

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4856

Heard in Montreal, August 10, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The issue in dispute is the use of Managers performing Bargaining Unit work while employees are available. Specifically, the Company's violations of the standardized calling procedures dated April 2, 2015, the CIRB order 748-NB, the CBA, and the CLC when Mr. R. Bobier was not called to work before a Manager being used.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Mr. Ryan Bobier was not on rest and available to work. He was not called to work the following:

On October 5th 2022 Conductor Ryan Bobier owned H32-Honda 2 as the trainman and went off-duty at 1600. He was rested and available to work XTRA RCLS which was on duty at 2100 on the 5th of October 2022. Mr. Bobier should have received a call for XTRA RCLS but instead Manager Ryan Harris worked the train.

During the time that Manager Ryan Harris was working the XTRA RCLS Mr. Bobier had earned \$363.60 and had he been called for the XTRA RCLS he would have made two deadheads (\$199.95 + \$199.95) as he would have been called from Spence as well as 9 hours and 9 minutes pay at P&C Helper rates (\$369.77) for working XTRA RCLS.

Union Position:

The Company's actions are in violation of the CIRB Order No. 748-NB as well as the CLC Sections 36(1)(a) and (d), 56 and 94 (1)(a) and (3), the CCA preamble and Articles including but not limited to 1, 29, 30, 31, 37, 66, 67, 68, 73, 80,87, 88, 90, 93, 109, 112, any and all references to seniority as each employee's seniority was violated, and the Standardized Calling Procedures of April 2, 2015.

The Union contends that this employee was available and ought to be called.

The Company in the earlier grievance decline state the following;

"The Company has reviewed this matter and your grievance in its entirety and cannot agree with the Union's position nor its requested resolve. The consolidated collective agreement provides the option to request extra work as outlined in Article 16. Sub section 16.01 (1) states "Employees desiring additional work when off for miles or on assigned days off may voluntarily place themselves on one or, where qualified, both auxiliary boards"

Mr. Bobier's claim was refused as he was not on assigned days off. Article 16.01 allows employees off on miles or on assigned days off to request extra work. Mr. Lambert was not off for miles nor was he on assigned days off.

The company is well aware of the CIRB Order No. 748-NB as well as the applicable Collective Agreement articles cited in this grievance. It is the company's position that we continue to abide by the CIRB order as well as the Collective agreement provisions with respect to utilization of Manager's when employee are not available. As well we will continue to ensure the process for use of management crews is adhered to each and every instance.

The company will continue to utilize manager's to operate trains or assignments to ensure we service our customers for which we are charged with and compensated for, in the event that TCRC employees are not available."

In this instance the Company chose to purposely ignore the Board Order as stated;

"...Nevertheless, the Board finds that when unionized crews are available and the employer uses managers to perform bargaining unit work, it violates sections 36(1)(a) and 94(1)(a) of the Code."

The Company deliberately chose to ignore this language and used a Manager in lieu of the available for duty BU member, Mr. Bobier.

To protect the clear language of the CLC, Board Order, CCA, with regards to operating with BU employees rather than managers is to call employees that are available when not actually working at the time of call. This includes those on assignments not currently working or not under rest at any time.

The Company as noted in their response use the Auxiliary Board as an excuse to not call Mr. Bobier, the Aux Board has nothing to do with this violation, Mr. Bobier was not off for miles, or on days off, he was rested and available. The Company on one hand will call an employee when they are scheduled later for their assignment but the next time they won't, examples of such have been provided to the Senior Labour Relations personnel.

The Union contends that the Company's actions indicate an arbitrary and non-bargained position that the Company has unilaterally enforced.

The Company has provided an objection to the Union's "cease and desist" request, this has been dealt with by Arbitrator Clarke in AH809.

For the foregoing reasons as well as those adduced in the appeals, the Union requests that the Company cease and desist its current and continuing practice in using Managers (non-BU employees) when Unionized employees are available. Further, that the Company follow the CIRB order, the CLC, and the CCA. The Union further requests that Mr. Bobier be compensated as provided.

The Union requests that as provided Mr. Bobier be compensated \$406.07 and in addition to such further relief the Arbitrator deems necessary in order to ensure future compliance with the above provisions.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Dispute:

The issue in dispute is the use of a manager to work a shift on XTR RCLS at Toronto on October 5, 2022 which the Union alleges is a violation of:

- Standard Calling Procedures dated April 2, 2015
- CIRB Order 748-NB
- Canada Labour Code Sections: 36(1)(a) and (d), 56 and 94 (1)(a) and (3)
- Collective Agreement Preamble and Articles including but not limited to:
 - 1, 29, 30, 31, 37, 66, 67, 68, 73, 80,87, 88, 90, 93, 109, 112

- any and all references to seniority as each employee's seniority was violated

Also in dispute is the Union claim that employee Ryan Bobier should have been called for the shift instead and is therefore owed \$406.07.

Statement of Issue:

Apart from citing CIRB Order 748-NB, the Union has failed to express what aspect of that September 17, 2014 Board Order was violated. In any event, there is no violation in this regard.

Apart from merely stating there were violations of the Standard Calling Procedures dated April 2, 2015, the Union has not expressed precisely what the violation(s) was. Moreover, the Union is referring to 2015 Standard Calling procedures, when it is well known by the parties that changes to calling procedures have been made since that time e.g. changes to reflect Directional Pools which was implemented in 2018. It is therefore peculiar and without an explanation, wasteful of the parties' time, for the Union to make an outdated reference such as this in a 2023 grievance.

The long list of Collective Agreement articles referenced in the Union's grievance, which include the Preamble to the agreement and the Annual Vacation article, are a reflection of the absurdity of the Union's claim on its face. The Union's additional blanket Collective Agreement reference to "*....any and all references to seniority as each employee's seniority was violated...*" fails on its face in two ways. It does not meet the specificity required of a grievance that alleges Collective Agreement violations and it does not fit the Union's own set of facts given in that they named a single employee in their grievance (R. Bobier) and then subtly broaden the scope with the plural reference in the quote above.

In terms of the alleged Canada Labour Code violations, the Union cites but fails to explain the relevance of the cited sections which relate to:

- Union exclusive bargaining authority,
- Binding effect of Collective Agreements
- Employer interference with a trade Union
- Prohibitions relating to employers.

The Company sees no violation of the Canada Labour Code, in the use of a manager on XTR RCLS on October 5, 2022.

The Union bears the burden of proof and has not demonstrated that a violation(s) of any kind has occurred nor has it justified its claim to a \$406.07 payment for R. Bobier.

Finally, the Union request for a cease and desist order on the basis of a single unfounded allegation is inappropriate to say the least. In that regard and notwithstanding that no violation of the collective Bargaining agreement or Canada Labour Code occurred in the instant case, the Arbitrator's jurisdiction is confined only to this particular grievance.

For all of these reasons, the grievance must be denied in its' entirety.

FOR THE UNION:

(SGD.) W. Apsey

General Chairperson

FOR THE COMPANY:

(SGD.) J. Bairaktaris

Director, Labour Relations

There appeared on behalf of the Company:

J. Bairaktaris – Director Labour Relations, Calgary
L. McGinely – Director Labour Relations, Calgary

And on behalf of the Union:

R. Church – Counsel, Caley Wray, Toronto
W. Apsey – General Chairperson, Smiths Falls
B. Baxter – Vice General Chairperson, Toronto

R. Finnon
J. Hnaituk

– Vice President, TCRC, Ottawa
– Senior Vice General Chairperson, Calgary

AWARD OF THE ARBITRATOR

General Context

1. Protection of bargaining unit work is critical to all unions. If there is not enough or no work, because it has been contracted out, or is being performed by management, bargaining unit members are left with not enough work, or facing lay-off because of lack of work.

2. Running an efficient operation is critical to all companies. Keeping key customers happy and continuing to pay is crucial to the survival of the entire enterprise.

3. The issue of the use of management personnel to perform bargaining unit work has been the subject of many disputes between the parties. It has also been the subject of agreements and Canada Industrial Relations Board Orders:

We will follow the following protocol with regard to future instances involved management employees performing bargaining unit work:

1. Collective Agreement and local decision rules relating to calling procedures and Local Chairman Notification will be exhausted before management personnel is utilized to perform bargaining unit work.
2. The appropriate Local Chairman will be notified by the Local Manager when this situation arises to allow the Local Chairman the opportunity to ensure that all bargaining unit employees have been exhausted before a management crew is utilized. If the Local Chairman is also unavailable, the Local Manager will proceed with the plan to use a management crew, when available unionized crews are exhausted.

Once again, management crews will be used when no bargaining unit employees are available to ensure that customer expectations are met and that Canadian Pacific remains competitive.

-

[31] With respect to the specific matters complained of by the TCRC, the board finds as follows:

- a. Cases in which managers operated trains when bargaining unit personnel were ready and available to do the work

In general, the use of managers to perform bargaining unit work on a regular or frequent basis threatens the security of the bargaining unit and a

union's exclusive bargaining rights, and thereby constitutes a violation of section 36(1)(a) of the *Code*. However, the parties in this case have recognized a limited exception to this general rule. Their June 8, 2011 protocol contemplates that managers may be used to perform bargaining unit work when no unionized crews are available. Although it is common ground between the parties that the protocol was negotiated to deal with specific issues that had arisen in western Canada, the evidence indicated that it has also been followed in Eastern Canada.
(See Tab 2, Union Exhibits)

4. The issue remains a live one, with a further CIRB complaint expected to be heard in the fall (see Tab 9, Union documents).

5. The 2011 CIRB Order provides that each time a management crew is used, the Union will be provided with a copy of the completed Management Crew Train Order Checklist. The document is intended to ensure that multiple processes are in place to find bargaining unit members to do bargaining unit work, before the Company resorts to having a member of management do the work.

Specific Context

6. Here, the issue is whether the Company took appropriate steps to find bargaining unit members to do the XTRA RCLS work at Alliston on October 5, 2022, prior to assigning the work to a member of management.

7. The Notification Details are set out in the mandated Checklist (Tab 3, Union documents). The top of the Checklist contains a note:

NOTE: *Management crews should only be utilized after all other contingencies have been exhausted and NO running trades employees are available. Smart and effective use of management crews is essential in order to avoid unnecessary conflict.*

8. Three levels of administration and management were involved, ranging from Crew Dispatcher to OC Director to CMC Shift Supervisor. The final step was: "Local Chair or Vice Local Chair Paul Barker was contacted by Devitt Neelands at 1756. Outcome or Comments: Advised".

9. It is common ground between the parties that the grievor was never contacted as a result of this process.

The Grievance

10. The grievor submitted a wage claim (Tab 6, Union documents):

“Lostwages For Extra Rcls -05 Manager Ryan Harris Worked And I Wasn’t Called> I Was Available And As Per 2015 Cirb Decision 755 All Union Labor Is To Be Exhausted Before Running Management. Please Adjust Ticket Show 9 Hours 6 Minutes.”

11. The Company refused the claim and the step 2 and 3 grievance on the following basis:

On October 5th 2022 Conductor Ryan Bobier owned H32-Honda 2 as the trainman he was rested and available to work XTRA RCLS which was on duty at 2100 on the 5th of October 2022.

Conductor Bobier should have received a call for XTRA RCLS as *CIRB 748-NB* states that all bargaining units must be called for work before any member of management, which dictates that the AUX code not being on his name is irrelevant. Since this CIRB order has been violated by calling manager Ryan Harris as the yard helper the union seeks that Conductor Bobier be made whole as if the CIRB order had been followed.

During the time that Ryan Harris was on XTRA RCLS conductor Bobier had earned \$363.60 and had he been called for XTRA RCLS he would have made two deadheads (\$199.95 + \$199.95) as he would have been called from Spence as well as 9 hours and 9 minutes pay at P&C Helper rates (\$369.77) for working XTRA RCLS. For Conductor Ryan Bobier to be made whole the union seeks a lost wages claim for \$406.07 to be approved.

Positions of the Parties Concerning the Availability of R. Bobier and the Applicability of the Auxiliary Board

12. The Company maintains that for employees holding assigned positions with known schedules, they will only be called in for extra work if they have indicated their wish to do so by signing up on an Auxiliary Board. To be eligible, the call-in must be on one of their assigned days off or when they are Off for Miles.

13. In the case of Mr. Bobier, on Wednesday, October 5, 2022, the call-in would have happened in the middle of his scheduled week, so he would not have been available.

14. The Union maintains that article 16-Auxiliary Boards is a red herring. The article reads as follows:

“ARTICLE 16 - AUXILIARY BOARDS

16.01 Separate Locomotive Engineer and Trainpersons auxiliary boards will be established at all home terminal locations for the calling of qualified employees under the following conditions. (1) Employees desiring additional work when **off for miles or on assigned days** off may voluntarily place themselves on one or, where qualified, both auxiliary boards. In the application of this article, Engineers work will be called from the Engineers auxiliary board and Trainmen work will be called from the Trainmen auxiliary board. Employees will only be called for work for which they are qualified and familiarized.

(2) Employees desiring to be placed on the auxiliary board will indicate their desire to do so on the Weekly Placement Bid Sheets and they will take such work when called.” [EMPAHSIS ADDED]

15. The Union submits that as Mr. Bobier was neither on an assigned day off, nor Off for Miles, the article does not apply.

16. The Union submits that as Mr. Bobier was ready, willing and able to perform the work, he should have got the assignment, rather than the work going to a member of management.

17. The Union notes that if the software used by the Crew Dispatcher fails to show Mr. Bobier as available, the Company bears the responsibility for this deficiency.

Positions of the Parties Concerning the Availability of R. Bobier and Hours of Service Regulation Implications

18. The Company argues at paragraphs 12-24 of its Brief that two Federal Hours of Service Regulations, being the Maximum Duty Times rule and the Mandatory Time Off Duty rule, would have prevented the grievor from accepting the contested assignment in any event.

19. It submits that based on the chart set out at paragraph 15 of its Brief, that Mr. Bobier would have been at 26.85 hours, over the maximum tour of duty of 18 hours and at paragraph 18, not in compliance with the mandatory off-duty times.

20. The Union argues that the Company is breaching CROA Rules by bringing up arguments concerning hours for the first time in their Brief, when they had not been advanced during the grievance process, or in the Ex Parte Statement of Issue. It cites (See paragraphs 1-6, Union Reply Submission).

21. It further submits that even if I were to accept that the hours argument could be advanced, it is not helpful to the Company. It points out that Mr. Bobier was under the 18 hour cut off, even after performing the extra duty. The only way that the grievor fails to meet the Rules, is if his shift the following day is included in the calculation. In reality, the Union argues, he would simply take the following day off and his shift would be taken by another bargaining unit member. Given the importance of maintaining bargaining unit work for bargaining unit members, for the reasons set out by the CIRB, the granting of this work to management members must be exceptional. This exceptional situation can only arise when bargaining unit members are unavailable to do the necessary work.

22. The Company does not disagree with this concept. It signed off on the 2011 Agreement which recognizes this principle. The Checklist, which it created, explicitly sets out:

NOTE: *Management crews should **only be utilized after all other contingencies have been exhausted and NO running trades employees are available.** Smart and effective use of management crews is essential in order to avoid unnecessary conflict.*

23. Here, I cannot agree that “all other contingencies have been exhausted” or that “NO running trades employees are available”. Mr. Bobier was available. He just was not presented as a possibility in the CMA available to the Crew Dispatcher and others.

24. I do not agree that an employee is only available for extra work when the conditions of the Auxiliary Board are met. I agree with the Union submission that the Auxiliary Board conditions of on assigned days off or off for miles do not apply to Mr. Bobier. The reality is that the grievor could have worked this extra shift, even in the middle of his work week.

25. Had he done so, it might have caused a ripple effect for the following day, but another bargaining unit member could have done this work. The price of the ripple effect is far smaller than the cost of breaching a fundamental labour relations principle, and the agreement and relationship between the parties.

26. Even this ripple effect has now been addressed by the parties. I am informed that amendments to the call in rules have now been made, such that a current employee in the identical situation to Mr. Bobier would not have a right to this extra work.

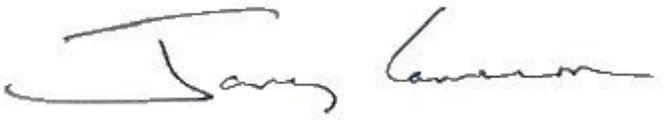
27. I agree with the Union submissions concerning the Company arguments based on hours. The CROA Rules and jurisprudence is consistent that these arguments need to be raised during the grievance process or in the JSI or Ex Parte Statement. However, even if I had considered these arguments, I am not convinced that the grievor could not have done the extra work and a fellow bargaining unit member work his shift the following day.

28. The Company also argued that it was not inevitable that Mr. Bobier would have been entitled to the extra shift, based on seniority, and cites **CROA 4694**. This case, in my view, is distinguishable, as it deals with claims between bargaining unit members. Here, the issue is between a bargaining unit member and a member of management performing bargaining unit work. Mr. Bobier is the only bargaining unit member claiming this extra work and the time for anyone else to do so is long past. The grievor was entitled to make the claim advanced.

29. The Union has also asked for a “Cease and Desist” Order to be given to the Company concerning the use of management members to do bargaining unit work. Although I agree that I have the power to do this see **AH 809**, I decline to do so here. The parties will be before the CIRB shortly, with far greater evidence and time than that available through the CROA process.

30. For these reasons, the grievance is allowed. I retain jurisdiction for any questions concerning the implementation of this award.

September 18, 2023

A handwritten signature in black ink, appearing to read "James Cameron", written over a horizontal line.

JAMES CAMERON
ARBITRATOR