIBS) Unit which is mounted on the tail end of a cabooseless train.

The facts giving rise to the grievance are not in dispute. On April 17, 1990, Train No. 217 running from MacMillan Yard to South Parry on the Bala Subdivision developed problems with the Sensory Braking Unit (SBU) component of its TIBS unit some seven miles out of MacMillan Yard. Its crew was instructed to continue to operate at the permissible speed restriction of twenty-five miles per hour until such time as a replacement unit could be forwarded to Train 217. Conductor Nadon and Trainman Goulet were assigned on Train No. 215, over the same territory and directly following Train No. 217 in straight-away through freight service from MacMillan Yard to South Parry. A replacement SBU component was placed on their locomotive and they were instructed to meet Train 217 en route, and to themselves replace the defective SBU unit on Train 217 at the meet point.

The trains met at approximately 07:35 hours at Smail, whereupon the grievors replaced the defective SBU on the last car of Train No. 217. Both trains then proceeded with their normal runs, with Train No. 215 leaving Smail at approximately 08:00 hours. Subsequently, a time claim was submitted on behalf of Conductor Nadon and

Trainman

Goulet for a basic day of 100 miles at through freight rates under

the provisions of article 9.10 of the collective agreement, relating

separately to the work performed in respect of changing out the SBU

unit on Train 217. This claim was made in addition to the time claim

for their scheduled run.

As reflected in the Joint Statement of Issue, the resolution of the grievance involves consideration of the terms of article 90.4(b) and article 90.5 of the collective agreement. In the Arbitrator's view consideration of those provisions is necessary as they may have a bearing on the claim of the Union that the work in question is extra work for the purposes of article 9 of the collective agreement.

The provisions pertinent to the grievance are as follows:

90.4 (b) (1) Conductors will be required, in respect of their train, to apply, test and remove the TIBS equipment and change batteries as required. This will not preclude the use of other qualified personnel. However, when a train is subject to a certain car inspection (C.C.I.), a qualified employee other than a conductor, if readily available, may be required to perform those duties. All TIBS equipment shall be identifiable by unit number.

90.5 The lead locomotive shall be equipped with tools (including pinch bar, brake hose wrench, wrecking cable, spare knuckles, hammer and cold chisel) and first aid equipment (including a stretcher, first aid kit and blanket) and a broom, all of which shall be placed in a storage space that will preserve the integrity of the equipment and will not interfere with the duties of the crew members.

9.10 Employees called upon to do extra service between regular laid out day's trips, or out of turning point on trips paid on a continuous time basis, will be paid for such extra service as follows:

PASSENGER SERVICE

(a) not less than a minimum day

FREIGHT SERVICE

(b) For less than 1 hour's service, 1 hour or 12-1/2 miles,

unless mileage actually run is greater, in which event actual

mileage will be allowed;

(c) For 1 hours and less than 2 hours' service, 2 hours or 25

miles, unless mileage run is greater, in which event actual

mileage will be allowed;

(d) For 2 hours and less than 3 hours' service, 3 hours or

37-1/2 miles, unless mileage run is greater, in which event

actual mileage will be allowed;

(e) For 3 hours and less than 4 hours' service, 4 hours or 50

miles, unless mileage run is greater, in which event actual

mileage will be allowed;

(f) For 4 or more hours service, not less than a minimum day;

(g) Time occupied in performing service payable under this

paragraph will be deducted in computing overtime. payments made

under this paragraph will not be used to make up the basic day.

The position of the Company is that the language of the collective agreement does not prohibit the assignment of Conductor Nadon and Trainman Goulet to transport the replacement SBU component to the location of the disabled train and, secondly, to mount it on the tail end of the other crew's train. With respect to the transporting of the equipment the Arbitrator can find nothing in the text of the collective agreement, nor anything that should be implied from its terms, that would prevent the Company from assigning the grievors to transport a spare piece of equipment for another train. As a general matter, absent any provision in the collective agreement, laws or regulations to restrict the prerogatives of the Company, it is within its discretion to determine the equipment, material or cargo that a train will carry. It is, of course, required to respect the spirit of article 90.5, to the extent that equipment or material carried on a train is not to unduly encumber the working space of a crew in a lead locomotive. As a practical matter that can generally be dealt with by using the space in a trailing power unit, an option which was apparently available in the case at hand.

The Arbitrator has greater difficulty, however, with the position of the Company to the effect that it could require the grievors to remove the TIBS equipment from their own train and change out the defective unit on the train of another crew, as they were required to do. The history of negotiations between the parties reflects, without any doubt, that the language of article 90.4(b)(1) was a disputed issue at the bargaining table. The initial position of the Company was that conductors should be required generally to handle, test and replace TIBS equipment. That is clearly reflected in

the
initial formulation of language tabled by the Company in
negotiations on February 18, 1988 and outlined in a subsequent
document dated March 4, 1988. At that point the position of
the
Company was to propose the following language:

Trainmen will be required to apply, test and remove TIBS equipment and change batteries as required.

The formulation proposed by the Company did not find its way into the collective agreement. At the insistence of the Union, finally accepted by the Company, Article 90.4(b)(1) now expressly states that the work of conductors in respect of applying, testing and removing TIBS equipment and changing batteries is: "... in respect of their train".

The handling and installation of TIBS equipment was a contentious issue, in part because of the weight of the equipment and the additional burden which would be placed upon conductors if they should be required, in a general way, to physically carry and service TIBS units for train movements other than their own. It is against that background, and precisely to prevent that result, that the Company must be taken to have conceded that the duties of conductors in respect of the installation, testing and removal of TIBS equipment was to be restricted to such equipment as relates to their own train. To interpret the language of article 90.4 in the manner advanced by the Company would, in the Arbitrator's view, effectively remove or render meaningless the phrase "in respect of their train" which was inserted into the text of the provision after much consideration and negotiation.

In the result, I am satisfied that with respect to the installing of the unit on the other train the Company issued a directive to the grievors which was outside the ambit of the work which they could be required to perform in accordance with the terms of article 90.4(b) of the collective agreement. In the case at hand I am not prepared

to find that there was a violation of article 90.5 of the agreement

by the Company as the facts disclosed would suggest that the grievors were at liberty to store the additional SBU unit on a

trailing locomotive, and were not forced to carry it within the

working space of the cab of the lead unit. Additionally, there is no

substantial evidence adduced by the Union to establish, in any

event, that the unit was unduly cumbersome to operations in the cab

of the lead locomotive.

With respect to the claim for payment, however, the Arbitrator has greater difficulty with the position of the Union. I must accept the submission of the Company that for the claim to succeed as a claim for extra service pursuant to the terms of article 9.10 of the collective agreement the employees must satisfy the precondition that the extra service is work performed "between regular laid out day's trips, or out of turning point on trips paid on a continuous time basis". Clearly, neither of those conditions is disclosed in the case at hand. While during the course of the hearing the Union further sought to justify the claim for wages under the terms of article 6 of the collective agreement, that is not an issue within the Joint Statement of Issue and cannot, therefore, be dealt with within the confines of the instant grievance.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator finds and declares that the Company violated the terms of article 90.4(b)(1) of the collective agreement when it required the grievors to install the SBU component of a TIBS unit on the tail end of a train of another crew at Smail on April 17, 1990. For the reasons related, however, the wage claim made under the terms of article 9.10 of the collective agreement cannot be allowed.
September 17, 1993
(sgd.) MICHEL G. PICHER
ARBITRATOR