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CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2578

Heard in Montreal, Thursday, 12 January 1995

concerning

Canadian National Railway Company.

and

Canadian Council of Railway Operating Unions
(United Transportation Union)

ex parte

DISPUTE:

Spare board regulation - Capreol, Ontario

Ex parte STATEMENT OF ISSUE:

On October 14, 1994, the Company, without prior consultation with local union officers, regulated the Capreol spare board which resulted in a furlough board being established and, in addition, the laying off of some 7 employees.

The grievance concerning the regulation of the spare board was filed by the local chairperson under the provisions of article 92.2 of the collective agreement. However, no response was forthcoming from the Company.

On November 1, 1994, the Union submitted this grievance to the Chief of Transportation under the provisions of article 92.3 and again no response was forthcoming.

It is the Union's position that the Company, in its regulation of its Capreol spare board, was in violation of articles 56.4 and 56.7 of agreement 4.16

The Company has not responded to any of the grievances in accordance with the grievance procedure.

FOR THE UNION:

(SGD.) M. P. Gregotski

General Chairman

There appeared on behalf of the Company:

D. W. Coughlin - Manager, Labour Relations, Montreal

J. P. Krawec - System Labour Relations Officer, Montreal

A. E. Heft - Manager, Labour Relations, Toronto

B. A. Kalin - System Transportation Officer, Montreal

B.W. Maskerine - District Superintendent, N.O.D., Toronto

D. K. House - District Superintendent, S.O.D., Toronto

B. J. Hogan - Manager, Special Projects, Toronto

J. W. Sauvé - Manager, Crew Management Centre, Toronto

And on behalf of the Union:

R. Beatty - Vice-General Chairperson, Hornepayne

M. P. Gregotski - General Chairperson, Fort Erie

W. G. Scarrow - General Chairperson, Sarnia

R. Roy - Local Chairperson, Capreol

R. Whoel - Local Chairman, CCROU(BLE), Hornepayne

B. Mann - Observer

AWARD OF THE ARBITRATOR

It is common ground that Capreol, located in Northern Ontario, has a joint spare board which provides relief employees who are utilized for both road and yard service. Effective October 14, 1994 the Company implemented a change in the regulation of the Capreol spare board by eliminating fifteen employees. As a result of the Company's action, eight of the employees cut off the board went to a furlough board established at Capreol while the seven

remaining employees, who are non-protected, faced layoff. It appears that they were able to exercise their seniority to displace to positions at Hornepayne.

The Company's action came as a result of its concern with respect to the efficiency of operations. Problems relating to profitability and the ratio of operating expenses to revenues caused the Company to examine closely its operations in the Great Lakes Region with a view to realizing savings, including savings in labour costs. The Company sought to optimize the use of crews by more efficient utilization of employees across the system, by a number of means which included reducing problems of absenteeism and of excessive unscheduled time off being taken by employees.

The Company's view of the problem were related to the Union, initially at a meeting held on June 28, 1994 in Burlington, and thereafter at a follow-up meeting in Toronto on December 6, 1994. Among the suggestions advanced by the Company was a scheme to maximize regularity in work assignments through an increase in the work performed by pool assignments, and a corresponding reduction in spare board work. Eventually the Union formed the view that the Company's proposals would occasion a reduction of work opportunities for its members in a manner which it took to be inconsistent with the intention of the Conductor Only Agreement previously negotiated with the Company. Consequently, in a letter dated September 8, 1994 to all yard and road local chairpersons, the Union's General Chairperson counselled against local agreements with the Company's proposals, stating, in part:

TO all Yard and Road Local Chairpersons

RE: Article 27 (Crew Runs) of the 4.16 Collective Agreement

Dear Sirs and Brothers:

On September 6, 1994 Brothers Scarrow, Hamilton and myself attended a meeting with the Company regarding crew scheduling. It is the position of the Company that the present crew scheduling at many or all terminals did not fully utilize all of our members or caused shortages during the month that should not occur. Some of the concerns raised by the Company were time pools where employees did not work and did not have a catch up clause, or other run schedules that permitted our members to be off for miles each month. Enclosed for your reference are examples of schedules the Company will be insisting on when they visit each terminal in the near future.

Please note, that the schedules the Company will be proposing to you do not provide for the maximizing of our members and these schedules also do not provide the regularity our members now work. The Company's proposals are nothing but spare board in time blocks/pools.

Brothers Scarrow, Hamilton and myself vigorously related to the Company that the present schedules in effect at each Local were mutually agreed to by the Company and the Union in concert with the implementation of the Conductor Only Agreement and for the Company to now change these schedules without each Local's agreement will be a violation of the Agreement.

This letter is to advise each Local of the Company's intentions when they visit each Local in the near future. It is the responsibility of each Local Chairperson under Article 92 to appeal the Company's action if the Company imposes run schedules that are not mutually agreeable. There are shortened and strict time limits in Article 92 that must be respected if you are going

to appeal a unilateral action by the Company.

Do not hesitate to call this office if you have any questions or are in doubt regarding this appeal procedure in Article 92.

(original emphasis)

The thrust of the Union's grievance is that the Company's actions undermine the intention of the Conductor Only Agreement and that they reduce the regularity of assignments and depart from established norms in the regulating of spare boards. Prior to 1990 the Company was required to operate each train with a crew consisting of one conductor, one brakeperson (now known as an assistant conductor) and one locomotive engineer. The Company and the Union entered into a voluntary memorandum of agreement on May 24, 1991 which allows the Company, in certain circumstances, to operate trains with crew consists of one conductor and one locomotive engineer. The "Conductor Only Agreement" provided for the elimination, by attrition, of the position of brakeperson. Pending complete attrition, remaining brakepersons' positions on through freight and Sprint train assignments were to be classified as "non-essential". Under the terms of the agreement only protected freight employees, with a seniority date as a brakeperson on or prior to June 29, 1990 could occupy non-essential brakepersons' positions, now referred to as non-essential assistant conductors' positions.

Following the Conductor Only Agreement assignments continued to be established for both conductors and for non-essential brakepersons. Such assigned positions could be bid on each change of time card, and typically filled by senior qualified applicants. Normally junior employees unable to hold an assigned position would then fill the spare board positions. Under the terms of article 49.1 spare board employees would work in relief for all vacancies, such as vacancies occasioned by sickness or injury, and to fill temporary assignments of less than seven calendar days in road service. Before the Conductor Only Agreement the temporary absence of a regular brakeperson had to be filled by a person from the spare board in order for the train to operate. After the Conductor Only Agreement, however, such a position need not be filled, and the Company could operate the train with a conductor only crew consist, subject to the right of a protected assistant conductor to claim a non-essential assistant conductor assignment. Should the spare board be exhausted the Company can fill a vacant or temporary assignment in road service by assigning the junior qualified conductor not working as a conductor to do so, in accordance with article 49.5(a) of the collective agreement. Further, the Company is entitled to hold conductors off their assignments to meet the requirements of the service, as contemplated under article 49.7.

The Union grieves that, in effect, the Company has utilized these provisions to create a spare board of protected employees at Capreol by reducing the spare board to a level which cannot provide sufficient relief. In the result, the Company is reverting to the application of articles 49.5 and 49.7 to press protected non-essential brakepersons into relief service as conductors, thereby maximizing trains run on a conductor only basis. In other words, as the Union would characterize it, by reducing the spare board the Company has succeeded in substantially reducing the utilization of non-essential assistant conductor assignments. This, the Union submits, is in violation

of article 27.6(d) Note 4 of the collective agreement, negotiated as part of the Conductor Only Agreement. It provides as follows:

NOTE 4: Existing practices or application of mileage regulations will not be altered so as to reduce the active working list for the sole purpose of discontinuing assistant conductors' positions.

The Company characterizes the situation in a very different way. It submits that what transpired at Capreol was not a spare board adjustment as contemplated by the collective agreement, but rather an administrative reduction of employees which is not otherwise prohibited by the agreement. The Company submits that what has transpired is a manpower reduction within its prerogatives, as contemplated in article 54 of the collective agreement which governs reductions in staff and the layoff of employees in road and yard service on the basis of seniority. While the Company acknowledges that it cannot lay off protected employees, by reason of the Conductor Only Agreement, it submits that nothing within the collective agreement restricts its ability to reduce staff by laying off unprotected spare board employees, and placing protected employees who are on a spare board onto a furlough board, as was done in respect of the certain of the employees at Capreol. The Company argues that the fact that the employees at Capreol who were affected by the reductions in staff were on the spare board is coincidental, noting that at other locations employees not exclusively assigned to the spare board were also laid off as part of the overall rationalizing of operations.

Fundamental to the Company's position is its assertion that it retains the right to regulate the size of its work force, including the right to determine spare board adjustments, in accordance with operational requirements. In this regard it refers to the language of Addendum No. 57 to the collective agreement, a letter of August 27, 1982 issued by the Company's Chief of Transportation and incorporated into the parties' agreement, which reads as follows:

One of your demands submitted for the current round of negotiations related to the method of payment of guarantees and problems associated with that process. A particular problem you sought to redress was that the Union, through the Local Chairman, was not being apprised before the fact when the boards were adjusted. You felt the Local Chairman's input, when decisions as to the magnitude of board adjustments are to be made, was necessary to ensure that the earnings of your membership not be detrimentally effected by "unilateral" actions on the part of Local Company Officers or their delegates at the time of board adjustments.

For the Company's part, we explained to you that a continuing and efficient operation were paramount, from our point of view, in determining board adjustments and, for the most part, that the Local Chairman is advised of board adjustments prior to their occurrence whenever it is practicable to so do. However, we remain adamant that the determination of board adjustments must remain tied to operational requirements so that such requirements remain economically efficient and viable.

Notwithstanding the Company's views regarding our responsibility to adjust boards, we are prepared to commit to you that the Local Chairman (or delegate) will be advised prior to

the effective time of board adjustments of the particulars of such adjustments and the reasons therefore, whenever practicable, so long as board adjustments are not unduly delayed as a result.

The Company asserts that nothing prevented it from making a management decision, for valid business purposes, to reduce the complement of employees at Capreol, by means of a reduction of the spare board, for the purpose of serving the needs of operational requirements and maximizing efficiency. In this regards it notes the use of the phrase "subject to operational requirements" which appears in the language of article 56.7, which the Union alleges to have been violated.

The following provisions of the collective agreement are pertinent to the resolution of this grievance:

27.5 Through freight assignments, pools or sets of runs will be established and regulated in a manner which will not limit or otherwise restrict the provisions of this Agreement but which, at the same time, will maximize the regularity with which employees are required to report for work at the home terminal.

56.4 An active spare board will be maintained at each home station from which spare and relief will be drawn. Employees on spare boards shall be entitled to:

(a) In Road Service:

(1) all relief work consistent with Article 49;

(2) all extra work to complete the consist of crews where applicable;

(3) extra trains, (due regard being had to the provisions of Article 10) or trains which cannot practicably be made part of any assignment, pool or set of runs;

(b) In Yard Service:

(1) all relief work consistent with Article 49;

(2) all extra work to complete the consist of crews where applicable;

(3) extra yard assignments.

56.7 (This paragraph and sub-paragraphs (a) and (b) are only applicable to the 17th Seniority District). Subject to operational requirements and except as provided by paragraph 56.6, the Company will regulate the number of employees on the road, yard or joint spare boards and, when spare boards are regulated, the Local Chairperson or delegate will be notified of the particulars at the time of regulation, except:

(a) Where established, conductors' spare boards will be regulated so that the earnings of employees assigned thereto will approximate the equivalent of between 3700 and 4300 miles per month at conductors' through freight rates of pay.

(b) The earnings specified for the regulation of spare boards will not be construed as the maximum earnings which employees will be permitted to make. It is acknowledged that spare boards are, generally regulated, in consultation with the Local Chairperson, in a manner that tends to allow for earnings closer to the maximum permissible rather than the minimum permissible and that, where practicable, this manner of regulation shall be maintained. However, it is recognized by all concerned that, in certain situations, earnings cannot practicably be maintained above the guarantee level; such cases should be limited to situations where the operation or the terms of the collective agreement make it impracticable to avoid.

49.5 When a position covered by paragraphs 49.2 to 49.4

inclusive is not filled under the provisions of those paragraphs:

(a) such position will be filled by the junior qualified Conductor not working as such in road service in the terminal who is available for service 2 hours before a Conductor is required to report for duty and who must accept such service;

(b) such employees will be considered available after being relieved at the final terminal at end of a tour of duty (unless proper leave of absence has been obtained) provided that an employee who books rest in excess of 14 hours will be considered as available after the expiry of 14 hours.

49.7 Employees liable for service as Conductors may be held off their assignments to meet the requirements of the service and to ensure that employees will be available two hours prior to the time a Conductor is required. When so held, employees shall be paid not less than the earnings they would have made on their assignment.

92.1 Any dispute or disagreement concerning the establishment and regulation of assignments, pools and sets of runs, spare boards, furlough boards and the administration of such local arrangements as set out herein shall be processed in the manner set out herein.

92.4 If the dispute or disagreement remains unresolved, the matter may, within 30 calendar days, be referred to the Canadian Railway Office of Arbitration in the manner specified in the Memorandum of Agreement dated September 1, 1971 for final and binding resolution.

92.5 The decision of the arbitrator shall be limited to a determination as to the practicability of the parties' respective positions on the issue(s) in dispute. The decision of the arbitration shall, in no way, add to, subtract from, modify, rescind or disregard any provision of the Agreement.

NOTE: For the purposes of this Article practicality means the capability of being reasonably done.

I turn to consider the merits of the grievance. The Arbitrator appreciates the concerns which motivate the grievance, as the Company's actions in respect of the Capreol spare board may have gone beyond the expectations of the Union's officers arising out of the Conductor Only Agreement. That alone, however, would not disclose a violation of the collective agreement, if it can be established that the Company's actions are within its prerogatives. Upon a close examination of the language of the collective agreement, I am satisfied that indeed the Company has acted in a manner consistent with the permissible limits of the collective agreement, and that no violation of its terms is established in the case at hand.

The issue to be resolved is whether the initiatives taken by the Company in respect of the regulation of the Capreol spare board is not practicable, or is less practicable than the Union's position, as contemplated under article 92.5 of the collective agreement. Without attempting to be exhaustive on the meaning of the concept of practicability, it would appear to the Arbitrator at the outset that that concept cannot be interpreted to countenance overt violations of specific provisions of the collective agreement.

In considering whether the schedule implemented by the Company violates the collective agreement, the Arbitrator was given pause to consider whether its actions were in violation of article

27.6(d) NOTE 4 and article 27.5. There can be little doubt that the cutting back the spare board at Capreol by fifteen positions constituted a change in existing practices, arguably involving the application of mileage regulations, which, as a result, reduced the active working list. For the purposes of article 27.6(d) NOTE 4, however, the fundamental question is whether such action was implemented "... for the sole purpose of discontinuing assistant conductors' positions."

In the Arbitrator's view the meaning of the reduction of assistant conductors' positions becomes more apparent when regard is had to the general language of article 27.6 which governs the establishment of non-essential assistant conductors' assignments or pools. That article provides, in part, as follows:

27.6 In the establishment and operation of assignments, pools or sets of runs for non-essential assistant conductors pursuant to sub-paragraph 27.4(d) hereof, the following principles shall govern:

(a) The initial number of non-essential assistant conductors pursuant to sub-paragraph 27.4(d) hereof will be occupied by protected employees only.

(b) The initial number of non-essential assistant conductors' positions established at each terminal in respect of such assignments, pools or sets of runs will be limited to the number of conductor's assignments established pursuant to subparagraph 27.4(a) hereof. Except as provided by the NOTES to this sub-paragraph 27.4(b) the total number of non-essential assistant conductors' positions on such assignments, pools or sets of runs at each terminal will, at no time, exceed this initial number.

NOTE 1:(This NOTE is only applicable to the 17th Seniority District) If, during the two (2) years immediately following the effective date of the memorandum of agreement dated July 12, 1991 (i.e., up to and including September 27, 1993), the service design specifications of a train or trains, previously identified as requiring an assistant conductor, are revised so that such train or trains meet the criteria for operation with a consist of a conductor only, the total number of existing non-essential assistant conductor's positions will then be increased by one for each such train.

As can be seen from the foregoing, the collective agreement makes a clear distinction between non-essential assistant conductors' positions, on the one hand, and non-essential assistant conductors' assignments, on the other hand. The Company remains obligated, subject to certain attrition rules, to maintain non-essential assistant conductors' positions at various terminals, in accordance with the formula established as part of the Conductor Only Agreement. The list of non-essential assistant conductors can be readily identified, and can only be reduced in accordance with the rules. However, whether certain trains run with or without a non-essential assistant conductor is a different matter, and many factors can result in a reduction of the number of assignments which function with a non-essential assistant conductor. If the Company can so order its affairs as to assign a non-essential assistant conductor to cover a conductor only assignment on a given train, and thereby avoid the utilization of any assistant conductor in that train assignment, it cannot be said to have thereby reduced the number of assistant

conductor positions. Assignments of non-essential assistant conductors can be reduced without reducing the number of non-essential conductors' positions.

In the case at hand that is what has transpired. By a combination of a reduction in the spare board and greater utilization of article 49.7, the Company has succeeded in maximizing the assignment of non-essential assistant conductors into conductor only service. In so doing, however, it has not reduced or discontinued any assistant conductors' positions at Capreol. Those positions remain intact, and can only be removed by the application of the attrition rules built into the Conductor Only Agreement. Significantly, the parties did not draft language to prevent the Company from minimizing or discontinuing as many assistant conductors' assignments as possible. Indeed, the thrust of the Conductor Only Agreement is to allow the Company to operate assignments without an assistant conductor, and the reduction of such assignments is therefore not surprising. In the result, on the evidence of this case the Arbitrator cannot find that the Company's actions at Capreol are in derogation of its obligation not to discontinue assistant conductors' positions by the manipulation of spare board practices and mileage regulations, as no reduction in assistant conductors' positions has been disclosed.

Can it be said that the Company has departed from the intention of article 27.5, which stresses the maximization of "... the regularity with which employees are required to report for work at the home terminal."? At first blush the observance of this provision appears, arguably, to be in doubt, in light of the Company's admitted practice of holding a greater number of non-essential assistant conductors for less regular service as conductors by the operation of article 49.7. If the Arbitrator were satisfied that the Company's use of that article effectively undermined the overall regularity of assignments at Capreol, such a departure from the intention of article 27.5 would arguably depart from the collective agreement and call into question the Company's argument as the practicability of its spare board regulation initiative.

When the picture is examined as a whole, however, the Arbitrator cannot find that any such violation has in fact occurred. Prior to the reduction of the spare board some fifteen employees whose spare board positions were discontinued were subject to being called for service on an irregular basis, to provide relief to the regularly assigned pools. The Company's actions have effectively transferred the lack of regularity experienced by those employees, to some degree, to employees who are occasionally held for service by the operation of article 49.7. It is not clear to the Arbitrator, however, that there has been any ultimate change in the total incidence of irregularity of assignments at the home terminal. Rather, such irregularity as already existed has been, at least in part, redistributed from the spare board to employees who are occasionally being held for service under article 49.7. The evidence before the Arbitrator does not establish that there are any more employees at Capreol who are now subject to a degree of irregularity in their assignments than there were previously. The overall balance of regularity has therefore not been disturbed in a manner inconsistent with article 27.5 of the collective agreement.

While the Union is obviously not pleased with the Company's actions, the Arbitrator can see nothing in the collective agreement which would prevent the employer from utilizing article 49.7 in the manner it has. Nor is there anything to prevent it from minimizing the use of non-essential assistant conductor assignments, and maximizing conductor only operations, for reasons of efficiency and profitability. The Union has not negotiated language into the terms of the conductor only provisions which would prevent the Company from doing what it has done at Capreol.

Nor do the facts disclose a substantial prejudice to the ultimate ability of the Union to protect itself, should it feel that the Company's actions are inconsistent with its expectations coming out of the Conductor Only Agreement. The Company's initiative at Capreol, and apparently at other locations, is fairly recent, having been implemented only for a matter of a few months. The parties are now at the threshold of the open period of their collective agreement, and the Union is fully positioned to seek to negotiate any necessary protections into the provisions of the collective agreement.

Can it be said, in light of the evidence before the Arbitrator, that the actions of the Company are not practicable for the purposes of article 92.5 of the collective agreement? I think not. The evidence discloses, beyond controversy, that the reducing of the spare board at Capreol has not impacted the Company's ability to service its manpower requirements in a manner consistent with the provisions of the collective agreement. A smaller body of employees is being fully utilized to discharge an unchanged workload, the only difference being that greater efficiencies are being realized as the complement of active employees has been reduced and there is less utilization of non-essential assistant conductor assignments. In the circumstances the Arbitrator cannot find that the Company's initiative is not practicable, as contemplated within the language of article 92.5. Indeed, from the standpoint of efficiency, I am compelled to conclude that it is more practicable than the alternative position of no change advanced by the Union.

For all of the foregoing reasons the grievance must be dismissed.

17 February 1995 _____

MICHEL G. PICHER
ARBITRATOR