CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4880

Heard in Calgary, November 14, 2023

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union alleges the Company is in violation of Articles 2, 6, 7, 9, 11, 12, 85 and 85.5 of the 4.16 Collective Agreement when the Company instructed Mr. Coons to depart Port Robinson to wye his locomotive.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On June 5, 2015 Conductor G. Coons was employed on train 531/530 and upon reaching his final terminal he was instructed to depart Port Robinson Yard at signal 233 on the Stanford Subdivision on wye his power.

Conductor Coons submitted a time claim for extra service, a basic day at Road Switcher rates for having to perform work after arriving at his final terminal.

Union's Position:

The Union contends that the Company is in violation of Articles 2, 6, 7,9, 11, 12, 85, 85.5 of the 4.16 Collective Agreement and arbitral jurisprudence by instructing Conductor Coons to depart Port Robinson and wye his power.

The Union seeks to have Conductor Coons made whole and paid for the extra service as claimed. The Union further seeks to have the Company cease and desist from issuing instruction for Conductors to wye their power after yarding their train at the final terminal.

Given the violations of the Collective Agreement that a Remedy is applicable in the circumstances consistent with Addendum 123 of the 4.16 Collective Agreement. The Union seeks a substantial remedy in this instance as this a repeated and deliberate violation of the 4.16 Collective Agreement.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Robbins	**(SGD.)**
General Chairman (2015)	

There appeared on behalf of the Company:

D. Wenstor	– Labour Relations, Edmonton
S. Fusco	– Labour Relations, Senior Manager, Edmonton

I. Muhammad – Labour Relations, Manager, Edmonton

And on behalf of the Union:
K. Stuebing – Counsel, Caley Wray, Toronto
J. Lennie – General Chairperson, CTY-C, Hamilton
G. Gower – Vice General Chairperson, CTY-C, Brockville
E. Page – Vice General Chairperson, CTY-C, Hamilton
M. Kernaghan – General Chairperson, LE-C, Trenton
R. S. Donegan – General Chairperson, CTY-W, Saskatoon

AWARD OF THE ARBITRATOR

Background, Issue and Summary

[1] The Grievor was employed as a Conductor, working out of the Port Robinson Yard at the time of this event. He retired from the Company's service in 2018.

[2] On June 5, 2015 the Grievor was working in a "Conductor Only" crew in road service, on train 531/530 (Port Robinson to Buffalo and return to Port Robinson).

[3] This Grievance is one of several brought to this Office relating to work jurisdiction under the "Conductor Only (road) provisions in Article 11.7, of Agreement 4.16.

[4] This Grievance raises whether the Company can require the Grievor to reorient his locomotive in the opposite direction to prepare it for future use after uncoupling the train cars, when he was part of a Conductor Only crew.

[5] The issue in this Grievance is:

a. Did the Company breach Article 11.7 of Agreement 4.16 when it required the Grievor to "wye" his power after his arrival at the Port Robinson Yard?

[6] For the reasons which follow, the Grievance is allowed. The Company was in breach of Article 11.7 when it required the Grievor to perform this work. The issue of remedy is addressed at the end of this Award.

Preliminary Objection

[7] As a preliminary objection, the Union noted that while the Company argued laches on the Union's part in pursuing this Grievance, it was constrained in doing so, since it had not filed an *Exparte* Statement of Issue, or agreed to a Joint Statement of Issue, to raise that issue.

[8] I am in agreement with the Union's argument on this point.

[9] Article 10 of the CROA Memorandum of Agreement ("CROA MOA") sets out the terms of this expedited arbitration process. It requires the parties to make "good faith efforts" to reach a Joint Statement of Issue ("JSI"). If they cannot do so, either party can approach the Arbitrator to obtain leave to file an *exparte* Statement of Issue[1]. In practice, the parties file these Statements of Issue quite regularly, without obtaining leave. The parties have also agreed that an Arbitrator is limited in her jurisdiction to resolving the issues set out in the Statement of Issue (whether filed "jointly" or "*exparte*").[2]

[10] In this case, there is no JSI. The Union has filed an *exparte* Statement of Issue, which is reproduced above. The Company has not. As the Company did not raise any issues in a Statement of Issue, the Company is limited in its arguments to responding to the arguments of the Union as set out in their *ex parte* Statement of Issue. In particular, as the Company has not properly raised any issue of delay or *laches* in its filings with this Office, I do not have jurisdiction to address those issues in this Award.

[11] The preliminary objection is sustained.

Analysis and Decision: Merits

[12] This is the third and final dispute heard during the November 2023 session involving what are referred to as "Conductor Only" provisions.[3] In this case – unlike in the other two cases – the work involved is Conductor Only (road) service and not Conductor Only (yard service). It is also work performed in Central Canada, which is governed by Agreement 4.16.

Collective Agreement Provisions

Article 7.8

> Final terminal time will be paid for on the minute basis at the straight-time rate (each 4.8 minutes to count as 1 mile) computed from the time engine reaches designated main track switch connecting with the yard track…

[1] At Item 10.
[2] At item 14.
[3] **CROA 4887**; **CROA 4888**

Article 11.4 [part of Article 11, “Freight Service”]:

Except as otherwise provided herein, all freight, work and mixed trains will have a conductor and one assistant conductor. On mixed trains, the assistant conductor may be used to handle baggage, mail and/or express.

…

Article 11.7 [part of Article 11, “Freight Service”]:

Notwithstanding the provisions of paragraph 11.4, trains operating in through freight service may be operated with a conductor but without an assistant conductor provided that:

(a) Such trains are operated without a caboose;

(b) At the initial terminal, doubling is limited to that necessary to assemble the train for departure account yard tracks being of insufficient length to hold the fully assembled train;

(c) At the final terminal, doubling is limited to that necessary to yard the train upon arrival account yard tracks being of insufficient length to hold the train;

(d) 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 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 ½ miles in addition to all other earnings for the tour of duty [emphasis added].

(e) Such trains are designed to make on more than three stops en route (i.e. between the initial and final terminals) for the purpose of taking on and/or setting out a car or group of cars together. [A Note follows applicable to the First Seniority district]

(f) Such trains are not required to perform switching en route (i.e. between the initial and final terminal) except as may be required in connection with the taking or setting out of cars as, for example, to comply with the requirements of rules and special instructions governing the marshalling of trains.

…

Article 12.5 [part of Article 12 Road Switcher Work]

Employees may be run in and out and through their regularly assigned initial terminal without regard for rules defining completion of trips. Time is to be computed continuously from the time employees are required to report for duty until time released at completion of the day’s work.

Article 41 “Yard Service Employees’ Work Defined”

41.1 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.

…

[13] The facts are not in dispute.

[14] On June 5, 2015, the Grievor was employed on Train 531/530. Upon reaching Port Robinson yard after performing this freight service (Port Robinson to Buffalo and return), the Grievor uncoupled his cars as directed. He was then instructed to "wye" his power. A "wye" is a set of tracks which allows a locomotive – through several movements – to change directions and end up in the opposite direction.

[15] In its Brief (para. 10), the Company noted that since the train in question is "one that starts and ends in Port Robinson, after traveling through Buffalo, locomotives are frequently facing the opposite direction from that which is needed for the following shift".

[16] In its Rebuttal Brief, the Company noted that crews are:

> "…regularly instructed to "wye" their power upon arrival at their final terminal being Port Robinson…Conductor Coons uncoupled his locomotive after setting his train off and then reoriented his power through the "wye" and parked his locomotive, then completing his workday".

[17] The Company also noted in its Rebuttal Brief that the reason the Grievor was asked to perform this work was so that the locomotive would be oriented in the proper direction, for a future movement:

> The Company contends that power is regularly decoupled and put through the "wye" to reorient the locomotive. Everything done at one point in time on a timeline is for future use and support of company business, maintenance, as per the Company's needs and requirements. This is a standard practice and not something special or a one-time event. The Union has no ability or responsibility to speculate about the "future" use of any power in this case[4].

[18] The Grievor claimed for extra service, being a basic day at Road Switcher rates, for having to perform this work after arriving at his final terminal. His claim was denied.

[19] There is some dispute about whether the "wye" the Grievor used to orient the locomotive was located within or without of the Port Robinson yard. In view of the basis of my Award, it is not necessary to resolve this disputed issue.

[4] Reply Brief, p. 2.

Arguments

[20] The Union argued the Company had improperly assigned work to the Grievor in breach of Article 11.7(d). it maintained the final set of instructions to "wye" his power was not work connected to the Grievor's "own train", but rather was to place the locomotive in a position for another train and crew to use, heading in the opposite direction. It urged the Company's assignment was in breach of the strict provisions limiting Conductor-Only work, which provisions had been restrictively interpreted in the jurisprudence. It pointed out that Article 12.5 refers to rules defining "completion of trips", which was inconsistent with the Company's argument there was no "release" of the Grievor after he had yarded his train, and it could assign that work. It also argued the "wye" was outside of the Port Robinson Yard, so the Grievor was also required to leave the Yard to perform that work.

[21] The Union argued the Company should have used a road switcher crew to "wye" the power for the next day, under Article 12 of Agreement 4.16. It was the Union's position that to "wye" the power was not a simple or incidental task, but required the Grievor to exit the Port Robinson Yard and proceed on the mainline, making a series of movements to orient the locomotive in the new direction. It relied on **AH560** and **AH606** which advanced a definition of 'requirements of service', which was something "necessary", rather than "preferred or desired" by the Company. It drew analogy from that decision to this case, as it argued there was no 'requirement' for the Grievor to "wye" his power, as that work was in the service of assembling the consist of another train, as in **CROA 4458**. It also relied on **CROA 4425** for the distinction between work to put away "one's own train" versus "further to movement out of the yard". It noted that decision was upheld on judicial review: *CN v. TCRC* 2017 NSSC 1117.

[22] The Union has requested that the issue of remedy be remitted back to the parties for negotiation, with the Arbitrator to remain seized, if the parties cannot agree.

[23] The Union relied on: *U.T.U. v. Canadian National Railway* 2005 CIRB 315 (Can. Industrial Relations Board; **AH560**; **AH606**; **CROA 4458**; **CROA 4425**; *CN Railway*

v. TCRC 2017 NSSC 117 (NSSC); **CROA 4575**; **CROA 4683**; **AH605**; and **CROA 4559**.

[24] The Company argued there was no 'automatic release' at the final terminal, so no violation of the collective agreement had occurred. Its position was there was no language in the collective agreement that prevented the Company assigning the crew tasks upon arrival at the final terminal, and no language which directed how locomotive power was to be handled. It maintained that the plain and ordinary meaning of Article 7.8 reflected that the Company had the ability to assign work at the final terminal and that the "wye" was within the yard limits of Port Robinson. It argued that train crews are required to "wye" their power on arrival as part of their duties when yarding their train, since the train starts and ends at Port Robinson, and that requiring the "wye" of power was a regular occurrence. The Company argued the Grievor claimed for extra work as he falsely believed he was out of the Yard limits in performing the work, which he was not.

[25] The Company argued a remedy was not applicable. It argued that the orientation of the locomotive was part of the Grievor's tasks to be performed in yarding his train, before he was released from service for that shift. It argued there was no blatant and indefensible violation of the Collective Agreement and so there was no basis for a remedy under Addendum 123.

[26] The Company relied on: **SHP698**; *Brown & Beatty, ss. 4:2100;* **CROA 3406**

Analysis and Decision

[27] The question in this grievance is not whether the Company required this work to be done, or if the Union was entitled to speculate about the future use to be made of the locomotive.

[28] Rather, the question in this Grievance is whether the Company was entitled to expect this work to be done *by a Conductor Only crew* as part of their assigned work before they were "released" from duty.

[29] For the reasons which follow, I find the answer to that question is "no".

[30] This is a contract interpretation Grievance. The principles to be used to interpret contracts have been recently synthesized by this Arbitrator in **CROA 4884**, and will not be repeated here.

[31] There are several 'surrounding circumstances' which are part of the factual matrix for interpreting Article 11.7. I am satisfied that:

a. Historically, trains in road freight service in Canada were operated by a four-person crew (a locomotive engineer, a conductor, and two brakespersons).

b. Over the years, with the implementation of technological advances (such as more sophisticated radio communication and dispatching and mechanized hot box detectors), railways achieved the ability operate with reduced crews.

c. The Union and the Company agreed to a series of Memorandum of Agreements beginning in 1989 with the advent of cabooseless trains.

d. Between July 12, 1991 and March 29, 1992, the predecessor Union to the TCRC signed Memorandums of Agreement surrounding the operations of Conductor Only operations for through freight trains across the CN system;

e. Different agreements were negotiated for different regions; and for Conductor Only (road service) versus Conductor Only (yard service);

f. As a result of these MOA's, the crew consist was first reduced from 1 Conductor and 2 Assistant Conductors to a crew consist of 1 conductor and 1 Assistant Conductor, both in the lead locomotive; the crew consist was further reduced from 1 Conductor and 1 Assistant Conductor to a crew consist of a Conductor Only.

g. Certain criteria had to be met for trains to be operated with a Conductor Only.

h. These provisions are not the same in all regions of the country; neither are they the same as between Conductor Only (yard service) and Conductor Only (road service);

i. These provisions are referred to in the jurisprudence as "Conductor Only" provisions;

j. For these parties, the criteria for Conductor Only (road service) for Central Canada are now incorporated in Article 11.7(a) to (f) of Agreement 4.16.

k. There have been several disputes regarding the meaning of the Conductor Only provisions between the parties.

l. The Supreme Court of Nova Scotia has judicially reviewed **CROA 4425** and provided certain guidance on the meaning of "the requirements of service": *CN Railway v. TCRC and Silverman* 2017 NSSC 117.

[32] This is the broader factual context that must be considered when interpreting these provisions.

[33] In this case, the Company was not simply requiring the Grievor to yard his engine on a particular track, or uncouple his train and then take the locomotive to the ”wye; turn it around to face the opposite direction, *so it would be oriented for the next work*; and then put it in a particular place.

[34] I have not been provided with any other arbitral award that addresses this factual circumstance.

[35] As a preliminary note, in *CN Railway v. TCRC and Silverman,* the Supreme Court of Nova Scotia noted that the provisions of Article 11.7 supersede the general provisions of Article 41.1[5].

[36] As a further preliminary determination, I do not find the requirements of Article 11.7(d) to be ambiguous. I note that none of the jurisprudence that has interpreted this provision has made that finding.

[37] The Company has argued that there is no language which prevents it from directing how the Grievor is to yard his power. I find I cannot agree.

[38] For ease of reference, Article 11.7(d) states:

> 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 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 ½ miles in addition to all other earnings for the tour of duty [emphasis added].

[39] Reviewing Article 11.7(d), the words the parties chose must be given their “plain and ordinary meaning”, as required by the modern principle of interpretation, and in the context of the historical background to these provisions. That Article states “such trains are not required to perform switching in connection with their own train at the initial or final terminal”. It also sets up a particular circumstance whether that switching can be performed, and a payment of 12 ½ miles attracted:

[5] At para, 30.

[40] Giving the words used in Article 11.7(d) their "plain and ordinary" meaning, and considering both a purposive interpretation and the broader factual context, I am satisfied that the objective intention of the parties was to restrict the switching work that can be performed by Conductor Only crews. Any switching that is assigned to such a crew – whether performed at the initial or final terminal by this crew – must be "in connection with their own train". If it *is* such work, then, so long as that switching is required to "meet the requirements of the service" – however that is interpreted[6] – then the Company can assign it to a Conductor Only crew *and the rate of pay for that work is as set out in Article 11.7(d).*

[41] However, if the switching is *not* "in connection with their own train", then it is *not* work that can be properly assigned to a Conductor Only crew. The question of whether that work was done to further the "requirements of the service" does not even arise, in that case[7], as the first criteria has not been satisfied: **AH605.**

[42] The Company has argued that by requiring the Grievor to "wye" the power, they were requiring him to yard *his* engine and complete his duties before he was released. I cannot agree that is what occurred here.

[43] The Company has conceded in its materials that the reason the work to "wye" the power was assigned was to *set up the locomotive engine for future work.* In my view, this is a key and important point.

[44] The Company has also argued that all trains are subject to future movement. Had the Company required the Grievor to take the locomotive to the shop; or even to place it in a track without reorienting it, that would be work done "in connection with his own train", to "yard" that train. The locomotive was required to be placed *somewhere* after all. However, in this case, the Grievor was required to make a series of movements through the "wye" to *reorient* that power in another direction.

[6] As noted in **CROA 4888**, the parties have not been given a great deal of guidance in the jurisprudence about the meaning of this phrase. However, it should be noted this Arbitrator was not provided with Justice Wood's decision in *CN Railway v. TCRC and Silverman,* which reviewed **CROA 4425,** or with **AH605,** which also provides some direction, when determining **CROA 4888**. Justice Wood's found t para. 38 that the "requirements of the service must be determined based upon individual circumstances…." as was done in **AH583.**

[7] See **AH605**

This was work which was required *to prepare that locomotive to make its* ***next*** *run.* It was not work that was undertaken "in connection with his own train". I am satisfied this was work to support a *future* movement, and that is work that is not permitted by Article 11.7(d).

[45] In considering what is meant by the phrase "in connection with their own train", I have carefully reviewed all of the jurisprudence filed by the parties. My finding of the parties' objective intention is consistent with the jurisprudence.

[46] In **CROA 4425**, the Grievor was required to make two cuts to yard his train, then he was *also* required to pick up cars from one track and take to another track and then shove the cars and spot the cars on air. The Arbitrator held that this "further and new task" was so those cars would be "ready for future movement out of the yard**"**[8]. Any further movement properly fell to the yard crew".[9] This was upheld on judicial review. The Arbitrator quoted **CROA 3182** where it was found that to move cars "for furtherance onward by another road crew" was *not* switching "in connection with their own train".

[47] In **AH605**, the Arbitrator held that requiring the lifting of cars to be added to a train which would *then* be handled by another crew "cannot, in my view, be properly be [sic] viewed as switching in connection with his own train". Like in this case, that was a case where the nature of the work was that it was to assist the *next* crew handling the train. In **AH605** the Arbitrator also relied on **CROA 3182,** which it held to be "four square". In that case, the Arbitrator stated:

> …the Arbitrator has some difficulty appreciating how the Company can assert that the movement of cars from one point inside the switching limits of Montreal to another point **for furtherance onward by another road crew** can be said to be switching "…in connection with their own train"[10] (emphasis added).

[48] To use this same phrasing, these two cases are "four square" with the situation before me. I am satisfied the Grievor was assigned work to "wye" this power which was not work that was in "connection with the [Grievor's] "own train". Rather, the

[8] At p. 7.
[9] At p. 6
[10] At p. 5.

work was to facilitate a *future* movement, in the opposite direction, as conceded by the Company.

[49] While I do not question that the Company required this work to be done, the difficulty for the Company is that Article 11.7 (d) does not allow this work to be assigned to a *Conductor Only crew*.

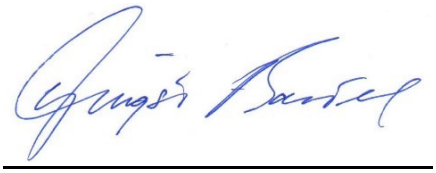
Conclusion

[50] The Grievance is allowed.

[51] I find and declare the Company breached Article 11.7(d) when it required the Grievor to "wye" the power to reorient the locomotive *in the opposite direction from which it had been proceeding,* to prepare it for a future movement.

[52] The Union has requested that the issue of remedy be remitted to the parties for their discussion. I hereby do so. I remain seized of that issue, should the parties be unable to agree.

[53] I remain seized regarding remedy, as above. I also retain jurisdiction to address any issues relating to the implementation of this Award and to correct any errors or omissions, to give it the intended effect.



March 1, 2024

CHERYL YINGST BARTEL
ARBITRATOR