CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

SUPPLEMENTARY AWARD CASE NO. 3445

Heard in Montreal, Wednesday, 15 December 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Awarding of "Conductor Only" Pension Credits at Capreol, Ontario – Implementation of CROA&DR 3445.

JOINT STATEMENT OF ISSUE:

On Tuesday September 20, 2004 the Arbitrator issued his decision (CROA&DR 3445) regarding a dispute between the United Transportation Union and the Canadian National Railway Company concerning the "issuing of Conductor Only Pension Credits at Capreol, Ontario".

The Arbitrator allowed the Union's grievance stating:

> … The Arbitrator therefore declares that the seven credits remain outstanding at Capreol and directs the Company to issue such credits to employees who may have retired from the Company who would otherwise have benefited from them, and to advertise forthwith all remaining conductor only pension credits to the terminal of Capreol, to be awarded consistent with the terms and conditions of the conductor only agreement.

On September 28, 2004, the Union advised the Company that there were no employees who had previously retired from the Company who would otherwise have benefited from the pension credits. The Union requests that the Company advertise the remaining 7 pension credits to the terminal of Capreol "forthwith" and to "award" such credits consistent with the terms and conditions of the conductor only agreement.

The Company agreed with the position of the Union to the extent that there were no employees who had previously retired who would have benefited from the pension credits.

The Union submits, however, that the Company subsequently failed to issue the remaining 7 pension credits "forthwith" as directed by the Arbitrator. The Company did however subsequently advertise 7 pension credits to the terminal of Capreol to coincide with the Fall Change of Time (end of October 2004).

The Company, subsequent to the their advertising 7 pension credits, received sufficient applications for each credit advertised from employees who met the terms and conditions of the conductor only agreement.

The Union submits however that the Company has failed to award the pension credits to the successful applicants who would have been eligible to receive such credits had the Company issued such credits "forthwith" as directed by the Arbitrator. The Union submits that to date the Company has not awarded the 7 pension credits as Ordered by the Arbitrator.

In summation, the Union submits that the Company had failed to comply with the Arbitrator's Orders as contained in CROA&DR 3445.

The matter is now properly before the Arbitrator.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. A. BEATTY	**(SGD.) D. VANCAUWENBERGH**
GENERAL CHAIRPERSON	**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

D. VanCauwenbergh	– Manager, Labour Relations, Toronto
J. Coleman	– Counsel, Montreal
B. Hogan	– Manager, Labour Relations, Toronto
J. Krawec	– Manager, Labour Relations, Toronto

And on behalf of the Union:

R. A. Beatty	– General Chairperson, Sault Ste. Marie
D. Ellickson	– Counsel, Toronto
J. Robbins	– Vice-General Chairperson, Sarnia
T. Beatty	– Local Chairperson, Belleville
C. Little	– Vice-Local Chairperson, Belleville

SUPPLEMENTARY AWARD OF THE ARBITRATOR

On September 20, 2004, the Arbitrator issued an award herein which included the following direction for relief:

> The grievance is therefore allowed. The Arbitrator therefore declares that the seven credits remain outstanding at Capreol and directs the Company to issue such credits to employees who may have retired from the Company who would otherwise have benefited from them, and to advertise forthwith all remaining conductor only pension credits to the terminal of Capreol, to be awarded consistent with the terms and conditions of the conductor only agreement.

It is agreed that the Company and the Union have investigated and determined that no employees retired from the Company would otherwise have benefited from any of the seven outstanding retirement credits. It is also not disputed that the Company did advertise the seven remaining credits at Capreol by bulletin on October 13, 2004, stipulating that the credits would be awarded if a surplus was identified in Capreol at the closure of the bulletin on October 31, 2004. The Arbitrator is satisfied that the posting of the pension credits within some three weeks of the award is reasonable in the circumstances.

Subsequently a dispute arose between the parties concerning whether there were any surplus employees at the time of the bulletin. The position taken by the Company is that from the outset of the conductor only agreement, and as is confirmed in correspondence dated June 9, 1995, retirement opportunities are to be awarded on the basis of the number of surplus employees at a given terminal. Based on a letter to the Union signed by Manager Al Heft, dated January 25, 1994 the Company maintains that, in the words of that letter:

> “A surplus is deemed to exist, at any given time, so long as there are employee occupying positions as non-essential brakemen or on the furlough board.”

The Union does not agree with the Company's view of what constitutes the existence of surplus employees. In the case at hand it maintains that a surplus existed at Capreol by reason of some ten employees working elsewhere while holding recall rights to Capreol under the provisions of article 55.8 of the collective agreement. The Union's representative maintains that the issue of whether there is a surplus at Capreol was part of the original dispute placed before the Arbitrator, noting that it was addressed as part of the Union's brief in the original hearing of this matter.

The Company takes strong exception to the submission of the Union to the effect that the issue of the definition of surplus employees, the triggering event which both parties agree is essential to the granting of conductor only pension credits, formed part of the original dispute. Its representative submits that the joint statement of issue placed before this Office addressed only the question of whether there were seven remaining pension credits at the terminal of Capreol. The Company argues that the issue in this file in no way involves a dispute between the parties concerning the appropriate means of determining whether or not a surplus exists at any given time.

After a careful review of the record, the Arbitrator is compelled to agree with the Company. While it is true that there were submissions contained in the Union's brief concerning what it views as a surplus at Capreol by reason of the fact that employees might have been cut off from work at that location and either bid or were forced to work at other locations while holding recall rights to Capreol, the issue of whether those persons are to be considered surplus does not appear in any part of the joint statement

of issue filed with this Office, nor was it addressed in the Company's submission to the Arbitrator. The sole issue addressed in the Company's brief was whether the issuance of twenty-one pension credits in early 2001 eliminated all twenty-eight pension credits then outstanding, an issue which was ultimately resolved against the Company in the award of September 20, 2004.

After a careful review of the material I am satisfied that that award did not, and indeed could not, dispose of any dispute concerning the existence or non-existence of surplus employees at Capreol. It is clear that there was no reference to any such dispute in the joint statement of issue leading to the Arbitrator's award. The memorandum of agreement establishing the Canadian Railway Office of Arbitration & Dispute Resolution specifically addresses the issue, as reflected in clause 14 which reads as follows:

> **14.** The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions. The Arbitrator's decision shall be rendered in writing, together with written reasons therefor, to the parties concerned within 30 calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, unless the applicable collective agreement specifically provides for a different period, in which case such different period shall prevail.
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> The decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.

In fact, in the drafting of the award herein dated September 20, 2004, the Arbitrator was not aware of any dispute between the parties as to whether there were or

were not surplus employees at Capreol. The first notice of that dispute came by way of the submissions which have prompted this supplementary award. While it may be that the Union made certain submissions about the existence of surplus positions in its original brief in this matter, that issue was not argued by the Company and no findings in that regard were made by the Arbitrator.

The issue of whether pension credits under the conductor only agreement are to be granted because the qualifying conditions are made out is one of considerable importance to both parties. It may well be that considerable practice has developed with respect to that issue since the inception of the conductor only agreement as scores of pension credits have been awarded across the system over the years. Most significantly, an issue of such importance should be dealt with in accordance with the rules of the parties' own collective agreement, including the rules establishing the procedures and jurisdiction of this Office. To put it simply, both parties should be entitled to know that the issue of whether a surplus exists is to be argued and disposed of, and be given the fullest opportunity to research and prepare their evidence and arguments on that issue. That plainly could not have happened in the instant case, as the Company was never on notice that the issue of whether surplus employees existed at Capreol was ripe for argument or adjudication. This finding obviously does not prejudice the Union in its ability to bring that issue forward by way of a grievance, in light of this award. Its doing so will obviously permit both parties to examine the question and to discuss it between themselves with a view to perhaps finding some resolution. Failing

resolution, the matter can then be properly brought forward for final and binding adjudication.

For all of the foregoing reasons the Arbitrator finds and declares that the Company has complied with the directions given by the Arbitrator in the award dated September 20, 2004.

December 17, 2005

(signed) MICHEL G. PICHER
ARBITRATOR