CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2099

Heard in Montreal, Thursday, 10 January 1991

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Claim of Conductor R.A. Kane and crew, Belleville, for a basic day at yard rates of pay, dated December 30, 1988, made pursuant to sub-paragraph 7.9(d) of Article 7 and paragraph 41.1 of Article 41 of Agreement 4.16.

JOINT STATEMENT OF ISSUE:

On December 30, 1988, Conductor Kane and crew operated Train 233 from Belleville to MacMillan Yard, Toronto, via Brampton Intermodal Terminal. At Brampton Intermodal Terminal, which is within the confines of the terminal of Toronto, they were required to set their caboose and 21 cars destined for furtherance to Chicago to Track Y-210, B-Yard, and the remainder of their train to Track Y-243, commonly called Pad No. 4.

In addition to pay for the trip, Conductor Kane claimed a basic day at yard rates on the grounds that his crew had been required to marshal a train upon arrival at Brampton Intermodal Terminal.

The Company declined payment of this latter claim and, as a result, the Union appealed the matter contending that Conductor Kane and crew are entitled to a basic day at yard rates pursuant to the provisions of sub-paragraph 7.9(d) of Article 7 and paragraph 41.1 of Article 41 of the Collective Agreement.

The Company declined the Union's appeal.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) T. G. HODGES	(SGD.) M. DELGRECO
GENERAL CHAIRMAN	for: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

J. B. Bart	– Manager, Labour Relations, Montreal
A. E. Heft	– Manager, Labour Relations, Toronto
M. S. Fisher	– Coordinator, Transportation, Montreal
S. T. Cudmore	– Trainmaster, Brampton Intermodal Terminal

And on behalf of the Union:

T. G. Hodges	– General Chairperson, St. Catharines
J. D. Pickle	– General Chairman, BLE, Sarnia
W. G. Scarrow	– General Chairperson, UTU, Sarnia
M. Gregotski	– Vice-General Chairperson, St. Catharines
G. Binsfeld	– Secretary/Treasurer, GCA, St. Catharines
G. Bird	– Vice-General Chairperson, Montreal

AWARD OF THE ARBITRATOR

The instant grievance involves the application of Articles 41.1 and 7.9(d) of the Collective Agreement which provide as follows:

> **41.1** Switching, transfer and industrial work, wholly within the recognized switching limits, will at points where yardmen are employed, be considered as service to which yardmen are entitled, but this is not intended to prevent employees in road service from performing switching required in connection with their own train and putting their own train away (including caboose) on a minimum number of tracks.
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> **7.9(d)** in the application of the provisions of paragraph 41.1 and 41.2 of Article 41, (Yardmen's Work Defined), when employees in road service are instructed to yard their train in a particular track at a terminal and such track will not hold the entire train, they will double over surplus cars to another yard track or, in cases of yard congestion where there is insufficient room to double over all cars to one track, it is necessary to double over to more than one track to effectively yard the train.
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> **NOTE:** In the application of the foregoing sub-paragraph (d) of this paragraph, employees will not be required to marshal trains upon arrival at terminals (e.g.: setting over 10 cars for one destination to one track and 10 cars for another destination to another track).

The facts pertinent to this dispute are not in question. Upon arrival at the Brampton Intermodal Terminal Conductor Kane and crew were instructed to cut their train into two parts. A group of cars destined for Chicago, including, it appears, two cars bound for Windsor, were set off on Track Y-210. The remainder of the train was spotted on Track Y-243, or Pad No. 4, which is an unloading pad at the Brampton Intermodal Facility. It is common ground that the cars set off on Pad No. 4 had reached their destination and were placed there for unloading. The crew claims a basic day at yard rates of pay on the basis that they were required to perform yardmen's work as defined in Article 41.1 of the Collective Agreement, and were effectively required to marshal trains, contrary to the intention of Article 7.9(d).

The initial position of the Company in declining the claim was that it was entitled to require the switching in question because, it asserted, MacMillan Yard was the yard of destination, with the Brampton Intermodal Terminal being a yard enroute at which a road crew could be required to perform switching. Some weeks before the date of this arbitration, however, the Company realized the error of that position, since the putting away of the caboose at the Brampton Intermodal Terminal made that location the indisputable yard of destination. The Company did not, however, abandon its position that no violation of the Collective Agreement is disclosed. In these proceedings it takes the alternative position that the cutting of Conductor Kane's train and the spotting of its cars on the two separate tracks at the Brampton Intermodal Terminal constituted for his crew "… switching required in connection with their own train" within the meaning of Article 41. of the Collective Agreement. The Union expressed a strong sense of frustration at the change in the Company's position, and being required to effectively plead a different case than was discussed through the steps of a fairly lengthy grievance procedure. As understandable as the Union's feeling may be, however, the Company retains the right to plead at arbitration whatever terms of the Collective Agreement it deems appropriate, provided that it does so in conformity with the requirements of the Collective Agreement and the rules governing this Office. There has been no violation of those rules and the case must be heard and disposed of accordingly.

The material before the Arbitrator reveals much past and present controversy with respect to the application of Article 41.1 of the Collective Agreement, as well as its predecessor provisions. The interface between the work of road crews and yardmen's work at both departure and arrival yards, as well as enroute, has been the subject of much grievance, arbitration and negotiation in the railway industry over the years. There has, as well, been a degree of evolution in the terms of the Collective Agreement which bear on this issue.

Article 41.1 of the Collective Agreement was previously found in what was Article 140 of the same document. Its evolution is reflected in a number of early awards of this Office, as well as an award of Referee Bora Laskin which is **Case 804** of the Canadian Railway Board of Adjustment No. 1, dated March 18, 1963. That decision, and two subsequent awards of this Office, **CROA 11** and **CROA 13** established beyond controversy that road crews could be required to perform switching at departure and destination yards, as well as enroute as "… switching incidental to their own train or assignment", or, as the wording came to be reflected after June 1, 1962, "…

switching required in connection with their own train and putting their own train away (including caboose) on a minimum number of tracks." (See also **CROA 185**.)

It would appear that a comment made by the Arbitrator in **CROA 11** may have led to the difficulties which eventually resulted in the addition to the Collective Agreement of Article 7.9(d). In considering the scope of the phrase "minimum number of tracks" under Article 140 (now Article 41.1) the Arbitrator stated:

> In view of the finding that under this Article trainmen are required to do switching in connection with their own train, and to the fact that no negotiated limit has been placed upon that requirement the term "minimum number of tracks" must remain a matter for determination by management in pursuance of their obligation to carry on an efficient operation.

To the extent that the above passage could be interpreted as affirming that management had a discretion in deciding what constitutes a "minimum number of tracks", incoming road crews could well find themselves being required to yard their trains in segments which were set off in a manner that was tantamount to marshalling new trains, going beyond what was intended by the phrase "switching required in connection with their own train". In this context Article 7.9(d) would appear to be the "negotiated limit" which did not exist at the time of **CROA 11**.

It cannot be disputed that through the 1960's, and at least until 1979, when the language of Article 7.9(d) appears to have been agreed to, the position which is advanced in this case by the Company with respect to the application of Article 41.1 and the meaning of switching performed by a crew in connection with their own train would have been sustained. That is perhaps best demonstrated by the reasoning of the Arbitrator in **CROA 333** where he denied the Union's claim that switching within the limits of Capreol Yard by a road crew was in violation of what was then Article 140 of the Collective Agreement. The Arbitrator commented, in part, as follows:

> It is apparent that the grievors did perform certain switching within the switching limits at Capreol. This would in general be yardmen's work, but it is said by the Company that it was "switching required in connection with their own train", and that it was therefore proper for the grievors to perform it.
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> The switching consisted of the setting off the third to twenty-second cars of their train, and then the twenty-third car of their train, in such a way that the twenty-third car was first out on the east end of track M6. As such, it was in position to form part of another train. The Union acknowledges that it was proper for the grievors to have made the first move, setting off twenty cars, but that the second move was properly yardmen's work; at least, it was not properly required of the grievors, although it could properly have been performed by the other train crew.
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> It may be observed that, since the other train crew could admittedly have made the move which would place the twenty-third car first out on track 6M, there is no question here of depriving a yard crew of work. The question remains, however, whether it was proper for the grievor's crew to do it. The work was two setting-off movements on one track. The result was that the making-up of another train was facilitated. Of course, there could be many cases where another train simply picks up a car or string of cars set off by an earlier train. It does not necessarily follow that the work of setting-off those cars should properly be characterized as making-up the other train, even although that might be the result. More properly, that would only be one of the results, and the work could properly be described, from the point of view of the first crew, as switching in connection with their own train, or as putting their own train away.

It would appear from the foregoing passage that in 1972, at the time of that award, and in light of **CROA 13** the facts disclosed in the instant case could not have established a violation of the Collective Agreement.

The issue therefore becomes the effect of Article 7.9(d) of the Collective Agreement, which became added in 1979, at a time prior to the establishment of the Brampton Intermodal Terminal. By its own terms, the sole purpose of Article 7.9(d) is to clarify the application of Article 41 (previously Article 140 and 119.1) of the Collective Agreement.

In the Arbitrator's view great care must be taken in the application of the language of Article 7.9(d). Historically, it responds to the Arbitrator's comments in **CROA 11** and arises from negotiations between the parties which culminated in a letter to the General Chairmen of the Union from the Company's Assistant Vice-President, Labour Relations on May 10, 1979. That letter is as follows:

> During national negotiations which culminated in the signing of the Memorandum of Settlement concerning Agreement 4.16 on March 15th, 1979 you asked that we provide you with a letter clarifying the intent of the words "… a minimum number of tracks" which appear in paragraph 119.1 of Agreement 4.16.
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> During our discussions on the matter you confirmed that the Union was not seeking to change the accepted practice whereby the appropriate Company officer in charge of the operation of a terminal would designate the track on which a train is to be yarded. Your concern was that in the application of the provision quoted above some Company officers were instructing trainmen to marshal cars on arrival at terminals where yard engines are on duty.
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> The Company informed you that if a trainman is instructed to yard his train in a particular yard track and such track will not hold the entire train, it would therefore be necessary to double-over the surplus cars to another track. In making the double-over it was not the intent of the rule that a trainman marshal the double-over by setting over for example 10 cars for one destination in one track and 10 cars for another destination in another track. It is the intent of the rule to provide that the surplus cars would be doubled-over, if possible, to one other track. However, if due to yard congestion there is insufficient room to double-over all cars to one track it may be necessary to double-over to more than one track in order to put the train away.
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> We believe that generally speaking the provisions of Article 119 of Agreement 4.16 are applied within the above intent. However we hope that the above clarification will clear up any misunderstandings in the application of such rules.

There is nothing on the face of the letter to suggest that it involved the alteration of the meaning of switching in connection with a road crew's train as that phrase had been interpreted by this Office. It is common ground that the understanding contained in the above letter was subsequently inserted into the Collective Agreement in 1982, in the existing form of Article 7.9(d).

The Arbitrator has some difficulty with the position of the Union respecting the effect of Article 7.9(d). If it is correct there would be little or no effective difference remaining between the concept of employees performing switching "in connection with their own train" and the concept of "putting their own train away … on a minimum number of tracks" as relates to the work of incoming road crews at destination yards. In other words if that view should prevail it would appear that the only prerogative remaining to the Company is to direct the road crew to set off all of the cars which comprise its train in a particular track, with the right to direct them to switch out part of those cars into one or more other tracks only to the extent that the designated track is insufficient to hold them. That interpretation of the application of Article 41.1 of the Agreement would, it seems to me, leave little or no scope for the meaning of the words "switching required in connection with their own train". However, the parties have chosen to leave that phrase unchanged and, absent clear language to demonstrate a contrary intention, must be presumed to have intended that its prior meaning should continue.

Having regard to the evolution of the language of Article 41.1 revealed in the cases noted above, it is indisputable that traditionally there was no question that switching in connection with a road crew's own train related to more than merely putting their train away at a destination yard. Switching in connection with a road crew's train could and did involve the setting off and spotting of cars intended for delivery to that destination (**CROA 13**). In the Arbitrator's view the record reveals that Article 7.9(d) was added to the Collective Agreement for a purpose other than abolishing the pre-existing right of the Company to require the incoming road crew to switch off and spot cars which they are delivering to a destination yard. It speaks to the separate question of how they are to put their train away, which presumably may involve both the setting off of cars which have reached their destination yard and the storage of cars other than cars destined for delivery at that yard. The purpose of Article 7.9(d), as evidenced in the letter of May 10, 1979, is to ensure that the storage of cars in that circumstance is not converted into the marshalling of trains for furtherance to other locations.

The material before the Arbitrator discloses further evidence that the concept of work in connection with a road crew's own train can be different from merely putting its own train away on a minimum number of tracks, even though the two concepts may be interrelated. It is common ground that it is not unusual for incoming road crews whose train consists, in part, of livestock cars to be required to set off and spot those cars separately within the destination yard at a facility properly equipped for the feeding and care of livestock. The Union does not argue that that work is exclusively the work of yardmen, or that in those circumstances a road crew could invoke the strict

application of Article 7.9(d) to insist on its right to simply switch all of their train, including the livestock cars, into a single designated track, or in more than one track only in a case of yard congestion. The example of the livestock car serves as an illustration of the parties' intention that incoming road crews can be required to perform switching in connection with their own train, and that that operation may be more than merely putting their train away on a single track, subject only to problems of congestion.

The Union's representative argues that to allow the Company's interpretation to stand would effectively give it concessions which it sought and did not gain at the bargaining table. With that I cannot agree. It appears that on two occasions the Company sought to amend Article 7.9(d) to gain the ability to cut trains which do not fit onto a single storage track into blocks that correspond to the composition of additional trains. The interpretation of Article 7.9(d) in this award does not give that right to the Company, a right that would be tantamount to marshalling trains. The right of the Company to direct an incoming road crew to set off all or part of its own train at a designated delivery point for unloading in the destination yard is entirely different. Such work continues to be switching in connection with their own train.

How do the facts of the instant case resolve themselves in light of the foregoing principles? Conductor Kane and crew arrived at the Brampton Intermodal Terminal on December 30, 1988, with a train consisting of two kinds of cars. The first category of cars were those destined for the Brampton Intermodal Terminal, where they were to be unloaded. The second category of cars were those bound onward for Windsor and Chicago. Upon arrival the crew were instructed to separate out the ongoing Windsor and Chicago cars, and to deliver the cars destined to Brampton to Pad No. 4 for unloading. In the Arbitrator's view the cutting of the Brampton-destined cars and their delivery to Pad No. 4 was switching which was required in connection with the crew's own train, as the Brampton Yard was its yard of destination. The separation out of the cars bound for Windsor and Chicago was necessarily incidental to the setting off and spotting of the Brampton cars. While, as was found in CROA 333, the spotting of the Chicago and Windsor destined cars on a separate track may have facilitated the marshalling of trains, that is an incidental result of the directive to the crew to deliver their Brampton bound cars to the point of destination for unloading. The fact that the Windsor and Chicago cars were set off in a track convenient to their future movement on another train does not change the essence of what transpired. It does not, in the Arbitrator's view, constitute marshalling trains within the contemplation of Article 7.9(d) of the Collective Agreement. Clearly the results would have been otherwise if, for example, the crew had been required to separate the Chicago cars from the Windsor cars, a movement which would have been solely for the purpose of assembling different trains. That is not what transpired in the circumstances of this case.

For the reasons related above, I am satisfied that the parties have preserved within their Collective Agreement a degree of distinction between the concept of switching required to be performed by a road crew at a destination yard in connection with their own train and the concept of putting their own train away on a minimum number of tracks. Article 7.9(d) was intended to clarify the rights of road crews in respect of putting away their train, but it did not have the purpose or effect of abrogating the rights of the Company or the obligations of the employees in respect of their long established duty to perform switching in connection with their own train as they had previously been required to do. I can find nothing in the history or language of Article 7.9(d) to overrule the prior awards of this Office which has held that the setting off and spotting of cars at a destination yard as part of the delivery process falls within the meaning of the phrase "switching required in connection with their own train" contained in Article 41.1 of the Collective Agreement. That is what the crew were required to do upon arrival at Brampton by cutting and spotting the Brampton destined cars on Pad No. 4 as directed. The placement of those cars at that point, as well as the remainder of the cars and the caboose on a separate track designated by the Company is consistent with the putting away of their own train, including its caboose, on a minimum number of tracks as contemplated in Article 41.1 of the Collective Agreement.

For the foregoing reasons the grievance must be dismissed.

January 11, 1991

(signed) MICHEL G. PICHER
ARBITRATOR