CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2453

Heard in Montreal, Wednesday, 9 February 1994
concerning
CANADIAN NATIONAL RAILWAY COMPANY

and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS [UNITED TRANSPORTATION UNION]

DISPUTE:

Claims for violation of Clause 71.(11), Appendices 1 and 4 of the Conductor Only Agreement and Articles 30.1 and 50.1 of Agreement 4.16 on behalf of Brakemen Dibiasi and Telford when held at the away from home terminal.

JOINT STATEMENT OF ISSUE:

On four dates in October and November 191, the grievors were held by the Company at the away from home terminal of their assignments to protect service as essential brakemen.

The Union contends that the grievors were held just in case their services were required as essential brakemen.

In each case at least one train passed for which the grievors were neither called, assigned or allowed to return home.

In fact, in some cases the grievors were not required to protect service as an essential brakeman.

The grievors submitted claims of 50 miles run-around pay for each train for which they were not called in accordance with Agreement 4.16 of the Conductor Only Agreement.

The Union claims a violation of Clause 7.1(11), Appendices 1 and 4 of the Conductor Only Agreement and Articles 30.1 and 50.1 of Agreement 4.16.

The Union further relies upon past practice in the handling of trainpersons at the away from home terminals and representations given to the Union during the negotiation of the Conductor Only Agreement that the Company would not change such past practices.

The Company has denied the claim of the grievors at all steps of the grievance procedure, maintaining that it was within its rights to hold the grievors for service on other than the first train departing from the away from home terminal.

FOR THE UNION : FOR THE COMPANY:
(SGD.) G. BINSFELD (SGD.) M. E. HEALEY
FOR: GENERAL CHAIRMAN FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

D. L. Brodie - System Labour Relations Officer, Montreal
D. W. Coughlin - Manager, Labour Relations, Montreal
V. J. Vena - Coordinator Transportation - Special Projects, Montreal
J. B. Bart - Manager, Intermodal Project, Montreal
B. Hogan - Manager, Crew Management Centre, Toronto

And on behalf of the Union:

G. Binsfeld - Secretary/Treasurer,
R. Beatty - Vice-General Chairperson, Hornepayne

W. G. Scarrow - General Chairperson, Sarnia

AWARD OF THE ARBITRATOR

There are two aspects to this grievance. The first concerns whether the provisions of the collective agreement cited by the Union have been violated. The second is whether, if the interpretation of the collective agreement adopted by the Company is correct, the employer is estopped from applying the interpretation it advances.

The facts giving rise to the grievance are not substantially contradicted. Foleyet is the away from home terminal for employees home stationed at Hornepayne. The grievance arises because a number of employees who had worked to Foleyet were held, and were not allowed to return to their home terminal on the first available train. Specifically, for example, if the first train returning to Hornepayne operated on a conductor only basis, the brakeperson would be held at Foleyet, subject to the twelve hour limitation, to be available to work on a later train which might require a brakeperson. It is agreed that in a number of cases the employees concerned were not in fact required to protect service as an essential brakeperson.

The grievance turns largely on the interpretation of clause 7.1(11) and Appendix 4 of the Conductor Only Agreement, which are as follows:

> 7.1(11) It is recognized that flexibility in the crewing of trains out of the away from home terminal is of critical importance. Therefore, notwithstanding their assignment out of the home terminal, conductors and brakemen will cycle independently out of the away from home terminal on a first-in, first-out basis in their respective classifications except that:
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> (a)Conductors may be called to work as brakemen back to the home terminal to meet the requirements of the service, such as a train on which a brakeman is required and there are no brakemen available at the away from home terminal. Employees so used will be paid therefor at the conductors' rate.
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> NOTE: When a conductor and brakeman are required for a train out of the away from home terminal and there are no brakemen available, the two conductors standing first out and available at the away from home terminal will be used and the senior employee will work as conductor.
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> (b)Qualified brakemen may be called, on a first-in, first-out basis, to work as conductor back to the home terminal to meet the requirements of the service when there are no conductors available at the away from home terminal and will be paid therefor at the conductors' rate including, where applicable, the allowance set out in NOTE (2) to Appendix 1 hereof.
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> NOTE: When a conductor is required for a train out of the away from home terminal and there are no conductors available, the brakeman standing first out who is available and qualified will be used except that, when a brakeman is also required for

the train, the senior qualified employee called will work as conductor.

APPENDIX 4

This is in connection with the Memorandum of Agreement in respect of the operation of SPRINT and through freight trains with a conductor only crew consist on the 17th Seniority District.

During discussions leading up to the signing of the Memorandum of Agreement, the Union expressed a great deal of concern in respect to the matter of deadheading employees to and from the away form home terminal particularly in light of the new provisions dealing with the utilization of employees out of the away from home terminal.

In order to alleviate those concerns, the Company gave its assurances that the aforementioned provisions would not be used in a manner that would circumvent normal practices where deadheading is presently being done to correct an imbalance of employees at the away from home terminal in relation to the number of employees actually required to operate trains.

Furthermore, we assured you that it was not our intention to use such provisions as a source of relief in a manner that would cause employees to be held at the away from home terminal to protect service in another classification when there are employees who could be deadheaded to the away from home terminal except, of course, where it would result in delay to a train or trains.

The Arbitrator has difficulty with the position argued by the Union from the standpoint of the interpretation of the provisions which it relies upon. A significant departure from past practice established through the Conductor Only Agreement, as reflected paragraph (11) of clause 7.1 is that once crews reach the away from home terminal conductors and brakepersons may be cycled homeward independently. In other words, where previously they travelled to and from the away from home terminal as an indivisible crew, with the advent of the Conductor Only Agreement they can be required to work homeward on separate assignments. As evidence by the language of clause 7.1(11) that arrangement is in furtherance of the need for flexibility in train crewing from the away from home terminal.

The Arbitrator must agree with the submission of the Company that if the Union's position is correct, namely that a brakeperson is entitled to work homeward on the first available train, even as a non-essential brakeperson, the situation contemplated by sub-paragraph 7.1(11)(b) could virtually never arise, as it would be all but impossible to have a situation where only brakepersons and no conductors are available at the away from home terminal. In this regard the language of the agreement lends greater support to the position of the Company.

Secondly, the Union's allegation of a violation of articles 30.1 and 50.1 of the collective agreement is not supportable on the language of those provisions. Article 30.1 relates to the method by which the employees' turns out of terminals are to be determined. It is clear on the face of the article that it

relates to resolving the pecking order among employees in a given classification. It does not deal with the entitlement to particular kinds of assignments, but rather with which employee is entitled to the first opportunity to work once a given assignment is established.

Article 50.1 concerns the rights of employees who have been run-around. It provides for a penalty payment for employees who are run-around, as well as their reinstatement to first-out status. Significantly, in the Arbitrator's view, the language of the provision clearly reflects the parties' understanding that an employee is run-around where he or she is "available for service at terminals and not called in their turn". As with article 30.1, the thrust of article 50 is to ensure that the rights of employees to work established assignments in a given order or sequence is respected. The article speaks to identifying the employee entitled to perform work, but makes no provision with respect to when or how work is to be available.

In the case at hand, it is not disputed that the employees who are the subject of the grievance were allowed to work, as among themselves, on a first-in, first-out basis. It is only when an employee has been denied that right, as compared with other employees, that the employee can be said to have been run-around. Consequently, holding an employee at the away from home terminal, and not assigning him or her as a non-essential brakeperson where no other employee is assigned is not, of itself, a violation of the first-in, first-out principles and run-around provisions of articles 30.1 and 50.1 of the collective agreement. The Arbitrator can therefore find no violation of those provisions in the case at hand.

It also appears to the Arbitrator that the language of Appendix 4 of the Conductor Only Agreement is consistent with the position taken by the Company. It does not appear disputed that during the course of negotiations the Union had expressed concerns that brakepersons might not be called to deadhead to the away from home terminal with conductors, where conductors would be operating homeward on a conductor only crew consist. By the terms of the appendix the Company undertook to deadhead both a conductor and a non-essential brakeperson in such a circumstance, even where the returning train might be operated on a conductor only basis. This, it seems, eliminated what would otherwise have been a loss of revenue for a substantial number of employees.

Secondly, in the final paragraph of the appendix, the Company undertakes that employees are not to be held at the away from home terminal to protect work in another classification where employees in that classification could be deadheaded from the home terminal. In the example cited by the Company, where a conductor and brakeperson are the only employees present at the away from home terminal, the Company would not recycle them separately, holding the brakeperson to work as a conductor on a later homeward train if qualified conductors were available at the home terminal who could be deadheaded to operate that train. The only qualification to that undertaking is that employees may be held to protect such service if a delay to a train would otherwise result.

In light of the foregoing, on the basis of the language of the agreement, the Arbitrator can find nothing which would sustain the interpretation advanced by the Union, to the effect that an

employee is entitled, regardless of the needs of the service, to return homeward from the away from home terminal on the first available train, and to work as a non-essential brakeperson if necessary. That very concept is, I think, contrary to the understanding of the parties with respect to the separate cycling homeward of conductors and brakepersons.

Finally, the Arbitrator cannot sustain the argument advanced by the Union with respect to the application of the doctrine of estoppel. In this regard the Union submits that representations were made by Company officers during the course of the negotiation of the Conductor Only Agreement, some of which responded specifically to concerns raised by the Union's local chairperson at Hornepayne. While I am satisfied that the local chairperson proceeded in good faith, and emerged from his discussions with officers of the Company with the impression that brakepersons would not be liable to be held at the away from home terminal for possible service on later trains which might require their presence, I can find no evidence to establish that such an undertaking was given in clear and categorical terms. More specifically, it appears that during the course of a meeting held at Oakville on June 27, 1991 the local chairperson made the following notation, in part, of his understanding of what was agreedt:

> DEADHEADING
>
> No change in the policy concerning deadheading, i.e. splitting up crews to save on deadheading to the away from home terminal.

The Arbitrator is satisfied that the foregoing entry speaks to the undertaking of the Company, reflected in appendix 4 of the Conductor Only Agreement, that where conductors are deadheaded to the away from home terminal the practice will continue to deadhead brakepersons along with them. While the local chairperson may have believed that his note had a bearing on the right of a brakeperson to recycle homeward out of the away from home terminal, that meaning is plainly not evident on the face of what was recorded.

Nor can the Arbitrator place substantial weight on a letter from the local chairperson dated August 26, 1991, addressed to the assistant superintendent at Hornepayne. While that letter expresses, in part, the local chairperson's belief that with independent cycling homeward the brakeperson is entitled to work the first train in which he or she "is entitled to operate as a non-essential brakeman or essential brakeman." it is difficult to attach great weight to the document, save as perhaps reflecting its author's understanding. Significantly, it comes after the signing of the Conductor Only Agreement, and Appendix 4, on July 12, 1991. Additionally, the language of the local chairperson's letter still leaves open to question when a brakeperson is "entitled" to operate as a non-essential brakeperson. In other words, his letter to the assistant superintendent can, I think, reasonably be interpreted as implying that the right of a brakeperson to work homeward as a non-essential brakeperson is nevertheless dependent upon such assignment being made by the Company. I find it difficult to ground an estoppel on the basis of so general a statement

The Conductor Only Agreement is one of significant importance to both parties. Its negotiation was complex, as was its eventual

drafting. For the reasons related above, having particular regard to the acknowledgment of the need for flexibility, and the recognition of the parties that the new order would sometimes require brakepersons to be held at the away from home terminal, subject to a twelve hour limitation, both the overall purpose and specific language of the Conductor Only Agreement lend support to the interpretation of the Company. Secondly, it is trite to say that it is incumbent on the party asserting an estoppel to adduce clear and cogent evidence of an undertaking or representation that is clear and unmistakable in its message. For the reasons touched upon above, the Arbitrator can find no such representation having been made in the case at hand.

For the foregoing reasons the grievance must be dismissed.

11 February 1994 (sgd.) MICHEL G. PICHER
ARBITRATOR