CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3310

Heard in Montreal, Tuesday, 10 December 2002

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Violation of article 22 of agreement 4.2 and article 79 of agreement 4.16. Implementation of an appropriate remedy consistent with the provisions of article 85 Addendum 123 of agreement 4.16.

UNION'S STATEMENT OF ISSUE:

On March 11, 2002 the Union received material change notices under the provisions of article 22 of agreement 4.2 and article 79 of agreement 4.16.

The Company, without Union agreement, unilaterally implemented the changes as contemplated in their material change notice.

It is the Union's position that the Company violated the reasonable intent of application of both article 22 of agreement 4.2 and article 79 of agreement 4.16.

The Union requested that the following remedy be applied as a result of such violation:

> the issuance of seven (7) early retirement opportunities similar to that which is being requested with respect to the changes initiated by the Company.

The Company has declined the Union's request.

FOR THE UNION:

(SGD.) R. A. BEATTY
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

D. Laurendeau	– Manager, Human Resources, Montreal
J. Torchia	– Director, Labour Relations, Edmonton
M. Farkouh	– Superintendent, Montreal Zone

And on behalf of the Union:

M. Church	– Counsel, Toronto
R. A. Beatty	– General Chairperson, Sault Ste. Marie
W. G. scarrow	– Sr. Vice-President, Ottawa
R. LeBel	– General Chairperson, Quebec
J. Robbins	– Vice-General Chairperson, Sarnia
G. Anderson	– Vice-General Chairperson,
N. Beveridge	– Local Chairperson, Montreal
M. G. Marcoux	– Local Chairperson, Montreal
S. Pommet	– Local Chairperson, Montreal
R. Dyon	– General Chairman, BLE, Montreal
P. Vincent	– Vice-General Chairman, BLE
B. Buckley	– Local Chairman, BLE

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, beyond dispute, that the Company violated provisions of collective agreements 4.2 and 4.16 in its implementation of a material change notice concerning the abolishment of positions relating to the cessation of operations at Turcot Yard in Montreal. By a letter dated March 11, 2002 the Company gave notice of a material change abolishing four positions of traffic coordinator at Turcot Yard effective June 30, 2002. On the same date it gave notice of the abolishment of two positions under collective agreement 4.16, being one conductor and one yard helper respectively, at Montreal effective July 8, 2002. The latter notice constitutes the 120 days' notice to the Union required under article 79.2 of collective agreement 4.16 which provides as follows:

> **79.2** In all other cases of material changes in working conditions which are to be initiated solely by the Company and which would have significantly adverse effects on employees, the Company will:
>
> **(a)** Give at least 120 days' advance notice to the Union of any such proposed change, with a full description thereof and details as to the anticipated changes in working conditions; and

It is not disputed that the provisions of collective agreement 4.2, which govern the abolishment of the traffic coordinator positions prohibit the Company from implementing a material change until the material change provisions of the agreement are complied with and exhausted. Article 22.1 of collective agreement 4.2 provides as follows:

> **22.1** 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 Chairman concerned, along with a full description thereof and with appropriate details as to the contemplated effects upon employees concerned. **No material change will be made until agreement is reached or a decision has been rendered in accordance with the provisions of paragraph 22.1 of this article.**
>
> **(a)** The Company will negotiate with the Union measures other than the benefits covered by paragraphs 22.2 and 22.3 of this article 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.
>
> …
>
> **(c)** The negotiations referred to in sub-paragraph (a) above shall be conducted between the Regional Vice-President (or his delegate) and the General Chairman and shall commence within 20 days of the date of the notice specified in this paragraph 22.1. If the negotiations do not result in mutual agreement within 30 calendar days of their commencement, the issue, or issues, remaining in dispute shall, within seven days of the cessation of negotiations, be referred to the Assistant Vice-President – Labour Relations, of the Company and the Vice-President of the Union for mediation by a Board of Review composed of two senior officers from each party. Such referral shall be accompanied by a Joint Statement of Issue, or Issues, remaining in dispute together with a copy of the notices served by the Company on the Union under this paragraph 22.1 and a summary of the items agreed upon.
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> In the event neither party desires to submit the issue, or issues, remaining in dispute to a Board of Review, the dispute shall be referred to the Arbitrator as provided in sub-paragraph (d) below.
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> **(d)** The Board of Review shall, within 20 days from the date of reference of the dispute, make its findings and recommendations. If the Board is unable to arrive at a decision within the time limits specified herein or such extended time limits as provided for in sub-paragraph (e) hereof, or if its recommendations are not agreeable to either party, a Joint Statement of Issue, or Issues, remaining in dispute may be referred within seven days by either party to a single arbitrator

> who shall be the person from time to time occupying the position of Arbitrator for the Canadian Railway Office of Arbitration.
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> In the event that the parties do not agree upon a Joint Statement of Issue, or Issues, remaining in dispute, either or each may submit a separate statement to the Arbitrator in accordance with the procedure outlined above the Joint Statement and the other party will be provided with a copy thereof.
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> The Arbitrator shall hear the dispute within 30 days from date of the request for arbitration and shall render his decision together with reasons therefore in writing within 15 days of the completion of the hearing.
>
> At the hearing before the Arbitrator, argument may be presented orally or in writing and each party may call such witnesses as it deems necessary.
>
> (*emphasis added*)

As is evident from the foregoing, the Company's discretion to implement a material change is substantially more limited under the collective agreement governing traffic coordinators. Very simply, it cannot implement the change until the process of negotiation and/or arbitration contemplated for minimizing the adverse effects of the change is completed in accordance with the provisions of article 22 of the collective agreement. The employer is somewhat less constrained as regards the implementation of a material change under collective agreement 4.16, it being understood that it is free to implement the change, subject always to the eventual completion of the material change process, as long as it respects the requirement of at least 120 days' advance notice to the Union of the proposed change.

The material before the Arbitrator confirms that with respect to the closure of the Turcot Yard and the abolishment of both running trades and yard coordinator positions the Company violated both collective agreements. Although it initially anticipated implementing the abolishment of the running trades positions on July 8, 2002, the 120th day from the date of the original notice, in fact the Company changed its position and

established June 3, 2002 as the revised date of implementation, clearly in violation of the 120 day period. Additionally, after several meetings with the Union concerning the measures which might mitigate the adverse effects of the closure of the Turcot Yard, without reaching agreement, without proceeding through the board of review process and without advancing the matter to arbitration, the Company unilaterally implemented the closure of Turcot Yard in violation of the clear prohibition established within the collective agreement.

The Union submits that the violation of the provisions so disclosed evidenced bad faith and a deliberate intention on the part of the Company to ignore its collective agreement obligations, the rights of the employees covered by the collective agreements and the obligations undertaken with the Union within the terms of the collective agreement. Its counsel suggests that the Company's actions are representative of a pattern of disregard for the collective agreement and are prompted, at least in part, by what he describes as a system of bonus incentives provided to local Company managers who achieve savings in the administration of their budget. At its most disturbing level, the Union's allegation suggests a system of deliberate corporate management whereby local managers have an incentive to violate the collective agreement to achieve savings in the cost of operations which result in an increase in their own earnings. Whatever the merit of that allegation, upon which the Arbitrator makes no comment, the representations made on behalf of the Union are to the effect that repeated disregard of collective agreement provisions by management, and the apparent futility of the grievance and arbitration system as a means to deter such conduct, have created substantial stress on local union officers, as rank and file

members of the Union increasingly express the view that their collective agreement is meaningless and their bargaining agent is powerless to enforce it.

It is in that context that the Union now invokes the extraordinary provisions of Addendum 123, which is appended to both of the collective agreements involved in this dispute. The addendum takes the form of a letter dated December 13, 2001, signed by Mr. R.J. Dixon, Vice-President Labour Relations and Employment Legislation and addressed to the three General Chairpersons of the Union. It reads as follows:

> Gentlemen:
>
> During the current round of negotiations the Council expressed concern with respect to repetitive violations of the Collective Agreements. Although the Company does not entirely agree with the Council's position, the Company is prepared to deal with this matter as follows:
>
> When it is agreed between the Company and the General Chairperson of the Union that the reasonable intent of application of the Collective Agreement has been violated an agreed to remedy shall apply.
>
> The precise agreed to remedy, when applicable, will be agreed upon between the Company and the General Chairperson on a case-by-case basis. Cases will be considered if and only if the negotiated Collective Agreements do not provide for an existing penalty.
>
> In the event an agreement cannot be reached between the Company and the General Chairperson as to the reasonable intent of application of the Collective Agreement and/or the necessary remedy to be applied the matter may within 30 calendar days be referred to an arbitrator as outlined in the applicable Collective Agreements.
>
> NOTE: A remedy is a deterrent against Collective Agreement violations. The intent is that the Collective Agreement and the provisions as contained therein are reasonable and practicable and provide operating flexibility. An agreed to remedy is intended to ensure the continued correct application of the Collective Agreement.
>
> Yours truly,
>
> (sgd.) R. J. Dixon
> Vice-President Labour Relations
> and Employment Legislation

In the face of the violations of the collective agreement surrounding the closure of Turcot Yard recited above, the Union's General Chairperson, Mr. R.A. Beatty, wrote a letter to the Company's Senior Vice-President for Eastern Canada, Mr. K. Heller, dated June 16, 2002 specifying the violations of the collective agreement and invoking the provisions of Addendum 123. In that letter the Union's General Chairperson submits that the appropriate remedy in the instant case "… is the issuance of (7) early retirement opportunities …".

In defence of its action, and to support its submission that the addendum should not be applied in the case at hand, the Company's representative submits that the Company was left under the impression that it could proceed in violation of the 120 day notice period and regardless of the fact that no agreement was concluded under collective agreement 4.2. The Arbitrator finds that submission to be unsubstantiated by any meaningful evidence. There is no evidence offered by the Company of any statement made by a responsible Union officer, much less any written document, which suggests that the Union ever agreed unconditionally to the surrender of these obligations. On the contrary, the correspondence tendered in evidence by the Union confirms that at all material times it indicated to the Company that waiver of the collective agreements' requirements might be possible, but only on condition that agreement could be reached on all aspects of the material change negotiations. That clearly never happened. I am satisfied that the Company knew, or reasonably should have known, that it was proceeding in direct violation of the Union's rights when it unilaterally implemented the abolishment of the traffic coordinator's positions at Turcot

Yard, and implemented the abolishment of running trade positions in yard service without respecting the requirement of 120 days' notice under collective agreement 4.16.

Nor is the Arbitrator persuaded by the Company's argument that the Union must first show a pattern of repetitive collective agreement violations before invoking the provisions of Addendum 123. Careful examination of the language of Mr. Dixon's letter confirms that, as a matter of background, repetitive violations of the collective agreements gave rise to serious concerns on the part of the Union. The substantive provisions of the letter, however, do not require repetitive violations as a condition precedent to the application of the remedy portion of the parties' agreement. It does appear to the Arbitrator that the parties intended the letter to apply to situations where a violation of the collective agreement was blatant and indefensible, and clearly should not have been committed by local management. It is in that context that the deterrent character of the remedy is to be understood. The letter is an agreement between the parties to establish a disincentive to violations of the collective agreement being resorted to simply as a means of doing business, ensuring that violations of the collective agreement do not pay.

I am satisfied that the instant case is one in which the Company can offer no meaningful defence to what was obviously a substantial violation of the collective agreement in circumstances where its representatives knew that they were acting contrary to their contractual obligations and without the Union's agreement. In such an unfortunate circumstance the case for deterrence is plainly made out.

As regards the remedy, the Union requests that the Arbitrator direct the Company to resume material change negotiations with the Union, as contemplated under the collective agreement. Additionally, it requests the Arbitrator to direct that the Company make seven early retirement credits available to the employees at Turcot Yard.

The Arbitrator is satisfied that it is appropriate to direct the parties to return to the bargaining table forthwith, to work out the terms and conditions of their own material change agreement to minimize the adverse effects of the closure of Turcot Yard on the employees concerned, and I so order.

I have greater difficulty, however, with respect to the appropriateness of the request for the establishment of seven early retirement credits. As reflected in prior arbitral awards, early retirement credits are a device which may be appropriate in some circumstances of material change. They may be particularly appropriate where redundancies will be caused by the material change in question. In that situation early retirement credits can be an incentive to attrition whereby the acceleration of the retirement of senior employees frees up available positions at the location to more junior members of the bargaining unit.

The arbitral direction of that remedy, however, is generally made within the context of full submissions with respect to the facts of a material change, the

complement of employees involved and the full panoply of options available to mitigate adverse impacts. In the case at hand none of that evidence is before me, and I find myself without any significant ability to understand the business feasibility or advisability of prompting the retirement of seven employees in Montreal. Unlike a material change proceeding, a grievance under Addendum 123 will generally provide relatively slim evidence with respect to the operational advisability of such a remedy, nor is the Arbitrator well placed to consider the value of other alternatives. It is also difficult to assess the Company's suggestion that the Union is seeking, by invoking Addendum 123, to gain through this arbitration what it might not gain in the normal material change process. Nor can I substantially test or evaluate the Company's argument that under present conditions to direct the offer of seven opportunities for early retirement will compel the Company to hire and train seven new employees.

For the foregoing reasons I am not satisfied that it is appropriate to resort to directing the establishment of early retirement credits as a remedy in the case at hand. It remains incumbent upon the Arbitrator, however, to respect the seriousness of Addendum 123, and its agreed deterrent intention. With that in mind I am satisfied that the payment of a lump sum, for distribution to the affected employees by the Union in accordance with a formula it deems appropriate, is the better alternative.

The Arbitrator therefore directs as follows. The parties are directed to return to negotiations as contemplated under article 79 of collective agreement 4.16 and article 22 of collective agreement 4.2 to reach their own agreement with respect to the measures appropriate to mitigate the adverse effects of the job abolishments which are

the subject of this grievance. Should they be unable to reach agreement, under the terms of those provisions they can, of course, proceed to arbitration for a final and binding resolution of the matter.

Secondly, the Arbitrator directs the parties to meet and negotiate an appropriate remedy in the form of a lump sum payment to the Union, which sum should also include the costs of its legal representation in the preparation and presentation of this grievance, which is appropriate in the circumstances. Should they fail to reach agreement the matter may be returned to this Office for further submissions from both parties with respect to the appropriate monetary remedy.

December 13, 2002

MICHEL G. PICHER
ARBITRATOR