CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3215
Heard in Calgary, Tuesday, 13 November 2001
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(BROTHERHOOD OF LOCOMOTIVE ENGINEERS)
EX PARTE

DISPUTE:

The proposed implementation of the run through of Edson Terminal to the Coal Branch (Mountain Park and Foothills Subdivisions), in addition to the reorganization of single sub work, and whether or not 12 hours on duty is negotiable within the confines of article 89 of agreement 1.2.

COMPANY'S STATEMENT OF ISSUE:

The Company issued notices of material change dated February 15 and June 28, 2000, under article 89 of agreement 1.2 concerning the run through of Edson Terminal onto the Coal Branch. On October 30, 2000 the Company revised the notice modifying the operational changes at Edson Terminal.

The Brotherhood contends that the Company cannot unilaterally implement 12 hour runs under article 89 of agreement 1.2 and contends that any changes to the provisions of the current collective agreement, namely article 28, must be negotiated with and agreed to by the Brotherhood of Locomotive Engineers during the open period of the collective agreement. The Brotherhood contends the Company is prohibited from altering certain portions of the collective agreement during the closed period.

The Company disagrees and contends that hours on duty are negotiable under article 89 of collective agreement 1.2.

FOR THE COMPANY:
(SGD.) S. J. BLACKMORE
FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

S. Blackmore - Labour Relations Associate, Edmonton
J. Torchia - Director, Labour Relations, Edmonton
B. Kalin - Superintendent, Edmonton
R. Reny - Human Resources Associate, Vancouver
S. Zeimer - Human Resources Associate, Vancouver

And on behalf of the Council:
J. Shields - Counsel, Ottawa
D. E. Brummund - Vice-General Chairman, Edmonton
D. J. Shewchuk - General Chairman, Edmonton
R. J. Ermet - Local Chairman, Jasper
R. R. Shack - Local Chairman, Edson

AWARD OF THE ARBITRATOR

For reasons of business efficiency the Company has sought to implement extended runs to and from the Alberta Coal Branch, comprised of the Foothills and Mountain Park Subdivisions. That change would involve operating trains from Jasper and Edmonton running through Edson to Leyland and Coal Valley, assignments which would require twelve-hour on-duty days.

On February 15, 2000 the Company issued to the two unions comprising the Council material change notices under article 89 of the Brotherhood's

collective agreement, and article 139 of the UTU's collective agreement 4.3. The notice initially took the form of advice with respect to changes in the operation of trains 724/725 and 706/707 by running through Edson Terminal, resulting in a reduction of two BLE and two UTU positions at that location. Meetings ensued, and the Brotherhood took the position that the Company could not change the hours of work and the rest provisions of the collective agreement by invoking the material change provisions of article 89 of the collective agreement. The matter remained in abeyance and the parties agreed to proceed to arbitration of that issue, the dispute being scheduled for hearing in this Office on July 13, 2000.

Before the date set for that hearing, however, further discussions occurred between the Company's representatives and the Brotherhood's General Chairman on June 7, 2000. The Company's representatives submit that on that occasion the Brotherhood agreed to the Company being entitled to implement run-throughs of Edson with twelve-hour on-duty days on the Coal Branch. It maintains that that understanding was confirmed by the signing of a letter dated June 29, 2000.

The letter, tendered in evidence, does not expressly state that the Brotherhood has agreed to twelve-hour tours of duty. It does reflect that the Company changed its original intention, and developed what became an intention to close entirely the terminal of Edson.

In that regard, the letter reads, in part, as follows:

In light of this new information, the parties again met on June 7, 2000 to contemplate what would be in the best interest of the employees of Edson Terminal, while at the same time addressing the CCROU's concern with regard to unilateral collective agreement changes during the closed period.

As a result of discussions at that meeting, the CCROU has agreed to meet and address the closure of Edson and the resultant changes to Edmonton and Jasper. The Company has agreed to provide a new notice closing Edson as a terminal and address the CCROU concern with respect to unilateral collective agreement changes in the closed period.

Therefore, in accordance with the above, this letter will serve to confirm that the Company recognizes that it cannot serve a material change notice for the purpose of changing collective agreement provisions. The new notice with respect to the closure of Edson will be provided at the meeting scheduled for June 28-30, 2000.

The general chairs of both unions signed their concurrence with the above.

It appears that the parties did meet to discuss minimizing adverse effects on or about June 28 through 30, 2000. No final agreement was reached, however, as the Company, which had given a new article 89 material change notice on June 28, 2000 with respect to the closure of Edson, again changed its position. It appears that in July of 2000 it began to reconsider the wisdom of closing Edson and, by letter dated October 30, 2000, finally advised the Council of new proposed changes which would combine some extended runs through Edson with some single subdivision work on the Edson Subdivision to be operated with Edson crews. In the result the Edson Terminal would not close. In that context the Brotherhood fundamentally changed its position, and as was eventually reflected in a letter from the Brotherhood dated September 4, 2001, it took the position that there was no agreement with respect to twelve-hour runs and that, in any event, the Company could not use the article 89 material change provisions to effectively override or amend the provisions of the collective agreement governing the length of tours of duty, generally established at ten hours within the provisions of article 28.5 of the collective agreement.

The dispute before the Arbitrator involves two issues. Firstly, was there an agreement by the Brotherhood relinquishing the application of article 28.5, thereby conceding to the Company the ability to operate twelve-hour runs to

service the Coal Branch from either Jasper or Edmonton? Secondly, if there was no such agreement, can the Company use the material change provisions of the collective agreement to seek to gain that concession by the operation of the provisions of article 89?

With respect to the first issue, having carefully considered the submissions of the parties and the evidence tendered at the hearing, the Arbitrator is compelled to conclude that the Company has not adequately proved an unconditional agreement on the part of the Brotherhood allowing the Company to implement twelve-hour runs by running through Edson onto the Coal Branch Subdivision. At most, what the evidence reveals is that the prior general chairman of the Brotherhood, Mr. Michael W. Simpson, essentially adopted the view that the run-through would, in any event, be inevitable, whether through a negotiated agreement or by an arbitration award. It would appear that, at most, he may have agreed to agree. In other words, he indicated to the Company that in the context of a larger change, including the closure of Edson, the Brotherhood would be willing to agree to twelve-hour runs. Clearly, in his own mind the agreement in that regard must be part of a larger material change agreement which would maximize the benefits for employees, something which would be best accomplished by the closure of Edson and the negotiation of substantial protections for the Edson employees in that context.

The well settled principle of law that an agreement to agree is not a contract also applies in collective bargaining. It is clear that what transpired in the instant case was a substantial change of plans on the part of the Company, which reversed its decision to close Edson as a terminal. An e-mail communication from Mr. Simpson to local chairs Bob Ermet and Brian Shack, dated June 15, 2000, clearly reflects the perception and intention on the part of Mr. Simpson, described above. It is in that spirit, and in that context, which Mr. Simpson signed his concurrence in the obviously vague letter which followed on June 29, 2000. Subsequently, however, the conditions precedent to his willingness to agree were removed, as the Company retreated from its announced intention to close the Edson Terminal.

It should be stressed that in this situation the Arbitrator is satisfied that the Company operated in the best of good faith. Its representatives obviously believed that they had secured the Brotherhood's agreement to twelve-hour runs, and that the negotiation of the minimizing of impacts on the employees under article 89 would take place separately. Its representative concedes, however, that that kind of arrangement is highly unusual, if not unprecedented in the context of a material change agreement. Such agreements, which are numerous in the industry, have almost uniformly been single document agreements which deal with all aspects of a material change. The suggestion that the Brotherhood agreed piecemeal to the twelve-hour runs, without linking that agreement to finalizing any other benefits is a proposition which, in the Arbitrator's view, would require clear and unequivocal evidence to support it. No such evidence is tendered in the case at hand. Neither of these parties, who are experienced in collective bargaining, should lightly be presumed to have bargained for a "pig in a poke". On the contrary, whatever the Company's representatives may have believed had been achieved, the thrust of the documentation confirms that the Brotherhood was prepared to agree to the twelve-hour runs only in the context of the closure of Edson and subject to the satisfactory negotiation of protections for the affected employees, under the provisions of article 89 of the collective agreement.

For these reasons the first issue must be resolved against the Company. The evidence does not confirm the existence of an independent agreement by the Brotherhood, unlinked to any other agreement, with respect to the waiver of article 28.5 of the collective agreement and the implementation of twelve-hour runs through Edson.

With respect to the second issue, however, the Arbitrator finds the position of the Brotherhood more difficult. I cannot accept the suggestion that the collective agreement must be amended on a mid-term basis, independently of

article 89, to effect relief against the provisions of article 28.5. Article 89.1 of the collective agreement expressly contemplates the introduction of run-throughs, and provides in sub-paragraph (c)(3) the negotiation of "hours on duty" as part of the measures to minimize any significantly adverse effects of the proposed change on locomotive engineers. The only authority which the Brotherhood attempted to marshal to the contrary is CROA 1280. That case concerned a different union, the United Transportation Union, and a different collective agreement, and did not, in its result, hold that the material change there under consideration, cabooseless trains, would necessitate a mid-term renegotiation of the collective agreement. In fact, the arbitrator there recognized that the union and company could engage in a process for the "relaxation" of the provisions of the collective agreement through the material change process, but that it was premature to do so at the time, as the company's proposal was not yet finalized or ultimately approved by the Railway Transport Committee. There is nothing in that case to suggest that as part of a material change exercise the parties cannot negotiate relief against the provisions of their collective agreement.

Admittedly, the instant collective agreement is different from that of the UTU. It does not speak to a general relaxation of provisions. But it does, as noted above, identify specific areas which are negotiable for the purposes of minimizing adverse impacts, including the negotiation of agreements on hours of duty. That is what the Company proposes in the case at hand.

On that issue the Arbitrator is satisfied that the Company is correct. It can, pursuant to a properly given article 89 notice of material change, seek to implement run-throughs and to negotiate with the Brotherhood changes in hours on duty, as part of the process of minimizing the adverse impacts of the material change that a run-through represents. The fact that the hours on duty might be increased does not, of itself, mean that the negotiation might not concern minimizing adverse impacts. Clearly, for some employees, working longer tours of duty, with correspondingly fewer runs and longer periods of time off between tours of duty, a reduction in layovers and the acceleration of an employee reaching his or her maximum miles, could be advantageous. If, as the Brotherhood maintains, the Company can never implement a material change which involves an increase in hours on duty, apart from a mid-term renegotiation of article 28 of the collective agreement, it becomes difficult to understand why the parties have made express provision within article 89.1 of the collective agreement for the possible introduction of run-throughs, a concept whose very essence involves the implementation of longer tours of duty. In the context of the language of the collective agreement the Arbitrator cannot accept the submission of the Brotherhood on this issue.

The Arbitrator therefore finds and declares that the Company is correct in its alternative position, namely that it is open to it to implement a material change in the nature of a run-through, including a run-through which would involve twelve-hour tour of duty days, and that it can proceed through the process contemplated within article 89 for the purposes of negotiating or arbitrating the terms of an overall agreement with respect to the implementation of such a material change.

On the foregoing basis the grievance is allowed in part. The Arbitrator confirms the position of the Brotherhood that there has been no agreement made with respect to the implementation of the twelve-hour tour of duty day in relation to the run-through of Edson. However, the Arbitrator confirms that that same issue is negotiable and arbitrable under the terms of the material change provisions of article 89 of the collective agreement. It is therefore open to the Company to invoke the provisions of article 89 based on its most recent material change notice properly communicated to the Brotherhood.

November 16, 2001

MICHEL G. PICHER
ARBITRATOR