CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4078

Heard in Montreal, Wednesday, 11 January 2012

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Group grievance advanced by the Union in response to the Company's ongoing breaches of Article 29 (Conductors' agreement) and Article 27 (Locomotive Engineers' Agreement).

UNION'S STATEMENT OF ISSUE:

On March 31, 2011, the Union advanced a group grievance on behalf of employees based in the Medicine Hat and Saskatoon Terminals whose employment is governed by either the Conductors' Agreement or the Locomotive Engineers' Agreement. The Union's grievance alleges that the Company has been systematically breaching Article 29 (Conductors' agreement) and Article 27 (Locomotive Engineers' Agreement) in respect of employees' right to book rest.

It is the Union's view that articles 29 and 27 provide employees with the right to be off duty at the objective terminal in 10 hours when 5 hours' notice is properly provided to the Company. If no notice is provided employees have the right to complete their tour of duty within 12 hours.

It is the Union's position that the Company has failed to ensure that employees are able to be off duty within 10 hours (or 12 hours as the case may be) in violation of the protections and procedures set out in articles 29.06 and 27.05. The Union claims that the Company has frequently failed to ensure that the hours of service protections set out in these provisions are applied in practice.

The Union seeks an order that the Company cease and desist its ongoing breaches of articles 29.06 and 27.05, in addition to such relief as the arbitrator deems necessary in order to ensure future compliance with the articles in question.

The Company disagrees with the Union's position.

COMPANY'S STATEMENT OF ISSUE:

On March 31, 2011, the Union advanced a group grievance on behalf of employees based in the Medicine Hat and Saskatoon Terminals whose employment is governed by either the Conductors' Agreement or the Locomotive Engineers' Agreement. The Union's grievance alleges that the Company has been systematically breaching Article (Conductors' agreement) and Article 27 (Locomotive Engineers' Agreement) in respect of employees' right to book rest.

The Company recognizes the provisions contained in both article 29 and article 27 and acknowledges that there have been instances in which employees who have provided their notice of rest have not been off duty within 10 hours. This has been a contentious issue for several years and the Company has been, and continues to be, committed to improvements in this area.

FOR THE UNION:

(SGD.) D. R. ABLE
GENERAL CHAIRMAN, LE WEST

(SGD.) D. OLSON
GENERAL CHAIRMAN, CTY WEST

FOR THE COMPANY:

(SGD.) M. THOMPSON
FOR: MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

M. Thompson	– Labour Relations Officer, Calgary
D. Freeborn	– Manager, Labour Relations, Calgary
R. Merritt	– Superintendent, NMC, Calgary
C. Ruff	– General Manager, Transportation, NMC, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Toronto
D. Able	– General Chairman, LE, Calgary
D. Olson	– General Chairman, CTY, Calgary
D. Fulton	– Vice-General Chairman, Calgary
G. Edwards	– Vice-General Chairman, Revelstoke
D. Edward	– Vice-General Chairman, Medicine Hat
D. Becker	– Vice-General Chairman, Medicine Hat
R. Finnson	– Vice-General Chairman, Wynyard
Wm. Pitts	– Vice-General Chairman, Moose Jaw
W. McCotter	– Secretary/Treasurer, Edmonton
B. Brunet	– General Chairman, Montreal
B. Hiller	– General Chairman, Toronto

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the Company has not achieved 100% compliance with the requirements of article 29 of the conductors' collective agreement and article 27 of the Locomotive Engineers' collective agreement. Specifically, the Union alleges that the Company has not made sufficient efforts over the years to ensure that employees are in fact into their respective home terminals or objective away-from-home terminals and off duty within ten hours, as contemplated under the collective agreements. The Union, representing the Western Canada General Committees of Adjustment for both trainpersons and locomotive engineers, asks the Arbitrator to find that a violation of the collective agreements has occurred and to order the Company to cease and desist from continuing to violate the provisions in question. It also requests that the Arbitrator retain jurisdiction to issue such further determinations and directions as may be necessary to enforce the requirements of the collective agreements. The Company denies that it has violated either of the collective agreements in question.

The following provisions of article 29 of the Conductors' collective agreement, which are identical to parallel provisions in the Locomotive Engineers' collective agreement, bear on the dispute at hand:

> 29.04 Employees, being the judge of their own condition, may book rest after being on duty 10 hours, or 11 hours when two or more Brakepersons are employed on a crew in addition to the Conductor.

29.05 Employees desiring rest en route will give their notice within the first 5 hours on duty to the Rail Traffic Controller or other designated Company employee. Notice will include the amount of rest required, 8 hours considered maximum at other than the home terminal, except in extreme cases.

29.06 Where it becomes necessary, arrangements will be made to have a reduced or Conductor-Only complete their tour of duty within 10 hours on duty which may require the discontinuation of work en route, changing meets and the prompt yarding of the train.

When such arrangements are made, the RTC will so advise all other employees having authority over the operation of the train, i.e., yard personnel at objective terminal, other RTC, etc. When, notwithstanding these arrangements, the reduced crew is unable to complete their tour of duty within 10 hours, the members of the crew may book rest after 10 hours on duty.

The provision will be applied as follows:

(1) Employees must provide notice of rest within the first 5 hours on duty. The amount of rest desired to apply after 10 hours. In such cases the Company has the existing obligations to have them into the objective or home terminal and off duty in 10 hours.

(2) Employees who reach their objective terminal and are off duty in less than 10 hours will not be bound by the notice of rest given previously. Employees will then have the option of booking rest.

(3) Employees who are more than 10 hours on duty will be bound by the amount of rest booked. Other Regulatory requirements remain in effect.

(4) Employees who do not provide notice of rest within the first 5 hours are subject to work up to 12 hours. These employees will have the option of booking rest at the objective terminal.

29.07 When an employee on a crew gives notice to book rest the Company will make arrangements to ensure the employee is off duty within 10 hours. The Company may, at its option, relieve a single employee or it may require that all members of the crew be relieved. This may result in the Company requiring that rest be taken prior to expiration of 10 hours and/or that the crew be relieved prior to 10 hours on duty, or 11 hours where applicable.

The road service rest rules of articles 29 and 27 have been in place for a number of years. The Union's brief, for example, references a grievance dating from 1999 with respect to alleged violations said to have occurred in October and December of 1998. It

appears that similar grievances, generally in the form of group grievances concerning numerous individual violations, continued to be filed over time, without any satisfactory resolution.

It appears that in fact the provisions here under consideration were first introduced as part of a memorandum of settlement executed on March 24, 1997. From the outset, the memoranda of settlement included penalty provisions for those instances when a crew is compelled to work in excess of ten hours prior to reaching their home or objective terminal. As paragraph 11(k) of the original memorandum of settlement of 1997 governing conductors reflects, a premium payment of $80 was then agreed to. That amount has continued unchanged until today. The record reflects, however, that in 2007 the parties added Appendix 9 to both collective agreements amplifying the application of the penalty payment, establishing a system of determined relief times and normal transit times by taxi to govern the entitlement of employees to the penalty payment. The final paragraph of Appendix 9 reads as follows:

> It was further noted during our conversations that these changes are designed to improve compliance to “in and off in 10 hours” as specified in the Collective agreement. It is also understood that should there remain issues at a given location regarding crews, who have given notice of rest and are not in and off duty within 10 hours, will be immediately escalated to the appropriate AVP – Operations by the respective General Chairs for resolution.

It does not appear disputed that in many parts of the Company’s national system substantial compliance with the requirements of the two articles here under consideration is met. However, in Western Canada, and in particular in relation to certain territories which involve greater distances, there has been a degree of non-compliance, the result of which has occasioned substantial expenditures by the

Company in the form of disincentive or penalty payments. It appears that two locations of particular concern are the Brooks-Maple Subdivision as well as the Swift Current-Wayburn Subdivision, although it is not disputed that shortfalls in meeting the standards do occur elsewhere in the west as well as in Eastern Canada.

As the Company notes, over the fourteen years these provisions have been in place there has never previously been a submission to arbitration. The Union, however, stresses that there have been grievances in the hundreds, including the grievances which form the basis of this policy grievance submission, which date from October of 2009 to the present.

The Company does not dispute that the strict standard whereby an employee is to be into his or her destination termination and off duty within ten hours, when that employee has given notice of rest within the first five hours on duty has not, in all cases, been met by the Company. The Company submits, however, that certain circumstances have contributed to its failure to meet the standard at various times, citing administrative and personnel changes implemented in the Network Management Centre (NMC), the office which manages crew calling, deadheading arrangements and the relieving of crews who book rest en route as well as such other related matters such as the dispatching of trains. It also submits that unforeseen events, not the least of which is weather, can make it impossible, at times, for the standards of articles 29 and 27 to be strictly met. By way of illustration, it placed before the Arbitrator a statistical chart for the year 2011 for one particular western terminal which shows success rates falling typically, on a weekly basis, in the range of 100% to 97%, with some occasional

declines, particularly in winter months, to as low as 91%. The Union stresses that those figures might not be accurate to the extent that it would not count employees who might have been “turned around” on their assignment, thereby not falling within the count. Its representatives also question the extent to which the success rate might be reduced by the recent introduction of Air Tablets, a form of computer documentation system found in terminals which conductors use to enter data at the end of their tour of duty. The Union’s suggestion is that that new technology has had a negative impact on the success rate of compliance with these articles.

The Company’s representatives submit that from the outset it was understood that 100% compliance with the road service rest rules of articles 29 and 27 of the respective collective agreements could not be achieved. On that basis it stresses that the parties therefore negotiated a penalty clause into the agreements which, according to the Company, was a mutual recognition that full compliance would not be possible. The Company’s representatives also question whether, at least on some occasions, employees do not themselves structure their work so as to ensure that their on duty time extents slightly beyond ten hours, to attract the penalty payment. In that regard the Arbitrator is directed to statistics for one terminal in May of 2011 where, it appears, the time overage for employees who gave proper notice of their intention to book rest was generally little more than ten, fifteen or twenty-five minutes more than the ten hour limit, although there are some more substantial exceptions.

In the Arbitrator’s view this is a unique grievance. As indicated above, both parties acknowledge that the requirements of articles 29 and 27 are not always going to

be met by the Company. Indeed, the language of Appendix 9 of the collective agreements appears to accept that there will, inevitably, be occasions when the standard is not met. That, in my view, is the clear message to be taken from the second sentence of the paragraph of Appendix 9 reproduced above, whereby cases of non-compliance can be escalated to the appropriate AVP – Operations by the respective General Chairs for resolution.

Upon a close consideration of the issues and arguments presented, I am not inclined to accept the submission of the Company that in fact no violation of the collective agreements has occurred. Its representatives argue that the provisions in question have not been altered since 1997, that no grievance has been taken to arbitration for over fourteen years, that the language of the articles has always contained a remedy clause which implicitly recognizes that there circumstances beyond the control of the Company what may lead to employees working in excess of ten hours and that, in fact, employees may themselves find reasons to exceed ten hours on duty to receive the over-hours premium. The Company argues that it has substantially complied with the requirements of the articles, and stresses that as the parties are currently in national negotiations, the bargaining table is the proper forum for discussion of the Unions' concerns under both collective agreements. They argue that to grant a cease and desist order would be tantamount to altering the negotiated understanding of the collective agreements and place the Company in a prejudicial position with respect to ultimate compliance.

Counsel for the Unions submits that the collective agreements must be respected, and that the data placed before the Arbitrator confirm that in fact the Company has, in a systemic way, violated article 29 and article 27, particularly on the two identified subdivisions in Western Canada. He submits that the forbearance of the Unions over the years should not now prevent it from grieving and obtaining redress after all efforts at correcting the problem seem to have failed.

In my view the position of neither party is ultimately compelling. I believe that the granting of a cease and desist order is, at least at this stage, questionable. To grant such an order would be to place the Company in a position of jeopardy with respect to compliance. Arguably, any further circumstances where the ten hour limit is not met could give rise to contempt proceedings before the courts to enforce the Arbitrator's award with punitive consequences for the Company and possibly some of its officers. While it is obviously true that contempt proceedings underlie the enforceability of any arbitration award, that is not a consequence that should be lightly encouraged.

On the other hand, I am compelled to accept the submission of the Union that there has been a failure to fully honour the requirements of these articles. I cannot accept the implicit suggestion in the position of the Company that the payment of the penalty provided for under Appendix 9 of both collective agreements is tantamount to a licence to violate the substantive requirement of these articles with impunity. To dismiss the grievance would be to effectively countenance that view.

In my view, at least at this stage, the issue should be viewed as one which should be resolved by the parties themselves, through the process of negotiation, whether that occurs at the current bargaining table or through collateral discussions, possibly in the context of a specially established joint committee. Should those further discussions not be successful, in whichever forum, the matter can still be brought back to this Office for further submissions as to the appropriate form of an ultimate remedy.

On that basis the grievance is allowed, in part. I find and declare that the Company has failed, on numerous occasions, to honour the requirements of articles 29 and 27 of the collective agreements of Conductors and Locomotive Engineers, respectively. I direct the parties to meet, whether at the current bargaining table for the renewal of their collective agreements, or in a separate forum with an established joint committee, to identify the problems particular to these two western subdivisions and possible solutions to minimize, if not eliminate, the number of occasions in which train assignments are compelled to exceed the ten hour on duty time contemplated under articles 29 and 27 of the collective agreements. Should the parties, after serious and extensive efforts, be unable to reach any such resolution, the matter may be returned to this Office for the issue of remedy to be spoken to.

January 16, 2012

(signed) MICHEL G. PICHER
ARBITRATOR