CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2696

Heard in Montreal, Thursday, 11 January 1996

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS [UNITED TRANSPORTATION UNION]

EX PARTE

DISPUTE:

Crane operation by conductors and assistant conductors at Brunswick Mines.

EX PARTE STATEMENT OF ISSUE

A new facility has been developed at Brunswick Mines for the removal and application of car covers utilizing an electric crane for the hopper cars. Employees represented by the UTU have been specially trained on an overhead crane at Brunswick Mines at the new load out facility, starting May 9, 1994.

It is the Union's position that employees represented by the UTU do not have to perform the work. The technological change in the handling of car covers at Brunswick Mines require new training and additional related duties that have to be performed by employees represented by the UTU therefore constitute a material change in working conditions and, accordingly, a notice pursuant to article 79 of agreement 4.16 is required.

The Company disagreed and implemented the change.

FOR THE UNION:

(SGD.) R. LEBEL
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

J. Coleman	– Counsel, Montreal
S. A. MacDougald	– Manager, Labour Relations, Montreal
D. W. Coughlin	– Manager, Labour Relations, Montreal
M. LeBlanc	– Manager, Train Service, Campbellton
M. Taylor	– Account Manager, Marketing, Moncton
O. Lavoie	– System Labour Relations Officer, Montreal
J. G. Gagnon	– District Manager, Moncton (ret'd)
W. D. Agnew	– Manager, Labour Relations, Moncton (ret'd)

And on behalf of the Union:

M. A. Church	– Counsel, Toronto
R. Lebel	– General Chairperson, Quebec
R. LeBlanc	– Local Chairperson, Campbellton
M. Jacque	– Local Chairperson, Campbellton
M. Collet	– Local Chairperson, Montreal

AWARD OF THE ARBITRATOR

Brunswick Mining and Smelting Ltd. is one of the Company's most important customers in Atlantic Canada. The undisputed evidence discloses that to keep the mining company's business the Company was compelled, in the early 1990's, to negotiate with the customer the implementation of a new system of loading ore cars at the Brunswick Mines site, and in particular a system whereby virtually all of the hopper cars being loaded, except for cars carrying lead, would be covered.

As a result, an arrangement was established whereby an enclosed loading facility was constructed. Within that facility is a large industrial overhead crane, owned and maintained by Brunswick Mining. The sole purpose of the crane is to remove and place specially constructed fibreglass lids on the ore cars being loaded inside the facility. The evidence establishes that, in accordance with the Company's agreement with the customer, the overhead crane is operated by the conductor of the train which is being loaded, as part of the train crew's normal duties in respect of that train. In the result, the train crew, consisting of a locomotive engineer and the conductor, arrive at the mine site, spend some three to four hours loading the ore cars and placing the covers on them, and then depart the premises with their train, generally to Campbellton.

It is not disputed that the work performed by the train conductor during the loading operation is different from the traditional duties of a conductor's position. Essentially, the employee operates the electrical crane from the controls which are inside an enclosed cabin, located within the load-out shed. The shed receives various forms of minerals through a conveyor system. The minerals are loaded into the hopper cars by way of a large front end loader operated by an employee of the mining company. It is common ground that that same mining company employee directs the movement of the cars along the loading track, by means of radio contact with the locomotive engineer. While the train conductor is also equipped with a radio inside the cabin of the crane, he has no direct involvement in the movement or spotting of the cars. The evidence confirms that the conductor is substantially occupied with removing and placing the fibreglass covers by the operation of the crane. The loading operation is virtually continuous, from the time it commences until the train, which may count as many as forty-five cars, is ready to depart. The evidence further discloses that the conductors performing the work have done so successfully, generally after completing a two day training program in the operation of the electrical overhead crane.

It is common ground that certain of the changes implemented at Brunswick Mines did amount to a material change which caused the Company to give the Union notice under article 79 of the collective agreement. Factors such as the reduction of the operation from seven days to five days, and a resulting decrease in the number of trips to the mine, as compared to the previous work which merely involved the marshalling of trains out of the yard at that location, did result in negotiations between the parties under the provisions of article 79, and the concluding of an agreement. The instant case arises, however, because the parties are disagreed as to whether the introduction of the duties and responsibilities of the train's conductor for the operation of the mechanical overhead crane inside the customer's loading facility is a material change within the meaning of article 79. The Union asserts that it is, that notice should have been given in that regard and that it should be given the opportunity to negotiate terms and conditions of employment which minimize the adverse effects upon employees. The Company's position is that the change has not resulted in the loss of employment, employment opportunities or income to any individual, and that the change in question cannot, therefore, be characterized as a material change having adverse impacts, within the meaning of article 79 of the collective agreement.

Article 79 provides, in part, as follows:

> **ARTICLE 79**
> **MATERIAL CHANGES IN WORKING CONDITIONS**
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> **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 Chairperson 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.
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> **79.1 (a)** the Company will negotiate with the Union measures other than the benefits covered by paragraphs 79.2 and 79.3 to minimize such adverse effects of the material change on employees

who are affected thereby. Such measures shall not include changes in rates of pay. Relaxation in Agreement provisions considered necessary for the implementation of a material change is also subject to negotiation;

79.1 (b) while not necessarily limited thereto, the measures to minimize adverse effects considered negotiable under sub-paragraph (a) of this paragraph may include the following:

(1) Appropriate timing
(2) Appropriate phasing
(3) Hours on duty
(4) Equalization of miles
(5) Work distribution
(6) Adequate accommodation
(7) Bulletining
(8) Seniority arrangements
(9) Learning the road
(10) Eating en route
(11) Working en route
(12) Layoff benefits
(13) Severance Pay
(14) Maintenance of basic rates
(15) Constructive miles
(16) Deadheading

The foregoing list is not intended to imply that any particular item will necessarily form part of any agreement negotiated in respect of a material change in working conditions.

The evidence before the Arbitrator discloses that the conductors required to work within the loading facility are placed in a working environment which involves environmental risks of some substance, which are generally not encountered in the duties which they traditionally have performed. Specifically, the load-out shed does contain a hazard in the form of airborne mineral dust which requires a high degree of precaution. That appears to be recognized in a letter of the Company's own medical consultant to its District Manager for the Maritime District dated January 28, 1993, which reads as follows:

> Please ensure that CN workers who will be involved with the loading of lead concentrate at Brunswick Mines shall be provided with adequate respirator protection. Further, specific attention to work clothes and work boots contamination by inorganic lead dust, respirator care and training as to exposure to lead should be completed before allowing CN workers to commence work loading cars at the Mines.

The concerns expressed by the Union with respect to the change of working conditions under which conductors are compelled to operate at Brunswick Mines are understandable. By way of example, the evidence discloses that on May 16, 1995 a safety officer from Labour Canada issued a directive which contains, in part, the following:

> On May 15, 1995, the undersigned safety officer conducted an inquiry in the work place operated by CN North America, being an employer subject to the **Canada Labour Code**, Part II, at 1234 Main Street, Moncton N.B., E1C 1H7, the said work place being in the Brunswick Mining loading facility Bathurst N.B.
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> An inspection at the said work place revealed that while an employee is performing assigned duties a condition exists that constitutes a danger while the employee is in the said work place:
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> > an employee working in the said location is not properly trained in the wearing of a respiratory protective device and the respirator protective devise supplied to him has not been properly fitted, this constitutes a danger while at work
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> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 45(2)(a) of the **Canada Labour Code**, Part II, to take measures immediately for guarding the source of danger.

The case presented by the Union is twofold. Firstly, it submits that the Company cannot assign the operation of an industrial overhead crane to a member of its bargaining unit. Alternatively, it submits that such an assignment does involve a material change in working conditions which have materially adverse effects on employees, within the meaning of article 79.1 of the collective agreement. In that circumstance it submits that the Company was under an obligation to give notice to the Union and to negotiate measures to minimize adverse effects.

The Arbitrator cannot accept the first submission of the Union. As long as railways have been in operation it has been part of their legitimate business concern to provide the fullest possible service to their customers. Not infrequently such service will involve the performance of work not normally associated with the regular operation of a train. One of the oldest examples, dating perhaps from the nineteenth century, is the unloading, feeding and watering of livestock being carried on the Company's trains, a task traditionally performed by running trades employees. The Arbitrator can find nothing within the terms of the collective agreement which would, either expressly or impliedly, limit the right of the Company to assign to conductors duties which are clearly in relation to the loading of their train, and in particular the placing and displacing of covers on hopper cars which, it is agreed, are leased by the railway for its exclusive use. In the result, on the particular facts of this case, the Arbitrator is satisfied that the collective agreement would not prevent the Company from assigning the work in question to the Union's members.

The issue of greater substance is whether the assignment in question does constitute a material change in working conditions as that concept is understood under the terms of article 79.1 of the collective agreement. Over the years this Office has had many opportunities to consider the scope of what might constitute a material change. One of the earliest comments in that regard appears in CROA 221, which dealt with the introduction of radios into yard switching operations. The Arbitrator specifically concluded that the physical inconvenience which might be experienced by employees being required to work with radios was not the kind of adverse effect addressed by article 79.1. Arbitrator Weatherill commented, in part, as follows:

> In some respects, as the Company points out, the introduction of radios may have beneficial effects, for example in making the work of yardmen easier in certain ways. At the same time, no doubt, as the union points out, they may be considered as having adverse effects, as being cumbersome, an added responsibility, requiring a new technique, and so on. These considerations are not, in my view, particularly helpful in resolving the question whether the change is a material one, or will have materially adverse effects on employees. The motion of a "material" change, or of "materially adverse" effects is question-begging, for the question which must first be resolved is: material to what? The answer to this question can only be determined upon a consideration of article 47 as a whole. What are its purposes, and what sort of matter does it contemplate as material to its operation? In the context of article 47, it must be said that a material change is one which leads to situations for which the procedures of that article are properly invoked. It is apparent at a glance that article 47 contemplates some substantial dislocation of employees with respect to their work, as to time, place or fundamental character. ...

In **CROA 2024** the Arbitrator declined to find that the introduction of a direct deposit system of payment constituted a material change under the terms of article 79.1 of the agreement. In so concluding the following comments were made:

> There are obviously many kinds of employee interests that can be affected by changes introduced by the Company. As indicated in *CROA 221*, however, not all changes which have some negative impact on employees are necessarily material changes in working conditions having materially adverse effects on employees within the meaning of Article 79.1 of the Collective Agreement. Many kinds of privileges and procedures, such as the allocation of parking spaces, lockers, work clothing and equipment, and indeed the physical location of a workplace or lunch room may form part of the daily working conditions of employees. Sometimes they can, upon the agreement of the parties, be elevated to the level of terms and conditions of employment which are included within the provisions of a collective agreement. The method by which employees are paid falls within this category of rights and privileges. Some collective agreements provide for it, others, like the agreement at hand, do not.
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> Generally speaking, such rights or privileges may be described as secondary or peripheral. They are to be contrasted with conditions of employment such as seniority, bumping rights, lay off

> provisions and rights of recall, to name a few, which are provisions central to the operation of a collective agreement, and to the vital job interests of the employees governed by it. It is in that context that the meaning of the terms "material change in working conditions" and "material adverse effects" found in Article 79.1 must be construed.

(*See also* **CROA 2225**.)

As noted above, the Company did acknowledge that certain aspects of the changes at Brunswick Mines did merit notice of a material change under the provisions of article 79.1. The reduction of the service from seven days per week to five and the decrease in the overall number of trips to the mine did justify the giving of a notice and the negotiation of an agreement to minimize adverse employment effects upon the individuals concerned. After careful consideration, however, the Arbitrator is compelled to conclude that the matters which are raised in this grievance cannot be said to qualify as a material change in working conditions "which will have materially adverse effects on employees" within the meaning of article 79.1 of the collective agreement.

Running trades employees have long been called upon to be flexible in the nature of the duties which they may be required to perform in the service of the Company's customers. What has in fact occurred is a change in duties, with conductors being relieved of the previous routine of turning switches, climbing on cars, applying hand brakes and walking extensive distances in the mine's freight yard, where mineral contamination could also be encountered. They now work almost entirely from within the cab of the crane. The analysis of whether a particular job is more physically or mentally demanding than another is, as a general matter, not relevant to the determination of whether there has been a material change which has materially adverse effects on employees in the sense reflected in article 79 of the collective agreement, as that article was originally negotiated, subsequently interpreted by this Office, and renegotiated without change.

In the drafting of the provisions of article 79 the parties sought, with some care, to circumscribe the scope of what might be characterized as a material change. Article 79.1(k) provides as follows:

> **79.1(K) WHEN MATERIAL CHANGE DOES NOT APPLY**
> This Article does not apply in respect of changes brought about by the normal application of the collective agreement, changes resulting from a decline in business activity, fluctuations in traffic, traditional reassignments of work or other normal changes inherent in the nature of the work in which employees are engaged.

In the instant case the Arbitrator is compelled to conclude that, although there is obviously a change in the duties and routine experienced by a conductor involved in the loading operation at Brunswick Mines, the change which was implemented in that regard, including the operation of the mechanical crane, must fairly be characterized as falling within the concept of "... normal changes inherent in the nature of the work in which employees are engaged." The evidence in the instant case discloses that the Company had no alternative but to provide the hopper car lids, and the full service with respect to their placement on and removal from the ore cars. The uncontroverted evidence is that had it not done so it would have lost the business, as the customer was prepared to convert to truck service for the handling of its ore. The modern railway, no less than railways traditionally, must be able to respond flexibly to the needs of its customers. In the Arbitrator's view it is in contemplation of that reality that the parties negotiated the proviso of paragraph 79.1(k) of the collective agreement, limiting the scope of what might constitute material changes in working conditions for the purposes of article 79.

That is not to say that the Union is without recourse with respect to the concerns it has expressed. Issues such as environmental monitoring, the provision of clothing and storage and change facilities can, of course, be negotiated at the main bargaining table upon the renewal of the collective agreement. Moreover, issues of immediate safety are fully protected by the prohibitions against unsafe work provided for within the **Canada Labour Code**. Indeed, it appears that those protections were in fact invoked for the benefit of employees at the Brunswick Mines loading facility in May of 1995. However, for the reasons related above, the reorganization or reassignment of a conductor's routine in the loading operations at Brunswick Mines is not, in and of itself, a material change with materially adverse effects, within the intention of article 79.1 of the collective agreement.

The Union relies, in part, on the decision of the Board of Arbitration in **BC Rail Ltd. and United Transportation Union, Local 1778**, 1923, an award of Arbitrator Dennis T. LaCharité, an apparently unreported award dated March 17, 1992. It appears that in that award the learned arbitrator concluded that certain changes in duties and

responsibilities placed upon running trades employees could be said to have materially adverse effects, to the extent that changes in the handling of track occupancy permits shifted a degree of responsibility from maintenance crews to train crews, thereby increasing their potential for disciplinary action. The arbitrator found that that alteration brought the changes in question within the terms of the material change provisions of the collective agreement. With respect, this Office is not inclined to follow that approach, which differs substantially from the jurisprudence of this Office. It must, I think, be taken that the parties subject to the jurisdiction of this Office negotiate and renegotiate their collective agreements in the knowledge of the interpretations of the provisions within them contained in prior awards of this Office. In the absence of any evidence to the contrary, I am not prepared to find that the parties before me intended to change the meaning of article 79.1 from that which is reflected in the prior awards of this Office, particularly when they have renewed the language of that provision without any change since those awards were rendered. While a different intention may well have obtained with the parties to the BC Rail case, the same cannot be said of parties in the case at hand who have renewed the terms of article 79.1 without change, in light of the prior awards of this Office. Indeed, the Arbitrator is satisfied that to accept the position advanced by the Union in the instant case would constitute a substantial amendment and departure from the understanding and intention of the parties with respect to the scope and application of article 79.

For the foregoing reasons the grievance must be dismissed.

January 16, 1996

(signed) MICHEL G. PICHER
ARBITRATOR