CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3570

Heard in Edmonton, Wednesday, 12 July 2006

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The interpretation and application of paragraph 64.25(c) of agreement 1.2 – Whiteman Scenario.

JOINT STATEMENT OF ISSUE:

Article 64.25 of agreement 1.2 was conceived between the parties during the course of the negotiation and mediation process which culminated in the May 5, 1995 Extended Run Agreement.

The Union contends that article 64.25(c) was intended to allow for the temporary reassignment of work between extended run terminals to address short-term fluctuations in employee availability. It is the Union's contention that long term or permanent employee shortages were to be promptly addressed through the applicable provisions of the collective agreement or through the hiring of new employees where required.

Furthermore, an integral element of the mediated 1995 Extended Run Agreement was the protection of the work allocation between extended run terminals. The Union contends that this was clearly understood by the parties and is reflected in article 64.25(a) and article 64.25(b) of agreement 1.2.

The Union's position is that the Company has reinterpreted the spirit and intent of article 64.25(c) in order to offset permanent shortages of UTU employees at the terminals of Edmonton, AB, Vancouver, B.C. and Winnipeg, MB. The Union contends that this has resulted in the long-term redistribution of work from these extended run terminals to adjacent terminals.

The Union has requested that the Company undertake immediate measures to adhere to the original intent of the parties with regard to the allocation of work between extended run terminals and to address any adverse effects.

The Company maintains that they are in compliance with the original intent of the parties and the provisions of the collective agreement, and disagree with the Union's position.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) B. WILLOWS	**(SGD.) B. LAIDLAW**
FOR: GENERAL CHAIRMAN	**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

M. McFadden	– Counsel, Toronto
B. Laidlaw	– Manager, Labour Relations, Winnipeg
M. Moroz	– Sr. Manager, Crew Management Systems, Edmonton
K. Morris	– Manager, Labour Relations, Edmonton
J. Lyon	– Manager, Board Adjustments Edmonton
D. Van Cauwenbergh	– Sr. Manager, Labour Relations, Toronto
J. Torchia	– Sr. Manager, Labour Relations, Edmonton
D. Crossan	– Manager, Labour Relations, Prince George

And on behalf of the Union:

M. Church	– Counsel, Toronto
D. J. Shewchuk	– General Chairman, Edmonton
B. Willows	– Vice-General Chairman, Edmonton
T. Markewich	– Vice-General Chairman, Thunder Bay
Wayne A Wright	– General Chairman (rt'd), Saskatoon
R. Cerilli	– Local Chairman, Edmonton

And on behalf of the Intervener UTU:

R. A. Hackl	– Vice-General Chairperson, Edmonton

AWARD OF THE ARBITRATOR

At issue in the current grievance is the Union's allegation that the Company has essentially disregarded the work allocation protections given to employees under the provisions of article 64.25(c) of the collective agreement. That article arises under the extended run provisions of the collective agreement. Article 64.25 reads as follows:

> **Extended Runs**
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> **64.25 (a)** In the application of paragraph 60.14 the workload between terminals will be divided based on the ratio of subdivision mileages. For this purpose, the subdivision mileages shall be the mileage between the point where road miles commence at the initial terminal and the point where road miles cease at the final terminal prior to the implementation of this Agreement.

EXAMPLE

Terminal "A" to Terminal "B"	112.8 miles	48%
Terminal "B" to Terminal "C"	124.6 miles	52%
	237.4 miles	100%

(b) During board adjustments, the total miles earned during the checking period coupled with forecasted traffic requirements and employee availability will result in a specific number of employees being required to meet that workload. This total number of employees will be multiplied by the terminal's ratio to determine the number of employees required on the pool at that terminal.

EXAMPLE
52 employees are required to meet the workload between Terminals "A" and "C".

Terminal "A" 52 employees x 48% = 25 employees
Terminal "C" 52 employees x 52% = 27 employees

In the application of this paragraph, the number of employees will be rounded to the nearest number.

(c) To meet service requirements at a terminal(s), adjacent terminal(s) may increase their complement of employees to satisfy service requirements. As employees become available at the terminal which created the necessity for the adjustment, the board will be adjusted reducing the employees filling the shortage at that location.

As can be seen from the foregoing, with the introduction of extended runs in 1995 the Union was concerned to retain an equitable distribution of road work as between the employees home terminalled at locations at either end of an extended run, based on a ratio calculated from the mileage of the respective territories covered by the employees of the two terminals. Article 64.25 (c), sometimes referred to as the "Whiteman Scenario", gives to the Company the latitude to depart from the strict ratios found in the first two paragraphs of the article, by assigning a greater percentage of work to employees at an adjacent terminal "to meet service requirements". The parties are agreed that the arrangement so contemplated cannot be permanent, and was intended as a means to give the Company a degree of flexibility in making adjustments

to meet unforeseen or temporary circumstances, such as high rates of absenteeism due to illness or fluctuations in traffic such as might be related to seasonal grain transport, for example.

Additionally, the parties turned their minds to providing a degree of wage protection to employees who might otherwise work in road service, but are compelled to work in yard service as a result of the application of the Whiteman Scenario, which is to say the transfer of a larger percentage of road service to the employees from an adjacent terminal. That is reflected in the provisions of article 2.6 of the collective agreement which read, in part, as follows:

> **Extended Runs**
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> **2.6 (c)** When a yard service employee is not promoted to road service as a result of a shortage of employees at that terminal and adjacent terminals are required to supplement employees for board adjustments, the employee withheld, whose earnings are adversely affected will be paid the difference between maximized earnings and the maximum mileage at the basic rate for the class of service from which withheld.
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> **Note 1:** Employees required to work in yard service as a result of the use of employees from adjacent terminals will be required to follow the conditions of their assignment and, provided such employees meet the requirements of their assignment, any additional earnings will not be used to offset the guarantee. In the application of the above, the guarantee will be reduced by 1/13 for each shift missed in the event the employee fails to protect service. ("Fails to protect service" refers to service the employee is obligated to protect under the terms of the collective agreement.) Employees will be assigned in yard service on a senior may/ junior must basis.
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> **Note 2:** In the application of paragraph (c) above, employees working in yard service receiving a road guarantee will not be considered as being adversely affected.

The issue to be resolved is relatively straightforward. The Union maintains that in recent years the Company has departed from what it maintains is the intended use of the Whiteman Scenario, namely to deal with temporary conditions, such as high fluctuations in traffic pending a return to normal operations. Its counsel submits that in fact the Whiteman Scenario has been effectively converted into a normal way of operating, rather than as a temporary measure. In particular, the Union asserts that at the major terminals of Vancouver, Edmonton and Winnipeg locomotive engineers have been unfairly deprived of their opportunity to do road work, to the undue advantage of employees at adjacent terminals such as Kamloops, Jasper, Biggar, Melville and Fort Frances. Its counsel submits that while the protective provisions of article 2.6 may ensure a minimum of earnings for the locomotive engineers so affected, to the extent that they cannot earn less than the guarantee, employees impacted are nevertheless prevented from the more lucrative opportunities of earning well beyond the guarantee which might be available to them in the active pursuit of road service over a significant period of time. This, he argues, can negatively impact not only the earnings of an employee, but also the employee's eventual pension entitlement, based as it is on the locomotive engineer's five best years of earnings.

Counsel for the Company does not dispute that the Whiteman Scenario does not give the Company a licence to permanently disregard the ratios established in articles 64.25 of the collective agreement and the equitable distribution of road work as among the locomotive engineers of various terminals contemplated therein. He argues, however, that the nature of operations is such that there may be multiple contributors to

any given fluctuation in the need to assign road work to locomotive engineers at an adjacent terminal, and that those conditions may well extend, in whole or in part and in various combinations, over a significant period of time. By way of illustration, he draws to the Arbitrator's attention the degree to which the Whiteman Scenario was invoked, particularly in Edmonton, in 1997. The evidence indicates that between February and November of that year there was a high rate of manpower borrowing from adjacent terminals for road work, at a rate ranging between ten and thirty-five employees at any given time. Counsel stresses that that corrected itself in time, as evidenced by the relatively stable ratios which were eventually restored, and apparently endured, at least through 2001.

Counsel submits that in fact the Company is cognizant of the need for manpower replacement, as a result of which it has engaged in what he describes as a robust effort to hire new employees, with a full appreciation of the demographic realities the Company is facing and will face in the time to come. He submits that the evidence before the Arbitrator does not disclose any violation of the collective agreement, and especially disputes the suggestion of the Union that the Whiteman Scenario was intended to deal only with relatively short periods of temporary adjustment. He stresses that it would be inappropriate for this Office to attempt, in any event, to give any hard and fast definition of what might constitute the difference between temporary and permanent adjustments. He argues that there is no violation of the collective agreement disclosed in the facts at hand.

The Arbitrator can well appreciate the perspectives which motivate both sides in this dispute. I must agree with counsel for the Company that it is not wise for a board of arbitration to attempt to define what might constitute the temporal limits of adjustments which the parties intended to be available to the Company by reason of the application of the Whiteman Scenario. I must also agree that the fact that they incorporated within the collective agreement the provisions of article 2.6, with specific guarantee protections for employees forced to yard service, is an indication that, at a minimum, relatively extended periods of adjustment were contemplated.

Notwithstanding the foregoing, however, the evidence before the Arbitrator does leave room for a substantial degree of concern. Firstly, at the risk of oversimplification, in reading the provisions of article 64.25, it is important to distinguish between the dog and the tail. Clearly the ratio of subdivision mileages and the related work allocation as between the employees required on the pool at the various terminals is the dog, whereas the exceptional provisions of sub-paragraph (c) must be viewed as the tail, that is to say the capacity to occasionally make some adjustments to the more substantial provisions of sub-paragraphs (a) and (b) of article 64.25.

When the overall history of the operation of these provisions since 1997 is examined, the general pattern has been one of relative stability, at least through 2004. For example, in the period between May of 2001 and December of 2004 the terminal of Edmonton experienced some periodic adjustments in the ratio, with some reduction in road opportunities at some times, perhaps most particularly in 2002, but with a general

return to relatively stable ratios through the better part of 2003 and 2004. Even in respect of the adjustments found in 2002, they are generally of the order of twenty or less road work opportunities, creeping upwards only occasionally.

A radically different picture emerges with respect to the application of the Whiteman Scenario in 2005 and 2006 to date. In the one year period since July 1, 2005, Edmonton has seen a constant average deficit in road work opportunities of 29. While that is the average, on some occasions the ratio imbalance reached as high as fifty and fifty-three employees. That picture contrasts starkly with the numbers recorded in 2004, 2003 and even, to some degree, 2002. The same situation is reflected in both Winnipeg and Vancouver, albeit the numbers are somewhat lower. In those locations there has been a virtual consistency of deficit numbers in available road work through the great bulk of 2005 and 2006. By contrast, adjacent terminals such as Kamloops, Jasper and Fort Frances have, in their respective adjacent pools, recorded virtually undisturbed positive increases in their ratio of available road work over the same period of a year and a half. A comparison of the 2005 and 2006 period with virtually all years previous tends to suggest, at least in the most recent year and a half, that the tail has been wagging the dog or, to put it differently, the negative ratios of available road work at Vancouver, Edmonton and Winnipeg have become an extended phenomenon that can fairly be described as indefinite, if not permanent.

The test of permanence is obviously not practicable. Recognizing that forever is a long time, it might never be possible to describe any change as permanent. That,

however, is not the issue. The issue is whether what has occurred at the three named terminals over the past eighteen months can fairly be described as being outside what the parties contemplated when they negotiated the provisions of the Whiteman Scenario incorporated into article 64.25(c) of their collective agreement. Recognizing that no hard and fast formula should be adopted, the Arbitrator nevertheless considers that it is reasonable to conclude that where it can be shown that over a sustained period of time the ratio contemplated under sub-paragraphs (a) and (b) of article 64.25 has been substantially and consistently exceeded, the inevitable conclusion must be that there has been a departure from the intention of the parties with respect to the overall operation of article 64.25 of their collective agreement.

The Arbitrator recognizes the importance of this issue for both parties. Nor should this award be construed as limiting the ability of the Company to "roll" ratio adjustments across the entire territory to meet demands at a given location. I am satisfied that that mechanism is consistent with the intention of the Whiteman Scenario as articulated in article 64.25(c) of the collective agreement. What is not contemplated, however, is that the employees at any given terminal are effectively deprived of fair access to road work, and the related earnings enhancements of that service, for a virtually indefinite period. It seems highly doubtful to the Arbitrator that the parties can be taken to have intended such a result given their deliberate efforts at fashioning a fair division of road work as found at sub-paragraphs (a) and (b) of article 64.25 at the time extended runs were introduced.

As should be appreciated from the foregoing, the Arbitrator does not suggest what level of absolute numbers or absolute period of time would be the limit of adjustments that could be made by the application of the Whiteman Scenario. This award must be clearly understood as simply confirming that the pattern of ratio adjustment which has been recorded in the past eighteen months at the three major terminals is clearly inconsistent with the pattern or prior years, and represents a degree of indefinite, if not permanent, adjustment beyond that which is contemplated in article 64.25(c) of the collective agreement.

Nor do I consider that this is an appropriate case to make an affirmative order for the compensation of employees alleged by the Union to be adversely affected. Firstly, as appears to be acknowledged in the materials before me, this is a circumstance of relative uncertainty which unfolded over a period of several years. As noted by the Company, the spiking of ratio adjustments which occurred in 1997, for example, apparently did not provoke any grievance. While there may have been scope for discussion of the ratio levels in the framework of joint committees over the period of time which is examined in this award, it is less than clear to the Arbitrator that the Company was put on notice as to its possible liability, as would have been the case through the filing of a traditional grievance. In the circumstances it appears to the Arbitrator that the better course is to issue a declaration, coupled with a directive that the Company comply with the collective agreement, and remit the matter to the parties while retaining jurisdiction in the event of the need for any further remedy should they fail to agree as to the appropriate means of corrective adjustment.

The grievance is therefore allowed. The Arbitrator finds and declares that the Company has violated article 64.25(c) of agreement 1.2 by departing from the ratios of available road work for protected employees at the terminals of Vancouver, Edmonton and Winnipeg in numbers and for durations beyond what is fairly contemplated in article 64.25(c) of the collective agreement. The Company is therefore directed comply more faithfully with the intention of that provision. The matter is remitted to the parties to determine by what means that might be best achieved, and failing their agreement the matter may be spoken to.

July 17, 2006

(signed) MICHEL G. PICHER
ARBITRATOR