CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4013

Heard in Edmonton, Tuesday, 14 June 2011

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dispute concerning the 2011 Pacific Region Initial Gang Bulletin (Awards).

JOINT STATEMENT OF ISSUE:

On December 23, 2010, the Company issued the Pacific Region Initial Gang Bulletin advertising positions for the 2011 work season. On January 28, 2011, the awards for the bulletin were issued. More than a week later, on February 10, 2011 the Company issued a "corrector" notice. The corrector had the effect of altering approximately sixty-nine (69) of the awards listed in the January 28 awards bulletin. A grievance was filed.

The Union contends that: **(1)** There is no provision in the collective agreement and no past practice between the parties that permits the Company to amend an awards bulletin. **(2)** The Company failed to provide advance notice of its decision to implement changes to the January 28, 2011 awards. No effort was made to enter into discussions or negotiations with the Union and no sufficient explanation has ever been given as to why the changes were necessary. This constituted a violation of section 36 of the *Canada Labour Code*. **(3)** The Company has acted arbitrarily, in bad faith, in contravention of the long past practice between the parties, and in violation of sections 10.1, 10.2, 10.3, 10.10, 10.11 and 10.13 of the collective agreement.

The Union requests that the Arbitrator **(1)** declare that the Company actions are in violation of the collective agreement, the past practice between the parties and the Canada Labour Code and **(2)** order that the Pacific Region Initial Gang Bulletin positions in question be re-bulletined in accordance with the collective agreement and that every employee who is required to bid again do so on Company time or, if that is not possible, be compensated with a minimum of three hours at the overtime rate pursuant to section 3.5 of the collective agreement.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:
(SGD.) WM. BREHL
PRESIDENT

FOR THE COMPANY:
(SGD.) B. LOCKERBY
LABOUR RELATIONS OFFICER

There appeared on behalf of the Company:

B. Lockerby	– Labour Relations Officer, Calgary
S. Seeney	– Director, Industrial Relations, Calgary
M. Chernenkoff	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. Brown	– Counsel, Ottawa
A. R. Terry	– Vice-President, Revelstoke
S. Brighton	– Local Chairman,

AWARD OF THE ARBITRATOR

The Union objects to what it characterizes as an improper correction of the job bulletin for the Pacific Region Gang originally awarded on January 28, 2011. It is common ground that the Pacific Region Initial Gang Bulletin established the bid positions of some 303 employees. After issuing the awards bulletin on January 28, 2011, approximately a week later, on February 10, 2011 the Company issued a corrected bulletin which changed the status of some sixty-nine positions. The record confirms that the Company made the changes in the award bulletin by reason of what it considered to be errors made in the original bulletin of January 28, 2011. These errors largely concerned the proper placement of employees by reason of their correct seniority date. It is also not disputed that there was no discussion with the Union of the errors identified by the Company or of the ultimate content of the corrector notice which did issue on February 10, 2011.

Initial gang bulletins are dealt with in a note to section 10.1 of the collective agreement which reads:

> **Note:** Initial gang bulletins, when issued, will remain open for a minimum of twenty-one (21) days to a maximum of twenty-eight (28) days. Positions advertised will be awarded fourteen (14) days following the close of the bulletin.

The Union's representatives stress that the issuing of an award bulletin has significant consequences, particularly in relation to seniority. In that regard it refers to the following provisions of the collective agreement:

> **10.13 (c)** An employee will only establish seniority in a higher classification by being awarded a bulletined vacancy in such higher classification. An employee filling a temporary vacancy under this article 10.13 other than by bid will, at the conclusion of such temporary vacancy, revert to their former position.
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> **10.14 (a)** A qualified employee appointed to a higher classification by bulletin will be accorded a seniority date from the date of appointment on bulletin in such classification and in all lower-rated classifications in which they are qualified to work and in which they had not previously established seniority. This Article 10.14(a) does not apply to Bridges and Structures Department Employees.
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> **(b)** An employee appointed by bulletin to a position in a B&S classification listed in Article 9.15(c) will be accorded a seniority date from the date of appointment in such classification and all lower rated B&S classifications in which they are known to be qualified to work and in which they had not previously established seniority. Notwithstanding the foregoing, an employee will only establish a seniority date in those groups in which they are known to be qualified to work and which they had not previously established seniority. (For purposes of this article 10.14(b) each position listed in classifications 2, 3, 4 and 6 is a separate group.)
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> **(c)** Employees establishing seniority as Extra Gang Foremen or Assistant Extra Gang Foremen on a District Seniority List will not establish such seniority and seniority in lower-rated classifications pursuant to Articles 10.14(a) and 10.14(b) on another seniority list without first being awarded a bulletined vacancy to which such other seniority list applies. An employee establishing seniority as Extra Gang Foreman on a District Seniority List will also establish seniority as an Assistant Extra Gang Foreman on that District Seniority List if not previously established.

> **(d)** An employee who has been appointed by bulletin to a higher classification and is not qualified to work in all lower-rated classifications or other group(s) within their classification at the time of their appointment, will be accorded their original seniority promotion date in the event they subsequently qualify for the classifications or group(s) for which they were previously unqualified.

The Union submits that on the issuing of the original Pacific Initial Gang Bulletin the successful applicants became the incumbents in the positions in question. They then acquired a form of possessory right over those positions and all associated collective agreement rights and responsibilities that go with them. While the Union acknowledges that it is within the discretion of the Company to make changes to job postings prior to posted positions or vacancies being filled, it submits that it was not open to the Company to do so unilaterally after the initial award bulletin in fact issued. It submits that if in fact the Company wishes to make changes to bulletined jobs it can only do so through the application of section 11.1 of the collective agreement which governs job abolishments. It would, in other words, be required to abolish the positions, re-bulletin them and go through the bidding exercise again.

In the Union's perspective the prospect of the Company unilaterally changing bulletined job awards without any discussion with the Union effectively undermines the Union's ability to administer the collective agreement and discharge its obligation as the exclusive bargaining agent of the employees concerned. Of particular concern to the Union is what it characterizes as the Company's failure to provide specific information to it, even after the change of the award bulletin, concerning what the Company considered to be the errors which resulted in its adjustment of the bulletin. Its representatives stress, on the basis of the general jurisprudence, that a Union must be

allowed to have such information so as to properly administer the collective agreement. In that regard reference is made to the decision of the Canada Industrial Relations Board in **Monarch Transport Inc.** [2003] CIRB No. 249 which contains reference to a number of other decisions, including decisions of the Ontario Labour Relations Board.

While the Company acknowledges that in the past there have been circumstances in which award bulletins have been changed after they initially issued, sometimes, though not always, after consultation with the Union, it stresses that there is no express provision within the collective agreement that would give the Union a right to be consulted prior to the issuing of a corrected or amended award bulletin. Its representatives rely, in part, on the established jurisprudence, including awards of this office such as **CROA 2638, 3054** and **1729**, which confirm that it is within the discretion of the parties to a collective agreement to correct errors in its administration.

Having carefully considered the submissions of the parties and the facts of the case, the Arbitrator has substantial difficulty with the position of the Union. Firstly, as is evident from the foregoing, there is simply no provision within the terms of the collective agreement which gives to the Union any right to be involved in discussions with the Company in the formulation of an award bulletin. While the record indicates that on some occasions the Company has found it appropriate to consult with the Union at that stage, it does not always do so and no contractual obligation to consult with the Union has been identified to the Arbitrator. Secondly, with respect to the question of issuing a correcting award bulletin, it should be stressed that that occurred many times in the

past, apparently without grievance by the Union. The representations before me indicate that on some occasions the Union is consulted before the issuing of an amending bulletin while on other occasions no such consultation has occurred. In any case, with respect to all award bulletins the Union retains the ability to grieve what it may be perceive to be an error within the bulletin.

On what basis can it be argued that the Company is without discretion to issue a correcting bulletin, when the sole basis for the correction is its own determination that the original bulletin violated the collective agreement and the seniority rights of the employees under it? The instant award bulletin is arguably the best case in point to support the Company's case. Following the initial award bulletin the Company identified over sixty positions which were awarded in error based on the true seniority entitlement of the employees concerned. Each error and change was effectively identified by print highlighting which the Company included in the correcting award bulletin. How, in light of that, can the Union now claim that it has no idea as to the nature of the errors which the Company identified? They are there to be easily recognized by reason of the highlighting of the changes and a basic reference to the relative seniority of the employees concerned.

I find it difficult to conclude that the parties would have intended once the Company has issued an awards bulletin its hands are tied. Is it then to await the filing of in excess of sixty grievances, to be dealt with through a grievance and arbitration procedure to restore the employees to the very position which it acknowledges they

should occupy by reason of its amending award bulletin? Alternatively, is the Company, not to mention the employees, to be subjected to the abolishment of all positions and an entire repetition of the bulletining and bidding procedure which, arguably, may produce different results based on the information as to bids of other employees gained by the publishing of the initial erroneous awards bulletin? To follow that course of action would, in my view, court not only administrative inefficiency but labour relations unrest. The course followed by the Company avoids those outcomes, restores the employees to their proper entitlements based on the correct assessment of their relative seniority and avoids the disruption and ripple effects of nullifying and restarting a complex and sensitive bidding process. In my view clear and unequivocal language in the collective agreement would be required to foreclose the Company's ability to correct a bulletin so as to respect the collective agreement itself. No such language is identified to me.

In my view there is also a certain logical discontinuity in the submission of the Union. Its representatives argue that it has a right of prior consultation and disclosure at any time the Company proposes to issue a correcting award bulletin. And yet, as appears from the submissions before me, it does not claim to have right of prior consultation and involvement in the drafting and finalizing of an initial job award bulletin. How is the interest of the Union as exclusive bargaining agent any more or less significant in either scenario? The overriding fact is that in neither case does the language of the collective agreement, or for that matter, any provision of the **Canada Labour Code**, give to the Union an operative role or consultative right in either exercise. While it is true, as the Union asserts, that on some occasions in the past the

Company has consulted with the Union in the drafting of a correcting bulletin. The fact that it has done so, however, does not of itself create a contractual right to be consulted. The unchallenged representation of the Company is that on many occasions no such consultation has occurred, and no grievance has ensued. The most that can be said, with respect to past practice, is that it is mixed. In that circumstance the Arbitrator should be wary of confirming rights which do not appear on the face of the collective agreement, particularly in relation to the all-important discretion of the Company, subject of course to the terms of the collective agreement, to administer job assignments.

In the result, I am compelled to conclude that the Company's actions giving rise to this grievance do not involve any violation of the rights of the Union under the collective agreement nor do they constitute a violation of the **Canada Labour Code** by undermining the representative rights of the Union as exclusive bargaining agent on behalf of the employees. For these reasons the grievance must be dismissed.

June 20, 2011

(original signed by) MICHEL G. PICHER
ARBITRATOR