CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4056

Heard in Calgary, Wednesday, 9 November 2011

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Alleged violation of article 67.10 of agreement 1.2.

JOINT STATEMENT OF ISSUE:

On March 24, 2011, Locomotive Engineer T. Savorn was assigned to train SA44531 23 operating from Mirror to Edmonton via Norway on the Camrose Subdivision. The grievor was required to taxi from Mirror to Norway to pick up his train enroute and proceed to his final destination, Edmonton, Alberta.

Enroute to Edmonton the grievor filed rest under article 28 of agreement 1.2 and was unable to complete the tour as originally called. The grievor secured his train at Mile 24.70 (New Sarepta) on the Camrose Subdivision and was deadheaded into Edmonton. The grievor was compensated in accordance with article 28.8(a)(ii) for miles travelled in taxi at freight rates of pay.

The Union contends the grievor must be paid 100 miles for the taxi to Edmonton as a separate tour as article 67.10 of agreement 1.2 precludes two deadheads in a single tour of duty.

The Company disagrees with the Union's contentions.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) T. MARKEWICH	**(SGD.) P. PAYNE**
FOR: GENERAL CHAIRMAN	**FOR: DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Company:

K. Morris	– Sr. Manager, Labour Relations, Edmonton
D. Brodie	– Manager, Labour Relations, Edmonton
D. VanCauwenburgh	– Director, Labour Relations, Toronto
D. Broesky	– Trainmaster,

There appeared on behalf of the Union:

M. A. Church	– Counsel, Toronto
B. Willows	– General Chairman, Edmonton
T. Markewich	– Sr. Vice-General Chairman, Edmonton

AWARD OF THE ARBITRATOR

As is evident from the joint statement of issue, on March 24, 2011 Locomotive Engineer Savorn commenced his tour of duty by deadheading from Mirror to Norway where he was to operate his train onwards to Edmonton. As he was operating he exercised his right to book rest and as a result was relieved of duty prior to reaching Edmonton, at Mile 24.70 on the Camrose Subdivision. He was then deadheaded for a second time to his destination terminal of Edmonton, from New Sarepta.

The Company compensated the grievor for his deadheading from New Sarepta to Edmonton in accordance with the provisions of article 28.8 of the collective agreement which provides as follows:

> **28.8**
> **(a)** When rest is booked en route, locomotive engineers will, at the Company's option:
>
> (i) Be relieved of duty and provided with accommodation either in a Company facility or an available hotel or motel; or
>
> (ii) be replaced and deadheaded immediately either to the point for which ordered or to the home terminal where they will be relieved of duty.
>
> **NOTE 1:** When deadheaded in the application of sub-paragraph 28.8 (a)(ii), locomotive engineers will be compensated on a continuous time basis for service and deadheading (miles or hours whichever is the greater) as per class of service.
>
> **NOTE 2:** In the application of sub-paragraph 28.8(a)(ii), locomotive engineers who are returned to the home terminal after being replaced on a trip to the away-from-home terminal will be paid, in addition to the earnings specified in

NOTE (1) above, the additional actual road miles thy would have otherwise earned for the round trip had they not been replaced.

The Union invokes what it maintains is the overriding or “trump” provisions of article 67.10 of the collective agreement which provides:

> **67.10** Deadheading and a tour in road service may only be combined once; i.e. going to the work location and tour of duty; or tour of duty and deadhead back to a terminal after completion of the tour of duty.

On the foregoing basis it maintains that the grievor should have been compensated on the basis of 100 miles for the second deadhead as contemplated within article 67.2 of the collective agreement which states:

> **67.2** Deadheading paid separately from service will be computed on the basis of miles or hours whichever is the greater, with a minimum of 100 miles, overtime pro rata, at the minimum rate applicable to the train on which the locomotive engineer travels.

The issue is whether the grievor was entitled to be compensated, as the Union claims, for 100 miles at passenger rates for his second deadhead or whether, as the Company maintains, he fell within the provisions of Note 1 of article 28.8. It should be noted that the Union does not claim what would amount to a pyramiding of benefits, as it would deduct from the 100 miles the deadheading miles which were in fact paid to the grievor.

The Company maintains that the grievor was properly paid in accordance with article 28.8(a)(ii) Note 1. It submits that notes kept by the Company at the time of the of the negotiation of these provisions in 1986 confirm that the deadheading which occurred

after the booking of rest is to be considered as part of the same tour of duty, and paid accordingly.

The Union's position is that the provisions which govern deadheading following booking rest en route found in article 28.8, first negotiated in 1986, must be viewed as qualified and effectively trumped by the language of article 67.10 which was introduced into the collective agreement in 1993. Its position is categorical, based on the language of article 67.10, that a tour of duty cannot contain two separate segments of deadheading with respect to a tour of duty in road service. By its interpretation, therefore, the initial deadheading and operation of the grievor's train would have constituted his tour of duty. The subsequent deadheading could not be part of the same tour of duty, as prohibited by article 67.10 of the collective agreement. On that basis, the second deadheading is payable "separately from service" in accordance with the terms of article 67.2, which would involve the payment of a minimum of 100 miles. According to counsel for the Union, to interpret these provisions otherwise, as the Company would do, is effectively to render the protections and provisions of article 67.10 meaningless.

The Company counters that article 67.10 is in fact intended to limit or prevent the Company from originally structuring or scheduling a tour of duty in such a way as allowing that tour of duty to have two separate portions of deadheading, along with a segment of road service. Its representatives submit that in fact the Company has held to that approach to the article, as well as to the application of article 28.8 for a number of years without apparent objection on the part of the Union. To that, the Union counters

that situations as those giving rise to the instant grievance are extremely rare, casting doubt on the extent of the Company's past practice. In fact, the Union points to as least one similar claim which was settled in a manner consistent with the Union's position in the past.

Having heard and considered the submissions of the parties, I am left in some doubt as to the Company's interpretation of the language of article 67.10. There is clearly nothing on the face of the article to indicate, as the Company would have it, that it is intended solely as a prohibition against structuring or scheduling a tour of duty in advance so that that tour of duty involves the combining road service with deadheading more than once. In my view the language must be read as it is found. The plain meaning of the words would, I think, extend to preventing deadheading twice in a tour of road service in circumstances where the second deadheading arises in a manner that is unforeseen, and not scheduled. That said, however, I am not inclined to reject out of hand the Company's position with respect to the administration of this article over the past eighteen years. As noted above, the Union points to only one precedent where its position appears to have been accepted by the Company, albeit in the context of a grievance which was settled. In my view the grievance must therefore be resolved on the basis of the application of the doctrine of estoppel against the Union, at least for the duration of the current collective agreement.

The Arbitrator therefore finds and declares that the interpretation of article 67.10 of the collective agreement presented by the Union in this grievance is correct.

However, given what I am satisfied has been the predominant practice of the Company in the handling of claims in this circumstance, and indeed consistent with the initial form of claim made by Locomotive Engineer Savorn, the Union is estopped from enforcing its interpretation for the duration of the current collective agreement. As it appears that the parties are now in bargaining for the renewal of their collective agreement, they are both fully able to deal with the manner in which this provision will be administered in the future. Failing any change in the language of article 67.10 and 67.2 of the collective agreement, in the future claims such as those made in the instant case by the Union would be successful.

For the purposes of clarity, it should be appreciated that, in the Arbitrator's view, article 67.10, which is placed in the collective agreement under article 67 which is entitled "Deadheading" speaks most directly to the limits on the Company's prerogatives and the protections of employees with respect to the treatment of deadheading. Article 28.8 deals with deadheading in only a peripheral manner, as its principal focus is the booking of rest by employees. That provision pre-existed the introduction of article 67.10 into the collective agreement and must now, in my view, be interpreted to apply to the circumstance where there is a single deadheading segment attached to an assignment in road service. Given the chronology of events, I cannot see how the payment provisions of article 28.8 can be said to apply notwithstanding the more direct and specific provisions of article 67.10. Nor, as indicated above, can I find language to sustain the view of the Company that article 67.10 speaks only to the Company's

inability to schedule more than one segment of deadheading with an assignment in road service.

For the foregoing reasons the Arbitrator finds and declares that the interpretation of the Union is correct. Given my acceptance of the Company's view of the preponderant practice over the years, however, the Union is estopped from succeeding with the instant claim, and the matter is remitted to the parties for resolution at the bargaining table.

November 14, 2011

(signed) MICHEL G. PICHER
ARBITRATOR