CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3561

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE MAINTENANCE OF WAY EMPLOYEES DIVISION

There appeared on behalf of the Company:
K. Fleming – Counsel, Calgary

And on behalf of the Union:
D. Brown – Counsel, Montreal

PRELIMINARY AWARD OF THE ARBITRATOR

On June 4, 2006, the Union filed a grievance against the policy of the Company to no longer supply change and storage rooms for the work clothing and related equipment of employees working on crews who stay in Company-supplied hotel or motel accommodations. More specifically, the Union protests the withdrawal of storage rooms for the Track Program and Equipment crews in Southern Ontario.

By letter dated June 6, 2006, counsel for the Union requested the Arbitrator to issue an interim order pursuant to Section 60(1)(a.2) of the **Canada Labour Code**. He seeks a direction from the Arbitrator requiring the Company to maintain the *status quo* with respect to the storage room facilities for crews in Southern Ontario, until such time as the hearing of the grievance on its merits. Two conference calls were convened by the Arbitrator to hear submissions from counsel for both parties concerning the Union's

request. An initial conference call dealing with the Arbitrator's jurisdiction to grant interim relief was held on Friday June 9, 2006. A subsequent conference call with respect to the merits of the Union's request was held on June 12, 2006.

Prior rulings of this Office have held that the jurisdiction to grant interim relief under the **Canada Labour Code** does not vest until such time as a grievance has matured to the point of being filed in the Canadian Railway Office of Arbitration & Dispute Resolution. In light of arguments now made for the first time by counsel for the Union, I am satisfied that this Office does have jurisdiction to grant interim relief in respect of a grievance which has been properly filed into the grievance procedure contemplated within a collective agreement over which this Office has exclusive jurisdiction.

The Canadian Railway Office of Arbitration & Dispute Resolution is a unique institution within the industrial relations system governed by the **Canada Labour Code**. Parties signatory to the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration & Dispute Resolution, which includes most of the railways in Canada and the various unions which represent their employees, are bound by agreement to have their grievances resolved in a final and binding way exclusively by the Canadian Railway Office of Arbitration & Dispute Resolution. That arrangement has allowed for the development of relatively expedited hearing procedures governed by a tribunal with experience and expertise in railway collective agreements. Under that system, when a grievance is filed by any member union against any member railway, absent any contrary agreement and failing withdrawal or resolution, the grievance must be heard and ruled upon by this Office.

Section 60(1)(a.2) of the **Canada Labour Code** provides as follows:

> An arbitrator or arbitration board has the power to make the interim orders that the arbitrator or arbitration board considers appropriate.

Section 3(1) of the **Code** contains the following definitions:

> Definition: "arbitration board" means an arbitration board constituted by or pursuant to a collective agreement or by agreement between the parties to a collective agreement and includes an arbitration board the chairperson of which is appointed by the Minister under this Part;
>
> "arbitrator" means a sole arbitrator selected by the parties to a collective agreement or appointed by the Minister under this Part.

How do the foregoing provisions apply in the case at hand? Firstly there can be no doubt but that this Office is the "arbitrator" selected by the parties to resolve the grievance which gives rise to the instant dispute. While technically the grievance may not have been progressed through the steps of the grievance procedure, this Office is the agreed upon or selected arbitrator for the purposes of resolving any aspect of the parties' dispute. It is in that context that the empowering words of section 60(1)(a.2) of the **Code** must be understood. The **Canada Labour Code** intends arbitration to be the means by which parties to a collective agreement may resolve their disputes in a relatively expedited fashion before an arbitration board or arbitrator of their choosing. On what basis could it be supposed that the **Code** would intend for an arbitrator who is selected by the parties to be unable to exercise the remedial powers of section 60(1)(a.2) of the **Code** merely by reason of the technical operation of the grievance procedure? It is true that the Memorandum of Agreement establishing the CROA&DR contemplates a grievance being heard and dealt with by this Office only after the grievance procedure is exhausted and the matter is properly filed with the CROA&DR. However, that arrangement, which predates the amendments to the **Canada Labour Code** giving the Arbitrator the ability to award interim relief, cannot effectively trump the intention of the **Code.** The intention of the **Code** is that if parties to a collective agreement have selected their arbitrator, that arbitrator has the authority to do those things contemplated within the **Code**, in a manner most consistent with the overall policies and purposes of the **Code**.

It should be stressed that interim relief, as requested in the case at hand, is extraordinary. It should be reserved for cases of demonstrable urgency. Interim relief may not be appropriate where parties can be made whole after the fact by an eventual award of compensation. Where, however, monetary damages may not be sufficient, as

for example where health and safety are at issue, the case for interim relief may be more compelling.

In the case at hand, by pre-arrangement through their participation in the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration & Dispute Resolution, the parties have agreed upon this Office as their arbitrator with respect to the grievance filed by the Union on June 4, 2006. I am satisfied that in that circumstance this Office has the fullest jurisdiction to order interim relief, if appropriate, as contemplated within section 60(1)(a.2) of the **Code**. In my view, it would be contrary to the intention of the **Code** to decline jurisdiction in these circumstances and effectively force the parties to proceed before the courts in respect of a dispute and remedies which are manifestly those to be dealt with by a board of arbitration or by an arbitrator under the **Canada Labour Code**. I am also satisfied that it would defeat the purpose and intention of the **Code**, particularly in a matter with allegedly urgent health and safety dimensions, effectively to delay the Union's access to interim relief until such time as the grievance procedure is fully exhausted, a process which could require months.

In all of the circumstances, the Arbitrator is satisfied that the intention of the **Canada Labour Code**, coupled with the intention of the parties with respect to the selection of their arbitrator, leaves no doubt with respect to my jurisdiction to grant interim relief in respect of the grievance at hand.

The issue then becomes whether it is appropriate to make a direction for interim relief. At the outset, it should be noted that the Arbitrator's discretion with respect to scheduling will allow this matter to be heard fully on its merits in July 2006, one month from now. In my view the expedited hearing of the grievance has some bearing on the balance of convenience in deciding whether to grant interim relief.

The two-fold question to be addressed is whether the dispute raises a fair question to be arbitrated and, if so, where does the balance of foreseeable damage or harm lie? (**See, Re Aliant Telecom Inc. and Atlantic Communication and Technical Workers Union** (2002) 103 L.A.C. (4th) 304 (Christie).)

Is there a fair issue to be arbitrated? The Union asserts that for many years the Company has provided its employees who work in large gangs, sometimes in remote areas, with hotel or motel sleeping accommodation, with two employees per room, as well as a separate common room where all employees can store and dry their work clothing and related equipment. That arrangement has succeeded the previous remote railcar bunkhouse accommodations, which also included a separate room for storing and drying the employees' work clothing. Now, according to the Union, the Company has ceased providing a separate common room for the storage and drying of work clothes and related gear.

The Union alleges that this new practice represents a health and safety hazard in contravention of clause 16.1 of the collective agreement. It provides as follows:

> 16.1 The Company shall institute and maintain all precautions to guarantee every employee a safe and healthy workplace and to protect the environment. The Company shall comply with the Canada Labour Code, Part II, its regulations, codes of practice and guidelines, and all relevant environmental laws, regulations, code of practice and guidelines. All standards established under these laws shall constitute minimum acceptable practice to be improved upon by agreement of the ES Health & Safety Policy Committee.

The Union also asserts a violation of section 124 of Part II of the **Canada Labour Code,** which stipulates:

> 124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

The record before the Arbitrator discloses that a similar issue was recently dealt with pursuant to an Occupational Health and Safety complaint under section 145 of Part II of the **Canada Labour Code** and the appeals provisions of section 146 of the **Code**. The complaint, filed by employee Allan Woollard, objected that the Company was no longer providing Maintenance of Way crews in Ontario with a separate room for storing their work clothing at hotels and motels where accommodation was provided to them by the Company.

In a decision dated November 30, 2005, the Appeals Officer largely sustained the decision of the Health and Safety Officer that the Company's failure to provide the storage and drying facilities contravened the **Code** and related provisions of the **Canada Occupational Health and Safety Regulation**. The Appeals Officer ordered the Company to refrain from its actions and further directed that the employer undertake a risk assessment study, apparently relating to the employees' clothing coming into contact with hazardous substances, including diesel fuel, lubricating grease, anti-freeze and hydraulic oils. Counsel for the Company advises that the decision of the Appeals Officer is presently being taken on judicial review before the Federal Court of Canada.

A review of the decision of the Appeals Officer discloses that the complaint before him involved the allegation that storing and drying work clothing and related equipment which was in contact with hazardous contaminants caused unacceptable noxious odours in the resident bedrooms of the employees and risked spreading contamination and odours to their personal non-work clothes.

On a review of the factors described above, the Arbitrator is satisfied that there is a fair question to be arbitrated. On its face, clause 16.1 of the collective agreement would arguably incorporate the occupational health and safety regulations which the Union alleges have been contravened. Moreover, in light of the decision of the Supreme Court of Canada in **Re Parry Sound (District) Social Services Administration Board v. O.P.S.E.U. Local 324**, [2003] S.C.C. 42, there can be little doubt that the **Code** and its related regulations can be applied and enforced as though they form part of the collective agreement.

With respect to the balance of convenience, in a case such as this it is appropriate for a board of arbitration to err on the side of caution with respect to what may be a genuine issue of health and safety. Placing employees in a position of arguable peril or at environmental risk is something which may not be fully remediable after the fact. On the other hand, the hardship to the employer of prolonging the *status quo* of providing storage rooms for no more than five weeks, pending the hearing of the merits of the grievance, is not unduly onerous. That is particularly so where the practice

which the Union seeks to continue in force has apparently been in place for many years, to all appearances without undue burden to the Company.

For the foregoing reasons, the Arbitrator allows the Union's request for interim relief. I hereby direct the Company to reinstate and continue the practice of providing a common room for the storage and drying of the working clothes of employees engaged in Track Program and Equipment assignments in Southern Ontario. The direction shall continue in effect until such time as a final decision issues with respect to the merits of the grievance.

The General Secretary is directed to schedule this matter for a hearing of the grievance on its merits in July of 2006. It should be noted that, in discussions with the Arbitrator, neither party objected to the expeditious scheduling of this matter for the July sittings of the Office.

June 12, 2006

(original signed by) MICHEL G. PICHER
CHIEF ARBITRATOR