CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4106

Heard in Montreal, Wednesday 9 May 2012

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE (LE)

And

TEAMSTERS CANADA RAIL CONFERENCE (CTY)
(Intervener)

DISPUTE:

The Union filed a remedy grievance alleging that the Company blatantly violated article 25 in regards to Mr. Arruda on January 30, 2009, by holding Mr. Arruda beyond 14 hours at the away from home terminal.

The Union and the Company have a dispute about the proper procedures for progressing a remedy grievance. The parties have agreed to have the issue determined by the arbitrator and deal with the merits of the grievance at a later date.

JOINT STATEMENT OF ISSUE:

The Union filed a remedy grievance dated June 30th, 2009 of the 1.1 collective agreement alleging that there was a blatant violation of article 25 in respect to Engineer Arruda operating Train 103 on June 30th 2009.

The Company denies that there was a violation of article 25 in the circumstances as alleged by the Union.

In addition to this position the Company objected to the Union's filing of a remedy grievance under Addendum 95. Specifically, the company's position is that a remedy grievance must be filed in accordance with Article 73 of the 1.1 collective agreement. It is the further position of the Company that the Union cannot file a remedy grievance under Addendum 95 to request a remedy with the issue has not proceeded through the grievance procedure as identified in article 73 and with disregard for the time limits set out in article 73 and thus, the remedy grievance would not be properly before the arbitrator.

The Union disagrees with the position of the Company. It is the Union's position that Addendum 95 establishes the process in which to file a remedy grievance such as the one in issue. Thus, the Union's position is that this remedy grievance is properly before the arbitrator.

The Union and the Company agree that the arbitrator has the jurisdiction to resolve only the dispute concerning proper remedy grievance progression.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. A. BEATTY	**(SGD.) M. MARSHALL**
PRESIDENT	**SR. MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

M. Marshall	– Sr. Manager, Labour Relations, Toronto
D. VanCauwenbergh	– Director, Labour Relations, Toronto
D. Gagné	– Sr. Manager, Labour Relations, Montreal
A. Daigle	– Manager, Labour Relations, Montreal
D. Larouche	– Manager, Labour Relations, Montreal

There appeared on behalf of the Union TCRC–LE:

R. A. Beatty	– President, Ottawa
P. Vickers	– General Chairman, CN Lines Central, Sarnia
B. Willows	– General Chairman, Edmonton
P. Boucher	– Arbitration Coordinator, Ottawa

There appeared on behalf of the Intervener TCRC–CTY:

J. R. Robbins	– General Chairman, CTY, Sarnia
B. R. Boechler	– General Chairman, CTY, Edmonton
R. A. Hackl	– Vice-General Chairman, CTY, Edmonton
W. G. Scarrow	– President, UTU, Ret'd, Sarnia

AWARD OF THE ARBITRATOR

At issue is the proper application of Addendum 95 of collective agreement 1.1 and the equivalent provision in other collective agreements including Addendum No. 123 of collective agreement 4.16 between the Company and the Intervener General Committee of Adjustment representing conductors, trainmen and yardmen (CTY). At issue is whether a Union General Chairperson may bring directly forward a grievance for resolution through the remedy provisions of Addendum 95 and its equivalent in other

collective agreements, or whether the Union must first proceed with that same grievance through the steps of the grievance procedure, for example as found in article 73 of collective agreement 1.1 governing locomotive engineers on Eastern Lines. Addendum 95 takes the form of letter dated December 13, 2001 addressed to the General Chairmen representing locomotive engineers system wide, and signed by then Vice-President of Labour Relations, Mr. R.J. Dixon. That letter reads as follows:

> Gentlemen:
>
> During the current round of negotiations the Council expressed concern with respect to repetitive violations of the Collective Agreements. Although the Company does not entirely agree with the Council's position, the Company is prepared to deal with this matter as follows.
>
> When it is agreed between the Company and the General Chairperson of the Union that the reasonable intent of application of the Collective agreement has been violated, agreed to remedy shall apply.
>
> The precise agreed to remedy, when applicable, will be agreed upon between the Company and the General Chairperson on a case-by-case basis. Cases will be considered if and only if the negotiated Collective Agreements do not provide for an existing penalty.
>
> In the event an agreement cannot be reached between the Company and the General Chairperson as to the reasonable intent of application of the Collective Agreement and/or the necessary remedy to be applied the matter may within 30 calendar days be referred to an Arbitrator as outline in the applicable Collective Agreements.
>
> NOTE: A remedy is a deterrent against collective agreement violations. The intent is that the collective agreement and the provisions as contained therein are reasonable and practicable and provide operating flexibility. An agreed to remedy is intended to ensure the continued correct application of the Collective Agreement.
>
> Yours truly,
> (Sgd.) R. J. Dixon
> Vice-President, Labour Relations
> And Employment Legislation

The instant grievance concerns a claim that the Company engaged in what the Union characterizes as a blatant violation of article 25 of the collective agreement in

respect of its treatment of Locomotive Engineer Arruda in the operation of train 103 on June 30, 3009. The grievance appears to relate to what the Union maintains is the improper administration of a held-away payment for Locomotive Engineer Arruda in service between Toronto North and South Parry on January 29 and 30, 2009 on Trains Q10721 28 and Q10251 25.

The Company maintains that the grievance is not receivable by this Office in its present form. Its representative submits that Locomotive Engineer Arruda did not file any claim in relation to what is now being contested, and that no grievance was filed on his behalf. The Company notes that under the time limits contained in the collective agreement Mr. Arruda's right to file a grievance for the events of January 29 and 30, 2009 expired on February 27, 2009. In fact, its representative stresses, no complaint was made to the Company concerning the trip in question until some six months later, on June 30, 2009 by a letter to the Company from the Union's General Chairman, Mr. Paul Vickers, which contains the following:

> Re: January 30 30 2009 – VIOLATION OF ARTICLE 25 OF AGREEMENT 1.1 – REMEDY APPLICATION
>
> The following grievance is submitted to you under the provisions of Addendum 95 of Agreement 1.1.
>
> On January 30, 2009 Mr. Arruda from Toronto North was held 1 hour and 13 minutes beyond the permissible time of 14 hours, at the away from home terminal of South Parry for train Q10251 25. He was off duty at 11:57 from train Q10721 28 and Q10251 25 departed at 02:53. Article 25.1(e) states, "Employees will not be held at the away from home terminal for more than 14 hours."
>
> It is the Union's position that the Company was in violation of the reasonable intent of the application of Article 25 in this matter.
>
> In keeping with the agreed to provisions of Addendum 25 which states in part:

> NOTE: A remedy is a deterrent against Collective Agreement violations. The intent is that the Collective agreement and the provisions as contained therein are reasonable, practicable and provide operating flexibility. An agreed to remedy is intended to ensure the continued correct application of the Collective agreement."

It is the Union's position that an appropriate remedy is mandated to be implemented in this specific case.

If you are in agreement with the Union as to the violation of the Collective agreement in this matter we respectfully request, for our consideration, your position as to the appropriate remedy.

In the alternative, if you are in disagreement with the Union as to the violation of the agreement, please advise accordingly and the reasons therefore so that a determination can be made as to whether or not the matter will be progressed to arbitration.

In spite of the above, with respect, the Union reserves its right to immediately progress this matter to arbitration under the provisions of Addendum 95 with respect to the alleged violations of the Collective agreement and/or the appropriate remedy to be applied.

Trusting the above is in order, I remain,

Sincerely yours,

(sgd.) Paul Vickers
General Chairman
TCRC Central Region

The Company maintains that all grievances, including grievances which seek to invoke the remedy provisions of Addendum 95 of the collective agreement, must comply with the procedural requirements of the collective agreement, and in particular article 73.1, which provides as follows:

> A grievance concerning the interpretation or alleged violation of this agreement shall be processed in the following manner
>
> An appeal against discharge, suspension, demerit marks in excess of 30 and restrictions shall be initiated at Step 3 of this grievance procedure. All other appeals against discipline shall be initiated at Step 2 of this grievance procedure.

(a) Step 1 – Presentation of the Grievance to Immediate Supervisor

> Within 28 calendar days from the date of cause of grievance the employee or Local Chairman may present the grievance in writing to the immediate supervisor. The grievance shall include a written statement of grievance as it concerns the interpretation or alleged violation of the agreement and identify the article and paragraph(s) of the article involved.

The position of the Company is that in fact the claim being made in relation to Locomotive Engineer Arruda has never been made in the manner which compiles with the requirements of article 73.1 of the collective agreement.

On that basis, the Company further maintains that it is not receivable in this Office. In that regard it relies on the language of paragraph 9 of the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration & Dispute Resolution which reads as follows:

> **9.** No dispute of the nature set forth in section (A) of clause 6 may be referred to arbitration until it has first been processed through the last step of the grievance procedure provided for in the applicable collective agreement. Failing final disposition under the said procedure a request for arbitration may be made but only in the manner and within the period provided for that purpose in the applicable collective agreement in effect from time to time or, if no such period is fixed in the applicable collective agreement in respect to disputes of the nature set forth in section (A) of clause 6, within the period of 60 days from the date decision was rendered in the last step of the grievance procedure.
>
> No dispute of the nature set forth in section (B) of clause 6 may be referred to the Office of Arbitration until it has first been processed through such prior steps as are specified in the applicable collective agreement.

The Company also draws the Arbitrator's attention to the second paragraph of clause 14 of the same memorandum which reads as follows:

> The decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.

For the purposes of clarity clause 6 of the Office rules reads as follows:

> **6.** The jurisdiction of the arbitrators shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of;
>
> > (A) disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and
> >
> > (B) other disputes that, under a provision of a valid and subsisting collective agreement between such railway and bargaining agent, are required to be referred to the Canadian Railway Office of Arbitration & Disputes Resolution for final and binding settlement by arbitration;
>
> but such jurisdiction shall be conditioned always upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this agreement.

The position of the Union is that the parties intended, from the inception of Addendum 95, that a General Chairperson could raise a “remedy” grievance of his or her own initiative, and bring it directly to the appropriate Company officer for resolution. In the Union’s view while such Union claims may be drawn from grievances which have been progressed through the various steps of the grievance procedure, they need not have so progressed, and can in fact be initiated by the General Chairperson. In the Union’s view that does not in fact constitute the submission of the grievance at Step 3 of the grievance procedure, but is nevertheless entirely in keeping with the intention of Addendum 95.

It may be noted that the following provisions of the collective agreement deal with the right to appeal matters to arbitration:

> **73.2** A grievance concerning the interpretation or alleged violation of this agreement or an appeal against discipline imposed, which is not settled under sub-paragraph 73.1(c) may be referred by any of the signatories to this agreement to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work.
>
> **73.3** A request for arbitration shall be made in writing by either party to the other within 60 calendar days following the date decision is rendered in writing under sub-paragraph 73.1(c) by filing written notice thereof with the Canadian Railway Office of Arbitration and on the same date by service thereof on the other party.

It must also be recognized, however, that referral to arbitration is also specifically addressed in the language of Addendum 95, where a delay of thirty calendar days rather than sixty calendar days is expressly provided.

The principal position advanced by the Union is that a proper reading of Addendum 95 indicates that the parties did not intend such disputes to be processed through the various steps of the grievance procedure. In particular, its representative stresses that neither employees nor local chairpersons have the ability to initiate a “remedy” grievance under Addendum 95 of the collective agreement. It is suggested, in fact, that if it were so there could be numerous frivolous nuisance grievances generated. In the Union’s submission that has been avoided by vesting only in the General Chairperson the ability to initiate a remedy grievance, whether by identifying and bringing forward into the remedy process a grievance which has already been filed and dealt with under the regular grievance provisions of the collective agreement or, alternatively, by putting it forward directly through the General Chairperson, as

happened with respect to the claim of Locomotive Engineer Arruda. With respect to the purposive intent of Addendum 95, the Union stresses that the obvious purpose of the Addendum is to give to the General Chairpersons the ability to move directly to arbitration with perceived blatant violations of the collective agreement, without risking the greater delays of the normal grievance process, which are said to possibly involve delays of as long as six months before a matter can be referred to arbitration. As an alternative submission, the Union relies on the doctrine of estoppel, maintaining that the Company has never previously objected to the Union dealing directly with remedy claims, without progressing them through the grievance procedure contemplated under article 73 of the collective agreement.

The parties referred the Arbitrator to a considerable amount of past practice. The Company's representatives note that the General Chairpersons in charge of other collective agreements have, in fact, followed the procedures of article 73, taking grievances through the various steps of the grievance procedure even where they are identified as being a remedy grievance. While the Company does not dispute that a number of remedy grievances advanced by the instant grieving Union as well as the intervener Union were resolved without going through the various steps of the grievance procedure, it stresses that those procedural shortcuts were the result of the Company's agreement, in the circumstances of each particular case.

The practice described by the Union, however, is substantially different. Under collective agreement 1.1, the Union submits that the virtually uniform practice of the

General Chairman has, since the inception of the remedy provisions of Addendum 95, been to file remedy grievances directly with the appropriate Company officer, stressing that hundreds of such grievances have in fact been handled in that manner and generally resolved without recourse to arbitration. The Union points out that in fact the Company's first apparent concerns with respect to by-passing article 73 began to emerge in 2009. As is evident from the record, it does appear that the Company did make a number of objections, whether in the form of grievance responses or letters, commencing in February of 2009 through to the present time, voicing its view that all grievances, including remedy grievances, must be processed through article 73 of the collective agreement. By way of example, the following letter from the Company's Director, Labour Relations, Doug VanCauwenbergh, dated March 16, 2010 clearly places the Union on notice. That letter reads, in part, as follows:

> The Company has, in previous correspondence, outlined to you its expectations, that you adhere to the provisions of Article 73 of the 1.1 Agreement. The Company has once again recently received alleged grievances from your office, which do not conform with the provisions found in Article 73 of the 1.1 Agreement.
>
> To that end please be advised of the following:
>
> > The Company fully requires that the Union submits grievances, in accordance with the grievance procedure outlined in Article 73 of the 1.1 Agreement, including but not limited to progression through the proper steps and within the timelines provided.
> >
> > In accordance with Addendum 51 of the 1.1 Agreement and the Memorandum of Agreement establishing the CROA&DR, no dispute can be referred to the arbitrator until it has been processed through to the last step of the grievance procedure.
> >
> > In respect to Addendum 95 of the 1.1 Agreement, the Company maintains its position that it is not a replacement for the grievance procedure, nor does it circumvent the requirements found in Article 73 of the 1.1 Agreement. The Company will not be agreeing to refer any dispute, under the terms found in Addendum 95 of the 1.1 Agreement, to arbitration unless the specific

> allegations and individual grievances have been processed through the grievance procedure.

Having considered the submissions of the parties, I turn to resolve this dispute. Firstly, what is the intention of Addendum 95? With the greatest respect to the submission advanced on behalf of the Union, I can see nothing in the language of Addendum 95 which indicates that it is intended to operate entirely independently of the normal grievance provisions found in article 73 of the collective agreement, save for one exception. As is evident from the language of Addendum 95, remedy grievances which are unresolved can be referred to arbitration within thirty days, rather than the sixty calendar days provided for under article 73.3 of the collective agreement. From a purposive standpoint, I am also persuaded by the submission of the Company that it is more plausible that the parties would have intended that all grievances, including remedy grievances, should have the benefit of being discussed and reviewed at the steps of the grievance procedure. In Canadian collective bargaining the grievance procedure is well recognized to be intended to assist in identifying issues and, if possible, resolving them through whole or partial settlements or, in the event they are found to be without merit, their possible withdrawal by the Union. In my view the parties should be presumed to have wanted to preserve that exercise for all grievances, including remedy grievances under Addendum 95, as least to the extent that they have provided no clear and unequivocal language to the contrary. Therefore, from the standpoint of the interpretation of the collective agreement, I would be compelled to conclude that the Company's interpretation is correct.

That, however, is not the end of the matter. As is clear from the substantial volume of material placed before me by the Union, for a good number of years the Company has accepted, without objection, the Union's practice whereby the General Chairman has directly advanced a substantial number of remedy grievances for resolution without those grievances having gone through the steps of the grievance procedure. In fact, insofar as I can glean from the record, for the better part of eight years, prior to 2009, the Company registered little if any objection to the approach whereby the procedures in article 73 were not followed in dealing with remedy grievances. On the basis of what is before me, had this dispute matured in 2009, it is arguable that the doctrine of estoppel would apply to prevent the Company from now asserting the application of article 73 to remedy grievances. However, as noted above, commencing in 2009, on a number of occasions through letters and verbal statements, the Company did communicate to the Union its view that remedy grievances must first proceed through the various steps of article 73 of the collective agreement. The Union was then well aware of the Company's view and both parties had the fullest opportunity to bargain a resolution of their differing interpretations at the renewal of their collective agreement which, I am advised, was concluded in late 2011. In other words, if it could be said that the doctrine of estoppel would have operated, there was no longer any injurious reliance which could be claimed by the Union, given that it had every opportunity to bargain about the issue with the Company upon the renewal of the collective agreement. No prejudice can therefore be demonstrated.

A review of the files of this Office suggests that the Union is not well placed to plead injurious reliance in any event. It would appear that this is the first remedy grievance which has matured to the point of arbitration, under the collective agreement of this Union. All others appear to have been resolved by the parties or otherwise dealt with. Additionally, the records of this Office indicate that remedy grievances brought to arbitration under other collective agreements have generally originated at the first step of the grievance procedure in the collective agreement in question, although there have been a few exceptions.

The parties, who are experienced in collective bargaining, have been explicit in identifying grievances to be dealt with other than at step 1 of the grievance procedure under article 73.1 of the collective agreement. For example, article 73.1 provides that discipline in excess of thirty demerits and discharge are to be commenced at Step 3 of the grievance procedure. Had they intended an exception for Addendum 95 they could have so stipulated. However, they did not.

In the result, the Arbitrator is compelled to conclude that the Company's interpretation is correct. There is very simply no language within Addendum 95 which would suggest that a remedy grievance is exempt from the procedural requirements of article 73 of the collective agreement, save for the shorter period identified for referral to arbitration. In effect, Addendum 95 allows a General Chairperson to expand the scope of a grievance at Step III and carry the matter forward from that point as a remedy grievance. Doing so then triggers a faster track to arbitration in 30 days rather than 60

days. However, there is no language in Addendum 95 to suggest that the normal steps of the grievance procedure can be ignored.

For the foregoing reasons the grievance, as presented, must be found to be inarbitrable.

May 17, 2012 **(signed) MICHEL G. PICHER**

ARBITRATOR