IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY

(the "Company")

and

TEAMSTERS CANADA RAIL CONFERENCE

(the "Union")

GRIEVANCES CONCERNING LAMBTON YARD
(THE BELLEVILLE RUN-THROUGH AGREEMENT AND THE BUFFALO/TORONTO ESR)

SOLE ARBITRATOR: John Stout

For the Company:
Lauren McGinley: Assistant Director Labour Relations, Calgary

For the Union:
Ken Stuebing: Caley Wray

HEARING HELD BY WRITTEN SUBMISSIONS

SECOND SUPPLEMENTAL AWARD

INTRODUCTION

[1] On February 7, 2017, I issued an award addressing a dispute between the parties relating to the Company's November 2015 decision to require Belleville Run-Through Pool train crews to operate beyond Toronto Yard (near Shepperd Ave. and McCowan Rd.) to Lambton Yard (near St. Clair Avenue West and Scarlett Rd.) and to require Buffalo/Toronto ESR train crews to operate beyond Lambton Yard to Toronto Yard. The Union alleged, among other things, that the Company violated the Belleville Run-Through Agreement (the "Belleville RTA") and the Buffalo/Toronto ESR Agreement.

[2] In my February 7, 2017 award, I made the following findings and orders:

> [59] After carefully considering the submissions of the parties, I make the following findings:
>
> - Crews operating under the Belleville RTA are not required to operate to Lambton Yard, save and except one train pair that may, at the Company's discretion be operated as far as Obico as a single fixed mileage tour of duty.
> - Crews operating under the ESR Agreement are not required to operate past Lambton Yard.
>
> [60] I order the Company to cease and desist operating trains operating trains contrary to my findings. I order the Company to create an abeyance code for all claims arising from their conduct.
>
> [61] I agree with the Union that the Company's failure to create an abeyance code should not prejudice any employee who might have a claim. Therefore, I order that the time limits for filing a claim will be extended and order the Company to provide the Union with any necessary records to establish entitlements.
>
> [62] In terms of damages, I accept the Company's position that they had no opportunity to discuss the 100 mile compensation request. Therefore, I remit that issue to the parties. If the parties cannot agree on the damages then they may provide me with submissions and I will make the appropriate orders.
>
> [63] Finally, I remain seized to address any issues arising from my award and to address any issue fairly raised by the grievances but not addressed in this award, including but not limited to the quantum of damages arising for the Company's conduct.

[3] Subsequent to issuing my February 7, 2017 award a dispute arose with respect to the Company operating one train pair under the Belleville RTA between

Toronto Yard and Lambton Yard. A hearing was held on July 26, 2017. I issued a supplemental award on August 31, 2017, finding that the Company may apply the Obico exception to trains operating under the Belleville RTA into the Lambton Yard for intermodal service.

[4] The issue giving rise to this second supplemental award involves a dispute respecting the Union's claim for 100 miles per employee per alleged violation, for the operation of trains between Toronto and Lambton Yards by Belleville RTA and Buffalo/Toronto ESR crews. The Company asserts that the Union's claim for 100 miles per employee is not appropriate because there is no provision in the Collective Agreement that requires such a payment and the employees in question did not suffer any actual loss.[1]

[5] A conference call was held on May 28, 2019. During the conference call it was agreed that the parties would file written submissions on July 22, 2019 and rebuttal submissions on August 6, 2019.

[6] The Union advises that they are aware of at least 250 instances, prior to my February 7, 2017 Award, where Buffalo/Toronto ESR crews were required to yard their train in Toronto Yard as opposed to Lambton Yard. These claims are being held in abeyance pending my determination of this supplemental dispute.

[7] The Union's position, simply stated, is that an arbitrator has the power to award damages and provide "just and reasonable relief" to employees affected by a breach of a collective agreement. The Union asserts that the requirement to operate the trains beyond the agreed-to scope of operations is compensable as additional work. The employees in question operated 14.9 track miles beyond the scope of work provided under the Buffalo/Toronto ESR, as they were required to travel to Lambton Yard after they yarded their train at Toronto Yard. The Union submits that this is effectively a separate additional assignment that attracts a

[1] At the time that the grievances were filed the parties, there were separate Collective Agreements applicable to Conductors, Trainmen and Yardmen (CTY) and Locomotive Engineers (LE). The Collective Agreements have subsequently been consolidated into one Collective Agreement.

minimum day's work and 100 miles per crew member is what would have been paid had there been proper performance of the yard transfer work by the yard crew. In this regard the Union points to provisions defining a day's work, see art. 68.12 and 95.01 CTY and 48.03 and 49.06 LE. The Union also asserts that 100 miles is the historic amount paid to crews who have been subject to this very violation, as well as the presumptive penalty under the Collective Agreement. The Union advises that the Company continues to violate my cease and desist order and that ought to be a consideration in crafting an appropriate remedy.

[8] The Company takes the position that the majority of the Union's claims cannot be provided with a remedy as they are not requested on the face of the grievance and/or out of time. The Company submits that the only claims submitted on behalf of the Buffalo/Toronto ESR crews for operating train 142 and 143 between Toronto Yard and Lambton Yard for work events after October 18, 2015 may be granted a remedy. The Company argues that a 100 mile payment is inappropriate as there is no language in the consolidated Collective Agreement to support such a remedy. The Company also asserts that no employee suffered any financial loss and therefore no compensation is payable in these circumstances. In the alternative, the Company argues that payment pursuant to paragraph 9.1.4 and article 9 Expanded Crew Change Locations (ECCP) should apply and payment ought to be for time or miles (14.9), whichever is greater.

DECISION

[9] After carefully considering the parties' submissions, I agree with the Union and order the Company to compensate the affected employees by payment of 100 miles for operating their trains beyond Lambton Yard and into Toronto Yard.

[10] At the original hearing, the parties filed comprehensive briefs and made extensive submissions with respect to the matter in dispute. The parties were unable to agree upon a Joint Statement of Issue (JSI). Instead, the Union filed an *Ex Parte* Statement of Issue, which included an explicit compensation claim for crews who were forced to work beyond the limits required of them by the Belleville

RTA and Buffalo/Toronto ESR Agreements. This claim for compensation, in the *Ex Parte* Statement of Issue, clarifies the relief being sought in the Step 2 grievance seeking payment for "any and all claims past and future, associated to the subject matter of this appeal". The Union's brief also included a clear request for an abeyance code, extension of time to file claims and a payment of 100 miles compensation for all affected employees. The Company did not file an *Ex Parte* Statement of Issue. The Company also did not raise any objection in their brief or at the hearing with respect to the timeliness of any claim for compensation. The only issue raised by the Company with respect to the remedy sought by the Union was an opportunity to discuss the 100 miles compensation request.

[11] In my view, any objection based on timeliness or failure to specify the claims on the face of the grievances are long past the date that they ought to have been raised by the Company. The hearing was held on January 21, 2017 and no objection to the claims was raised by the Company either before or during the hearing. In my February 7, 2017 award, I ordered the Company to create an abeyance code and I granted an extension of time to file claims. If the Company felt that the claims were untimely or not raised on the face of the grievances, then they ought to have raised such objections long ago, prior to the hearing or at the hearing and in any event not after I issued an award on the merits. In other words, the Company's objection is ironically untimely and that train (the time to raise an objection) has long left the station and it is just too late to raise such an objection over two years after I ruled on the merits of the grievances.

[12] I now turn to the Union's request for compensation of 100 miles for each affected employee.

[13] It is well established that arbitrators have broad remedial powers to fashion effective labour relations remedies, see *Re Oil, Chemical & Atomic Workers and Polymer Corp. Ltd.* (1959), 10 L.A.C. 51 (affirmed 1962 SCR 338) and *Greater Toronto Airports Authority v. Public Service Alliance Canada Local 004* 2011 ONSC 487 (Div. Crt.).

[14] The Union advises that there are in excess of 250 claims filed through a mutually agreed process that was created after my February 7, 2017 award. The Union argues that provisions found in the Collective Agreement and previous 100 mile payments made for similar work is the “presumptive penalty” for such a violation. The Company argues that there is no specific penalty provided in the Collective Agreement.

[15] I acknowledge that in the consolidated Collective Agreement, the parties have provided for a specific penalty in certain circumstances. However, providing a specific penalty in some circumstances does not restrict the power or authority of an arbitrator to award a specific penalty in other circumstances not specifically stated. Rather, the agreement to a specific penalty only limits an arbitrator’s authority in those specific circumstances agreed upon by the parties. An arbitrator is free to provide the same or a similar penalty in a different set of circumstances, if they are of the view that such a penalty is appropriate. By way of example, the parties may provide for the specific penalty of termination for incidents involving theft. Providing such a specific penalty would limit an arbitrator’s authority to provide any other lesser penalty once the theft is proven. However, an arbitrator could also uphold the penalty of termination for other types of fraudulent behaviour not subject to a specific penalty, if they were of the view that termination was appropriate in all the circumstances. In other words, the parties are free to limit an arbitrator’s jurisdiction with respect to remedy with specific language. However, limiting an arbitrator’s jurisdiction in some circumstances does not limit an arbitrator’s jurisdiction in other situations. If the parties wish to limit an arbitrator’s jurisdiction then they must do so using specific language with respect to the specific circumstances. The language relied upon by the Company in this matter does not apply to any of the circumstances before me. Therefore, I reject the Company’s argument that absent specific language in the Collective Agreement, I am precluded from granting the Union’s requested remedy.

[16] The Company also asserts that the remedy being sought by the Union is an additional payment for performing the same work. I disagree with this

submission. The Company's requirement that Buffalo/Toronto ESR employees operate their train beyond the agreed upon point (Lambton Yard) is additional work and employees are entitled to be compensated for such additional work, see *Re Canadian National Railway and Canadian Telecommunications Union* (1978), 17 L.A.C. (2d) 142 (Adams) and ***Ad Hoc 653*** – *IBEW System Council No. 11 and CN* (Schmidt).

[17] I agree with the Union that employees who are required to operate their trains beyond Lambton, in breach of the limits found in the Buffalo/Toronto ESR, must be compensated for the additional work being required by the Company. To require employees to provide such additional work without compensation would be absurd (requiring additional work without additional compensation) and would do nothing to ensure compliance by the Company in the future.

[18] The cases relied upon by the Company are clearly distinguishable from the matter before me. Both ***CROA 74*** (Hanrahan) and ***CROA 2027*** (Picher) addressed situations involving pyramiding. The concept of pyramiding involves the payment of two types of premiums for the same work. That is not the case before me. Rather this is a case of the Union seeking additional payment for additional work being required of employees by the Company.

[19] The Company also argues that employees have suffered no loss because the Buffalo/Toronto ESR already provides compensation that is greater than the actual miles. In effect, the Company asserts that the affected employees are already being overpaid pursuant to the Buffalo/Toronto ESR. This argument must also fail because the payment under the Buffalo/Toronto ESR was a negotiated agreement pursuant to a material change. Whether the employees receive payment greater than the actual miles is neither here nor there, as the parties agreed to such a payment and the scope of the operations. In other words, the employees are not overpaid. Rather, they are appropriately paid according to the parties' agreement, made pursuant to a material change, for the work performed to the specified destination (Lambton Yard). The additional work of operating the

train into Toronto Yard is beyond what was agreed upon in the Buffalo/Toronto ESR. This additional work being required by the Company supports a claim for additional compensation.

[20] This brings me to the point of deciding whether the payment of 100 miles is just and reasonable in all the circumstances.

[21] There is no dispute that arbitrators generally apply the rule that an aggrieved party is to be placed in the same position they would have been in had there been no breach of the collective agreement, see Brown & Beatty, *Canadian Labour Arbitration (4th) Ed.* at 2:1505 and *Re: Red Deer College and Michaels et al.* (1975) 57 D.L.R. (3d) 386 (SCC).

[22] At first glance, I am attracted to the Company's alternative position that the remedy should be payment for the actual time or miles, whichever is greater. However, upon further reflection, I am of the view that the Union's position is more appropriate in these circumstances.

[23] First of all, it is very difficult to determine the actual loses beyond the 14.9 additional miles between Lambton Yard and Toronto Yard. The 14.9 additional miles does not take into consideration the additional travel time required of crews to return to Lambton Yard after yarding their train at Toronto Yard. Anyone who has driven in Toronto can attest to the difficulty in determining the time it takes to get from point A to point B at any given time of the day. At best, it would be an educated guess as to the actual time that the crew needed to travel from Toronto Yard to Lambton Yard. In addition, had the Company complied with the Buffalo/Toronto ESR, then a different crew would have to move the train from Toronto Yard to Lambton Yard.

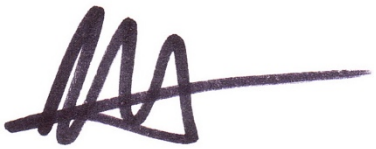
[24] Second, the Company's reference to the payment in paragraph 9.1.4 of the Buffalo/Toronto ESR Agreement is not applicable. As pointed out by the Union, the parties have not negotiated an ECCP local agreement in Toronto. Therefore, paragraph 9.1.4 has no application to the matter before me.

[25] Third, the payment of 100 miles was paid on a previous occasion for similar additional work. A June 11, 2004 email from CP's Manager Yard Operations offered payment of 100 miles for yarding Smith Fall's trains at locations west of Toronto Yard (i.e. Lambton Yard). The Union agreed to the Company's offer and the agreement was not made on a without prejudice basis. In my opinion, this earlier agreement demonstrates what the parties agreed to be reasonable compensation for similar additional work.

[26] Finally, the Union included two awards where CROA arbitrators ordered payment of 100 miles for similar additional work. In **CROA 4025**, Arbitrator Picher ordered compensation of 100 miles for marshalling service that was required of an employee yarding a train. In **CROA 1187** Arbitrator Kates ordered payment of 100 miles to a conductor and crew for performing yardman duties. I agree with the Union's submission that the additional work required by the Company in this matter is similar to the yard work referenced in the two CROA awards. I also agree that the work should be compensated as a separate additional assignment. I am of the view that such payment will not only compensate employees but also provide the Company with a disincentive to violating the Buffalo/Toronto ESR agreement. Therefore, I order the Company to make payment of 100 miles to the employees who filed claims.

[27] Accordingly, for all the reasons stated above, I order the Company to pay each affected employee 100 miles within 30 days of the date of this award. I remain seized to address any issues arising from my award and this supplemental award.

Dated at Toronto, Ontario this 21st day of August 2019.



John Stout - Arbitrator