# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

# CASE NO. 4459

Heard in Montreal, April 14, 2016 and October 18, 2016

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Conductor Frank Henophy was required to set out 53 cars from his train at the initial terminal.

**THE COMPANY'S EXPARTE STATEMENT OF ISSUE:**

The Union alleges that after reporting for duty on June 9th, 2014 Conductor Henophy was instructed by a Company officer to set out 53 cars (CGTX 781312 – NCIX 6078) from his outbound train to track A09 in Sarnia Yard. Conductor Henophy actually worked train M38261 09 on June 10th, on duty at 1446.

Conductor Henophy claimed and was paid a PI for making the set off under Article 2.5 of the 4.16 Agreement.

In addition, Conductor Henophy submitted a claim for 100 miles for making the set off, which was declined by the pay office.

The Union asserts that the setting out of cars into the yard tracks was yard work. The Union submits that the Company blatantly and indefensibly violated Articles 11.7 (b) and 41 of the 4.16 Collective Agreement, the St. Clair Tunnel Agreement, CROA jurisprudence, Arbitrator Picher's cease and desist award and CIRB decision 315.

The Union further submits that the Company violated Articles 85 and 56.

The Union is seeking an order for the Company to cease and desist from violating Articles 11 and 41.

The Union seeks to have Mr. Henophy be made whole.

The Union further seeks a remedy under addendum 123 of the 4.16 Collective Agreement for the blatant and indefensible violation of the Collective Agreement.

The Company disagrees and denies the Union's request. In addition, the Company submits the Union forfeited their claim for a Remedy when they refused to meet.

**FOR THE UNION:**
**(SGD.) J. Robbins**
General Chairman

**FOR THE COMPANY:**
**(SGD.) V. Paquet for J. Orr**
Vice-President Eastern Canada

There appeared on behalf of the Company:

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| D. Larouche | – Manager Labour Relations, Prince George |
| D. VanCauwenbergh | – Director Labour Relations, Toronto |
| C. Michelucci | – Director Labour Relations, Toronto |
| J. Krawel | – Retired Labour Relations Manager, Toronto |
| R. Helmle | – CMC Manager East |
| V. Paquet | – Labour Relations Manager, Toronto |

And on behalf of the Union:

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| M. Church | – Counsel, Caley Wray, Toronto |
| J. Robbins | – General Chairman, Sarnia |
| J. Lennie | – Vice General Chairman, Sarnia |
| J. Halle | – General Chairman, Levis |
| S. Savage | – General Chairman, Levis |

## AWARD OF THE ARBITRATOR

This case is a claim by the Union of a violation of Article 41.1 of the 4.16 agreement. That article provides:

> Except as provided in Article 12 of Agreement 4.16, the following will apply: switching, transfer and industrial work, wholly within the recognized switching limits, will at points where yard service employees are employed, be considered as service to which yard service employees are entitled, but this is not intended to prevent employees in road service from performing switching required in connection with their own train and putting their own train away (including caboose) on a minimum number of tracks. Upon arrival at the objective terminal, road crews may be required to set off 2 blocks of cars into 2 designated tracks.

The Company parties also refer to Article 11.7(d) of the 4.16 agreement:

> Notwithstanding the provisions of Article 41, such trains are not required to perform switching in connection with their own train at the initial or final terminal; if switching in connection with their own train is required at the initial or final terminal to meet the requirements of the service, (except to set off a bad order car or cars or lift a bad order car or cars after being repaired), the conductor will be entitled to a payment of $12^{1/2}$ miles in addition to all other earnings for the tour of duty.

On June 10, 2014 Mr. Henophy was to work on a Conductor Only crew from Sarnia to Toronto. When he arrived at the terminal he was instructed to set off 53 cars.

In the usual circumstance, this work would have been performed by the inbound crew (in this case from the U.S.) but due to time constraints, the inbound crew was unable to perform the set off. Mr. Henophy performed the set off and then left for Toronto with the train.

The Union claims the work Mr. Henophy was asked to perform was in violation of Article 41.1 of the collective agreement and that the work was yard work. The Company says that the 12-1/2 mile payment provided to the Grievor is the correct payment in this case. The Union relies on **Ad Hoc 560**, an award from the Western Region which the Company contends has no relevance given that it was decided under a different collective agreement.

The Company contends that the work the Grievor did was allowed under Article 11.7 (d), with the 121/2 mile payment paid (referred to under code PI). It contends further that the Union cannot rely on both Article 11.7(d) and Article 41 as to do so would be contradictory. It contends what the Grievor did was “switching in connection with his own train to meet the requirements of service”. (Article 41.1).

The Company asserts that if the Union’s argument is correct then the work at issue is yard work, which cannot logically be the case since if the inbound US crew would have performed the work, there would have been no objection. In this case the inbound crew was out of time to perform the work. It also relies on **AdHoc 524** for the proposition that Article 11.7 contemplates the Conductor Only road crew making a set

off at the initial terminal and being paid only the 12 ½ mile payment. The Union distinguishes this case by noting that it did not arise in the Sarnia yard, but rather in an operation where there were no road assignments.

The Company's estoppel argument begins by reliance on a meeting held in November 2004 where the Union referenced **AdHoc 560** and its application to the Eastern Agreement. The Company argues an agreement was reached with the Union at that time and the Company has paid in accordance with that agreement. The Company produced four grievances dated after November 2005. A number of grievances subsequent to that agreement were not pursued, and it would appear on reliance on that agreement. The agreement was referred to by the Company in its Claim Form appended to the instant grievance. In addition to arguments advanced by the Union about the Company's right to raise an estoppel case at the time and manner in which it did, the Union argues that in any event, these facts do not give rise to an estoppel.

On the substance of estoppel argument, the Company raised the issue of an agreement between the parties in its Claim Form appended to its grievance response. It provided responses to other grievances between 2005 and 2007 and it provided a number of claim forms in the form of an excel spreadsheet detailing when payments were made. Upon close inspection of the a spread sheet and claim forms produced at the hearing, on a small number of what was listed on the spreadsheet involved the same situation as gave rise to this grievance; specifically when the work is done because the inbound crew is out of time. Although the Company described a meeting,

discussions and grievances that were not pursued on this issue there is written agreement to substantiate the clear position of whether only a PI payment or a remedy payment was required. There appears to be agreement that generally the inbound crew would perform the set off, but no clear understanding between the two parties as to what would occur in the event, as in the instant case, when the outbound crew was required to do so. Absent a written agreement, the issue did not arise sufficiently often enough to create a practice that the Company can now rely on as an estoppel.

In respect of the particular circumstances of this case, I need not deal with the Union's objection to the Company's estoppel argument (that I should not hear it at all) since the facts and conduct upon which the Company relies are not sufficient to create an estoppel in favour of the Company's position.

In this case and based on the relevant CROA jurisprudence and the findings above, Conductor Henophy was instructed to perform work, i.e. switching, not in connection with his own train. As such, and in regard to my finding on the estoppel issue, there was a violation of the Collective Agreement.

Accordingly the grievance is allowed. At the request of the Union the issue of remedy is referred to the parties for resolution, failing which I remain seized to deal with it.

December 19, 2016

**MARILYN SILVERMAN**
**ARBITRATOR**