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CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3539

Heard in Montreal, Tuesday 14 February 2006

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

&

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Unions policy grievance alleging a violation of article 78 of Agreement 1.1 and Article 79 of Agreement 4.16 concerning the replacement of CN crews with Ontario Northland Railway (ONR) crews operating Ontario Northland passenger trains on CN lines between North Bay, Ontario and Toronto, Ontario.

JOINT STATEMENT OF ISSUE:

Effective with the Spring Change of Card 2005 CN Rail advised its employees, by bulletin, that assignment designated as "T-1" (ONR passenger trains 697/698) would be abolished. CN crews were notified that such assignments would subsequently be operated by Ontario Northland crews.

It was and is the Unions' position that such changes constituted an adverse effect governed by the material change provision[s] of the collective agreement[s] (articles 78.1 - 1.1 and 79 - 4.16). The Unions requested the Company (CN) comply with these articles. The Unions requests that the Company address all adverse effects as a result of such changes in the crewing of trains 697/698 consistent with these articles.

The Company submits that passenger trains 697/698 are owned by the Ontario Northland Railway (ONR) and that the ONR, under a master agreement between the ONR and CN Rail, exercised its right to crew such trains with their own employees.

The Company argues that such changes fall within the provisions of articles 79/6 - 1.1 and 79.6 - 4.16, which identify when a material change is not applicable.

The Company declined the Unions' policy grievance.

FOR THE UTU:	**FOR THE COMPANY:**
(SGD.) R. A. BEATTY	**(SGD.) J. KRAWEC**
GENERAL CHAIRPERSON	**MANAGER, LABOUR RELATIONS**

FOR THE TCRC:
(SGN.) P. VICKERS
GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. Van Cauwenbergh	- Sr. Manager, Labour Relations, Toronto
J. Krawec	- Manager, Labour Relations, Toronto
J. Torchia	- Sr. Manager, Labour Relations, Edmonton
E. Posyniak	- Chief Engineer Track
D. Fournier	- Regional Manager, CMC

And on behalf of the Unions:

M. A. Church	- Counsel, Toronto
R. A. Beatty	- General Chairperson, UTU, Sault Ste. Marie
P. Vickers	- General Chairman, TCRC, Sarnia
J. Robbins	- Vice-General Chairperson, UTU, Sarnia
R. Caldwell	- Vice-General Chairman TCRC,
G. Anderson	- Vice-General Chairperson, UTU
B. Boechler	- General Chairperson, UTU, Western Canada, Edmonton
G. Ethier	- Local Chairperson, UTU, Hornepayne - Local Chairman,
C. Grant	TCRC, Hornepayne
A. McDavid	- Local General Chairperson, UTU, Capreol
D. Behun	- Local Chairperson, UTU, Toronto North

AWARD OF THE ARBITRATOR

While the evidence and materials before the Arbitrator in the case at hand are relatively extensive, the facts material to the dispute can be succinctly stated. At least since 1988 the Company has had a commercial agreement with the Ontario Northland Transportation Commission. Among other things, that agreement provides for the Company not only giving the Ontario Northland Railway passage over its own lines, but includes an arrangement by which the trains of the ONR are to be operated by CN running crews. It appears that in fact full crews of five persons, including two locomotive engineers, a conductor and two brakepersons were assigned to operate the passenger trains of the ONR, referred to as the Northlander, in both directions between Toronto and North Bay.

Commencing in January of 2004, under the newly acquired responsibilities of Mr. Gord Ryan, Director Rail Passenger Service for the ONR, the Ontario Northland Railway developed concerns about the efficiency and cost of its arrangement with CN. One of its two principal concerns was the inefficiency of operations, marked as they were by undue delays which appear to have had an negative impact on ridership. Secondly, the ONR was concerned about the costing formula, considering that it was considerably less advantageous than other arrangements such as one which applied to VIA Rail. The evidence confirms that ultimately three representative of the

ONR met with the responsible officers of CN on or about June 1, 2004. It would seem that prior to and during those discussions the ONR had tabled a proposal for three alternate train schedules geared to improving ridership, all of which involved CN crews operating the trains. It would seem that the discussions between the parties gave rise to the alternative scenario of the ONR possibly providing its own crews to handle its passenger service between Toronto and North Bay.

That is ultimately what came to be. In a letter dated November 18, 2004, Mr. Ryan communicated with Mr. Ed Posniak, General Manager of the Northern Division, Eastern Canada Region, asking to re-negotiate the operating agreement, on the understanding that the re-negotiation would involve using ONR crews on CN lines between North Bay and Toronto. Subsequently, an agreement was reached whereby the ONR would take over the operation of the two Northlander trains at the spring change of card on April 24, 2005.

In understanding what transpired it is important to look to the commercial agreement which governed the two railways. More specifically, article 7 of the commercial agreement, which originated in 1988 and apparently continued in effect, provides that CN (referred to as the "National") shall:

> "... subject to the concurrence of the National, shall permit running trades employees of the Northland to operate all or a portion of the Northlander Service trains between Mimico and North Bay."

In other words, the original commercial agreement contemplated the possibility of the ONR itself operating the Northlander trains with its own crews, but that it could do so only with the agreement and consent of CN. That is what in fact transpired in April of 2005.

With the change which took place, twelve running trades positions at the Toronto North terminal were abolished, compelling the employees affected to exercise their seniority to other work. The position of the Company is that what transpired is not a material change because, according to the Company's interpretation, it came about as a result of ONR exercising its "right" to utilize its own running trades crews in the operation of the Northlander trains. The Unions counter that in fact the decision to make the change was a joint decision of both companies, and indeed could not have gone forward without the full agreement of CN. To that extent, their counsel argues that what has transpired is a material change which was essentially planned and agreed to by CN so as to give rise to the application of the material change provisions of article 79 of collective agreement 4.16 and article 78 of collective agreement 1.1, governing conductors and locomotive engineers respectively.

Therefore, the first issue is whether what transpired can be characterised as a material change for the purposes of these provisions. A related question is whether the change was such as to cause adverse impacts to the vital job interests of the employees affected.

This Office has had considerable opportunity to consider the meaning of "material change". Essential to the concept is the notion that a change is essentially initiated as a result of a decision of the employer, rather being dictated by circumstances beyond its control, such as the closing of a client's business or plant, fluctuations in traffic or other such factors which can normally impact railway operations. The essential concept of material change protection is that if the employer chooses, of its own volition, to materially alter its operations, employees should be given certain protective benefits which might not otherwise be available to them, where it can be shown that those employees would be adversely affected.

Certainly in the case at hand if the ONR had simply ceased operations, resulting in the

abolishment of the twelve running trades positions, there could be no case made for a material change. The change would, in fact, not be one implemented by the Company, and could truly be said to be as a result of a fluctuation in traffic or the operation of influences inherent to work within the railway industry. In other words, such a change would be caught by the exception articulated within article 79.6 of collective agreement 4.16 and the mirror image provisions of agreement 1.1.

What did happen in fact? The reality of what emerges is that, not surprisingly, CN retains full control over the decision as to which trains will operate over its lines, and which crews will operate those trains. As reflected above, the commercial agreement between the parties did not give an unfettered "right" to ONR to operate the Northlander with its own running trades employees between North Bay and Toronto. On the contrary, it could only go to such an operation with the agreement of CN. In such a commercial contract, unlike a collective agreement, the assent of CN could be withheld for any reason, and could not be subject to any test of reasonableness. In effect, the Company held an unreviewable veto over whether the Northlander would be operated by its own employees or the employees of the ONR. To that extent, it is difficult to conclude other than that it was central and instrumental in the decision to change the operation of the Northlander, to the extent that it would no longer be manned by CN crews from and after April of 2005.

In the Arbitrator's view the instant case falls within principles previously canvassed by this Office. In **CROA 2975** it was found that a change implemented by the Ontario Northland Railway, pursuant to an agreement with CN, resulting in the abolishment of a yard assignment within ONR did trigger the material change provisions of the collective agreement there at issue. In that award the arbitrator commented, in part:

> ... Where, however, as in the instant case, the Company enters into an arrangement with another railroad, the impact of which is to permanently abolish assignments which previously existed, be they regular yard assignments or extra yard assignments, with a corresponding reduction in jobs and work opportunities, the conditions of a material change have been made out.

Similarly, in **CROA 2159**, this Office reviewed an arrangement whereby Canadian Pacific Limited abolished certain switching assignments at Gatineau, Quebec by reason of the hand-in-glove facilitation of a contracting out arrangement in favour of CP's industrial client, including the construction of siding enhancements and a maintenance undertaking engaged in by CP Rail. In that award the arbitrator commented as follows:

> When all of the above evidence is examined, the Arbitrator finds it difficult to characterize what has transpired as little more than the unilateral decision of a customer to terminate part of its business with the Company. It is not disputed before the Arbitrator that the subcontracted industrial switching by Railserve put into effect at Gatineau involved certain business gains for the Company. While one obvious factor is the maintenance of business relations with an important customer in a competitive market, under cross-examination it was conceded that, insofar as operations at Gatineau were concerned, the arrangement concluded resulted in an overall cost/benefit advantage for the Company. Moreover, as counsel for the Union submits, the evidence discloses the instrumental involvement of the Company in suggesting, identifying and facilitating, both by physical works and by a legal contract, the transfer to Railserve Inc. of the industrial switching work at Gatineau which previously belonged to it. As the matter was fairly described by one of the

> Company's marketing officers who was a witness at the hearing, "We were making a commercial deal amongst three parties."

The arbitrator concluded that what transpired did amount to a material change in working conditions within the contemplation of the collective agreement there at issue.

The inescapable conclusion is that, in the end, the abolishment of running trades jobs at Toronto North with respect to the operation of the Northlander trains between Toronto and North Bay transpired, of necessity, because of the decision and agreement of CN. Without the Company's own decision the change could simply not have taken place. CN was an essential, indeed controlling, actor in the decision making process. I am satisfied, therefore, that what occurred does constitute a material change within the contemplation of the two collective agreements.

The issue then arises as to whether the material change is such as to occasion significantly material adverse effects on the employees concerned. The scope of the meaning of adverse effects has been touched upon in a number of awards in this Office commencing with **CROA 221**. It is clear that not all consequences of a material change, even if they might involve some less pleasant alternatives for the employees concerned, amount to adverse effects sufficient to invoke the material change protections negotiated by the parties within their collective agreement. It would seem doubtful, for example, that employees who are forced from passenger service to rail service, perhaps with less advantageous hours of work but with no discernible loss of earnings, could be said to have suffered a significant adverse impact in the sense contemplated by the collective agreement. This aspect of material change analysis was touched upon in the following terms by this Office in **CROA 3083**:

> As the party pursuing a claim under the terms of article 78.2 of the collective agreement the Council bears the onus of proof. To bring itself within the terms of the article the Council must establish that there has been a material change, that it was initiated solely by the Company and that it "... would have significantly adverse effects on employees". This Office has had prior occasion to consider the meaning of significantly adverse effects. In **CROA 1167** the following comments appear:
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>> In considering the second factor referred to above I am also satisfied that it would not suffice for the Trade Union to show that the engineers involved were merely adversely affected by the proposed changes. The Trade Union must demonstrate "significantly" adverse effects. That is to say, it must be established that such proposed changes in working conditions will have the adverse effect of rendering the engineer redundant or superfluous to the Company's manpower exigencies or otherwise undermine his job security. ...
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> A similar note was struck in **CROA 2364**, where the following comment is found with respect to the material change provision in the collective agreement then in effect between the same parties:
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>> ... That provision is, I think, drafted in contemplation of minimizing real consequences on individual employees whose lives are negatively impacted in a meaningful way, as regards their earnings, their work opportunities, the possibility of demotion, lay-off and the like. ...
>
> In the instant case, the Council brings no evidence to the table with respect to any employee having suffered adverse effects by reason of the abolishment of temporary

> assignment 584. It is common ground that the last employee to operate the assignment, other than from the spareboard, Locomotive Engineer Dumas, did not suffer any loss in respect of earnings and work opportunities by reason of the change. The uncontradicted submission of the Company is that in fact Mr. Dumas' earnings increased in the year following the abolishment of assignment 584. Nor can it be inferred, much less concluded, that adverse effects were visited upon any junior employees. The record discloses that the number of regular locomotive engineer positions on the Second Seniority District in fact increased from thirty-six positions to thirty-seven at the 1998 fall change of time. Over the same period the spareboard remained constant, with five employees both before and after the fall change of time table.

The question of whether a given case satisfies the requirement of significant adverse effects is one to be determined on a case by case basis, having regard to the specific facts. For example, in **CROA 2225**, where the evidence before the arbitrator gave no indication of any layoffs, transfers, displacements or of any employee being required to exercise their seniority as a result of any reduction in work, the grievance was dismissed for lack of evidence of any adverse impact.

In other cases, on the other hand, it may be difficult to know at the time of the notice whether or to what extent there will be significant adverse impacts. In those circumstances, as occurred in **CROA 2139**, where the Union has established a *prima facie* case of a material change which would in all likelihood cause some dislocation of employees, the matter of material change may be examined as a separate head, in light of the more detailed evidence which might only be available after the fallout of the implementation of the change.

In the Arbitrator's view this is such a case. *Prima facie*, the evidence before me would suggest that the employees who were affected by the job abolishments at Toronto North were, at the change of card, compelled to exercise their seniority, and to do so in a more restrictive pool. Consequently, it is certainly possible, if not probable, that some of the employees may have suffered, or could reasonably be expected to suffer, losses in work opportunities and a loss in their potential earnings as a result of the material change implemented by the Company. In these circumstances I am satisfied that the condition of adverse effect is sufficiently made out so as to remit the matter to the parties to allow them the opportunity to examine more closely the impacts, including ripple effects, on employees which can be said to have been occasioned by the change implemented by the Company. For the purposes of clarity, however, should that exercise show that the employees affected could, by the exercise of their seniority, have secured work elsewhere at Toronto, including Toronto South, without any significant loss of earnings, the element of adverse impact may not be sufficiently made out.

The Union's policy grievances are therefore allowed. The Arbitrator finds and declares that the abolishment of the assignments in Northlander service in April of 2005 did constitute a material change within the pertinent provisions of both collective agreements, and that the change was such as to signal the likelihood of adverse effects on the employees affected, so as to place the Company under the obligation of the material change provisions. The matter is therefore remitted to the parties for the purposes of examining in greater detail the extent of the adverse effects and the remedies, if any, which should apply. The foregoing is, of course, subject to the full rights of the parties to the procedures under the material change provisions of their respective collective agreements.

February 20, 2006

(signed) MICHEL G. PICHER
ARBITRATOR