CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4531

Heard in Montreal, January 11, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the Company's unilateral changes of not paying "off main track payments" (OM) at Vaughan Yard and the refusal to establish an Abeyance Code for these declined claims.

THE UNION'S EX PARTE STATEMENT OF ISSUE:

The Company, without notice, arbitrarily ceased approving of "off main track" payments at Vaughan yard which is an "enroute" location as defined in the Collective Agreements. Articles 15.01 and Article 12.03 of the Locomotive Engineer and Conductor, Trainmen and Yardmen Collective Agreements respectively state "Mileage or hours made, whichever is greater, when engine is run more than one mile off main track will be added to mileage of the trip." Furthermore, in both Collective Agreements, LE and CTY, there is a letter Re: Off-Mainline/Conductor Only Premium Payments Enroute (EC) stipulating that duplicate payments entitlements were contemplated and payable.

The Union further contends that Canadian Pacific Railway is estopped from unilaterally departing from past practice by cancelling OM payments as it has honoured these payments since Vaughan Yard began operations.

Furthermore, the Company, in response to the step two appeal, misinterpreted the Arbitrators award in CROA 3769. The first paragraph quoted by CP states "However the Union's case is more compelling as regards the purposive interpretation of article 15.01…." The Company's response is supportive of the Union's argument. Furthermore, the Arbitrator states the following;"… I am satisfied that the parties would not have intended the anomalous situation by which hno such payments are made for the movement of the Company's crews on CN territory at Franz where, if the Company's practice is supported, no OM payment is to be made and no mileage or time payment is to be made either. From a certain perspective that interpretation would occasion something of a windfall for the Company." In fact, the last paragraph of Arbitrator Picher's award, he allows the grievance and remitted back to the parties for payment.

There can be no disputing the fact that locomotives travel more than one mile from the main track at Vaughan, in order to make lifts of set offs of cars which renders the Company's argument unsubstantiated.

Further the Company has refused as per the Collective Agreement provisions to establish an Abeyance Code. Appendix 25 of the 2007 MOS reads in part;" In order to ensure clarity regarding the process of establishing a code, the following was confirmed:

- A grievance is filed regarding a claim for payment.
- If it is expected that this circumstance will occur on a regular basis during the grievance procedure, the local chair may make a request to the local manager that an abeyance code be established.
- The local manager will review the matter with Labour Relations to ensure that the requested code falls within the purpose of the codes as outlined above.
- When in accordance with the purpose, Labour Relations will (Emphasis added) arrange that the CMC establish an abeyance code and issue a bulletin detailing when the code should be used and what supporting information, if any, is required."

The Union contends that the Company has/is violating the terms of the Collective Agreements as well as arbitral jurisprudence.

The Union requests that: the Company be found to have violated the Collective Agreement as alleged; the Company be ordered to cease and desist from said violations; the Company be ordered to comply with the Collective Agreement; the Company compensate the Union and employees in question for any and all loses suffered as a result of these violations; and such other relief as the Union may request. The Union also requests that an abeyance code be set up for reoccurring claims to be tracked. The Union requests that all claims submitted (declined by the auditors) by searched and paid for in accordance with above.

The Company disagrees with the Union's contentions.

FOR THE UNION:
(SGD.) J. Campbell
General Chairman – LE East

And

(SGD.) W. Apsey
General Chairman – CTY East

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

B. Scudds	– Manager Labour Relations, Minneapolis
C. Clark	– Assistant Director Labour Relations, Calgary
T. Sheaves	– General Manager, Special Projects, Calgary

And on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
M. Biggar	– Counsel, Caley Wray, Toronto
J. Campbell	– General Chairman, LE East, Peterborough
W. Apsey	– General Chairman, CTY East, Smiths Falls
C. Yeandel	– Vice General Chairman, LE East, Montreal
D. Fulton	– General Chairman, CTY West, Calgary

G. Edwards – General Chairman, LE West, Calgary

D. Edward – Senior Vice General Chairman, CTY West, Calgary
D. Psichogios – Vice General Chairman, CTY East, Montreal
P. MacDonald – Local Chairman, LE East, Toronto

AWARD OF THE ARBITRATOR

The present arbitration concerns the appeal of the Company's unilateral decision to stop paying "off main track payments" (hereinafter: "OM payments") at Vaughan Yard and the refusal to establish an Abeyance Code for these declined claims.

Situated in Ontario, the Vaughan Intermodal Terminal was built in 1990. The facility has been extended several times after its initial construction. The Yard's tracks were expanded North, towards the spur track connecting Vaughan terminal and the Mactier Subdivision mainline. The latest extension was done in 2013, when a double loop was added.

The essence of this conflict revolves around the interpretation of the articles of the Collective Agreements in question that determine the eligibility for OM payments: Article 15.01 of the Locomotive Engineer Collective Agreement and Article 12.03 of the Conductor, Trainmen and Yardmen Collective Agreement. Both state that:

> "Mileage or hours made, whichever is greater, when engine is run more than one mile off main track will be added to mileage of trip."

Since the 1990's, the distance between the main track and the yard was considered to be more than one mile and the Company has made OM payments accordingly.

Although OM payments were still made, the beginning and end mark of such payments has changed over the years. In 1997, the mark was identified as being between the crossover switches at Vaughan terminal (Bulletin 721). Then, in 2002, the mark was understood to be west of the #4 crossover (Notice 308). On October 2nd, 2013, the Company served 30 days' notice that it was cancelling a letter of understanding signed by the parties concerning the start and end of EC claims. That decision was appealed and, following a grievance meeting on November 29, 2014, another local agreement was signed between the parties. This new letter of understanding pertained to the beginning and end of EC and OM claims, it provided that OM claims would begin and end at the "AEI" reader near Huntington road.

Less than three months following the local agreement, based on new calculations, the Company deemed the distance travelled between the main track and the Vaughan terminal to be 352 feet short of a mile. The Company calculated that starting from the siding at MP 15.3, the distance travelled to the Terminal was 4,928 feet. On February 17, 2015, the Company exercised the 30-day Notice to cancel the 2014 Local Agreement, as per said agreement.

During the first week of October 2015, the Company effectively stopped making OM payments for the distance travelled on the spur track leading to Vaughan terminal. The auditors would simply state: “not payable at this location”. No notice was given to the crews in advance. Furthermore, although the Union asked for it in its Step II grievance letter, the Company did not establish an abeyance code for the employees to keep records of theirs claims pending the grievance process.

The Union claims that no material change to the Vaughan facilities justify a change in the calculation of the distance between the yard and the main track. It asserts that the spur track is longer than one mile to and from Vaughan Yard and that, as such, crews are entitled to OM payments as it has been the practice from the Company for decades. Additionally, the Union asserts that nothing in the articles of the Collective Agreements specify that mileage inside a yard’s limits do not count towards OM payments calculations. Alternatively, it submits that the Company is estopped from cancelling a practice that dates back to the 1990s. Finally, it adds that an Abeyance Code should be set to track reoccurring claims.

With all due respect, some of the arguments presented before this Office were lackluster and unconvincing. Not only were they, at times, unsubstantiated by any evidence or justification, some were plainly opposed to the parties’ own practice followed for the past decades.

Concerning the expansion of the limits of Vaughan Yard, the Company states that throughout the years, the limits of the Yard, due to alterations in the tracks in relation to the main line changed the application of the provisions dealing with OM payments. However, the Employer failed to provide any evidence that changes would have been made to the Yard since the November 2014 agreement between the parties, indeed, the Company clearly states in its brief that the last change to the yard was effected in 2013. Also of interest is that the new point designated by the Employer, the #4 crossover, is closer to Vaughan Yard than the one to which both parties agreed in 2014: the AEI reader near Huntington road. Logically, one would assume that a designated point nearer to the Yard would entail a longer distance from the main track. Nevertheless, the Company's calculations, which were never detailed, provide that the distance is now shorter than a mile by a mere 352 feet. Additionally, it was pointed out during the hearing that the Employer did not take into account the distance travelled by crews travelling to and from the South.

The Employer asserts that his interpretation of the Collective Agreements is condoned by the jurisprudence of this Office in **CROA&DR 134**, where the Arbitrator stated that only mileage made on the spur can count towards OM payments. Conversely, to justify that OM payments should be made for miles travelled inside a yard's limit, the Union submitted the decision **CROA&DR 4**, in which the arbitrator stated that "running off main track" was not limited in its scope by any qualifying restriction. The decisions cited by the parties go back to 1965 and 1968 respectively. Although the Company and the Union assert the validity of these decisions, in fact, they

both acted differently from said decisions since the construction of Vaughan Yard. Indeed, the process of determining a specific point on the spur where OM payments would begin and end goes contrary to the two cases they cited and of which they are reputed having knowledge of. For the Company, it means that the whole of spur was not always considered to be off the main line, and for the Union, it entails that OM payments were not made for miles made in Vaughan Yard. Therefore, both arguments must fail, since the parties' pretensions go against their practice of the last decades.

A question remains: was the Company estopped, as the Union claims, from refusing to honour the employees' claims?

As mentioned by learned authors Brown and Beatty, the concept of equitable estoppel has been expressed in the following way:

> "The principle, as I understand it, is that where one party has, by his word or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration, but only by his word."[1]

[1] *Combe* v. *Combe*, [1951] 1 All E.R. 767 (C.A.), p. 779; see Brown and Beatty, 2:2211, Release No 55, December 2016.

In *Canadian National Railway* v. *Beatty*, the Ontario Divisional Court, regarding the doctrine of estoppel by conduct, applicable in the specific context of this case, stated:

> "By its conduct in persistently paying many classifications of employees from the first day of illness in the face of a clause providing for a waiting period, the company gave the union an assurance which was intended to affect the legal relations between them. The union took the company at its word and refrained from requesting a formal change in the agreement. The company should not now be allowed to revert to the previous relations as if no such assurance had been given."[2]

The evidence shows that throughout the Yard's existence, since the 1990s, the Company has paid crews departing and arriving at Vaughan Yard OM payments. Throughout that period, mutually satisfying points of beginning and ending of OM payments were agreed upon by the parties, both with and without a bilateral agreement.

As such, I am satisfied that the Employer, by his conduct, has made a promise that it would provide the crews operating at Vaughan OM payments for a certain distance travelled on the spur leading to the terminal. The Union has acted upon that promise by submitting claims for OM payments which were made since the construction of the yard. It goes without saying that the Company's refusal to pay crews for OM claims is prejudicial to them. Thus, the Employer is effectively estopped from refusing to make OM payments to its employees.

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[2] 1981 CarswellOnt 1137, par. 28

The Company has argued that by cancelling the November 2014 agreement, it had cancelled the estoppel and was not bound by it anymore. The jurisprudence of arbitral courts, including this Office, give a different interpretation of the possibility to cancel an estoppel by notice to the other party. In a most recent case, although the arbitrator decided against the union, he stated the following concerning the notice to cancellation:

> [27] I conclude that any detrimental reliance ended with the notice on January 16, 2013 by the Employer that it was going to exercise its right to eliminate the camp shifts. It would have been different if notice had been given after collective bargaining had ended and a new collective agreement signed. But notice was given in the midst of bargaining when the Union had a chance to do something at the negotiating table about the Employer's decision.[3] (emphasis added)

In **CROA&DR 3769**, arbitrator Picher held a similar stance:

> "Before turning to that aspect, however, the Arbitrator must agree with the Company's representative that a case of estoppel is not made out on the facts before me. The record discloses that at the time the Union was aware of the Company's change of position with respect to the payment practice at Franz it was in bargaining with the Company for the renewal of the collective agreement. In other words, the Union did have every opportunity to deal with the Company's change of position as regards the OM premium being discontinued at Franz, contrary to the previous practice. For reasons the Union best appreciates, however, although it filed a grievance during the same period, it made no attempt to resolve the issue at the bargaining table. In that situation, I must agree with the Company's representative that the element of injurious reliance on the part of the Union is not made out." (emphasis added)

In the present case, the notice was given after collective bargaining had taken place and so the Union did not have a chance to negotiate with the Company on this

[3] *Saskatchewan (Ministry of Justice)* and *SGEU (Humble)*, *Re,* [2014] CarswellSask 645 (Saskatchewan Arbitration)

occasion. As such, it cannot be pleaded that notice was given to the Union on that matter, as no bargaining was happening or was to happen when the notice was given.

By cancelling the 2014 agreement and unilaterally determining a new reference point, the Employer went against a practice that was held for decades. It did so without producing any evidence or justification to support its claims for a newly designated point. As previously mentioned, the Company, in its own brief, explains that the last change to the Terminal occurred in 2013, yet, it cancelled the 2014 agreement on the basis that changes were made to the yard which allegedly supports its decision to set a new point. Evidently, the argument cannot stand.

However, because of insufficient evidence and jurisprudence pertaining to the proper calculation of distances between the main track and the Yard's limits and where a new reference point should be set for OM payments, I am unfortunately in no position to define them in this award. To support their claims, both parties presented decisions of this Office that were rendered prior to their following practice, which cannot be applied to the case at hand. Therefore, regarding OM claims, for the remainder of the Collective Agreements, or until a new agreement is made, the parties shall be brought back to the *status quo ante*, namely, the 2014 agreement.

As for the Union's grievance regarding the Company's failure to establish an abeyance code, it is entirely justified. Concerning the reason and process of

establishing an abeyance code, Appendix 30 of the 2007 Memorandum of Settlement states, in part:

> "Dear Sirs,
>
> This refers to our discussion during bargaining concerning the process for establishing an abeyance code.
>
> During our conversations it was recognized that the purpose of an abeyance code is to track multiple claims relating to a specific dispute at a location, while a grievance related to pay was being resolved.
>
> In order to ensure clarity regarding the process for establishing a code, the following was confirmed:
>
> - A grievance is filed regarding a claim for payment.
> - If it is expected that this circumstance will occur on a regular basis during the grievance procedure, the local chair may make a request to the local manager that an abeyance code be established.
> - The local manager will review the matter with Labour Relations to ensure that the requested code falls within the purpose of the codes as outlined above.
> - When in accordance with the purpose, Labour Relations will arrange that the CMC establish an abeyance code and issue a bulletin detailing when the code should be used and what supporting information, if any, is required.
>
> […]"

I am satisfied that all conditions were met, save for the Company's responsibility to establish the code, which it failed to do. The Employer should have established an abeyance code when it was requested by the Union in accordance with the Memorandum of Settlement letter.

Therefore, for all the above-mentioned reasons, the grievance must be allowed. Until a new agreement is to be reached concerning a new reference point for the beginning and ending of an off main track calculation, if applicable, the parties shall

apply the reference point agreed upon in the 2014 Letter of Agreement. The Company's auditors shall search and pay for OM claims that were denied since the October 2015 period. Furthermore, an abeyance code is to be established in order to track potentially reoccurring claims that the Company would refuse.

I shall remain seized in the event of any difficulty arising from the application of this award.

January 31, 2017

MAUREEN FLYNN
ARBITRATOR