

IN THE MATTER OF AN ARBITRATION

BETWEEN:

BC RAIL

(hereinafter referred to as the "Railway")

AND:

CANADIAN UNION OF TRANSPORTATION EMPLOYEES, LOCAL #1

(hereinafter referred to as the "Union")

(Article 2.5.2 Arbitration)

Dispute:

The application of Article 2.5.2 of the current Collective Agreement.

Joint Statement of Issue:

On September 8, 2000, a single Budd Car was operated from North Vancouver to Squamish. It was not being operated in Passenger service between North Vancouver and Squamish, no passengers were on board, and it was operated by a crew consisting of a Locomotive Engineer and a Conductor.

Locomotive Engineer Stowe was first out on the spareboard and available on September 8, 2000.

The Union contends that Locomotive Engineer Stowe should have been called as the second Locomotive Engineer for this trip under authority of Article 2.5.2. The Union further contends that the "Budd Car" was operated as a "light running engine" and should have been manned with two engineers.

The Union seeks the payment of 8 hours pay to Mr. Stowe, as remedy.

The Railway contends that Article 2.5.2 does not apply to the circumstances at hand and has declined payment.

For the Union:

Robert Samson
General Chairperson
C.U.T.E. Local 1

For the Company:

D.A. Lypka
General manager
Field Operations

Arbitrator:

H. Allan Hope, Q.C.

Counsel for the Railway:

Michael Keiran

Counsel for the Union:

Robert Samson

Place of Hearing:

Vancouver, B.C.

Date of Hearing:

September 24, 2001

Dispute

As indicated in the joint statement of issue, the Union alleges that operating a Budd Car, which is identified as a Rail Diesel Car (RDC), with a single engineer and a conductor amounts to a breach of Article 2.5.2 of the collective agreement. That provision reads as follows:

2.5.2 With the exception of electronically controlled units, all pusher units and light running engines dispatched will be manned by two (2) engineers when two (2) engineers are available. (emphasis in text)

It appears in Article 2 in the context of language having application exclusively to pusher service. The other provision in the Article reads:

2.5.1 Freight engineer will not be used in pusher or helper service when regularly assigned pusher or helper engineer is available.

The position of the Union was that the phrase, "all pusher engines and light running engines", is to be read as reflecting a mutual intention in the parties to distinguish between "pusher engines" and "light running engines". Based on that perceived distinction, the Union said as a first step in its interpretation that a Budd Car is "an engine" and when it is running light as opposed to running in revenue service, it is the contractual equivalent of a "light running engine". On that interpretation, the Union's position was that Article 2.5.2 applies to circumstances outside pusher service and requires

that any light running engine, including a Budd Car running light, should be manned by two engineers.

Evidence was called by the Union from both Union and management officials which was directed at establishing that a past practice existed in which Budd Cars running light were operated by two engineers and that light running engines generally are operated by two engineers. The basic submission of the Union was that there was an established practice in which Budd Cars running light were manned by two engineers. The Union filed the following summary of the experience of one engineer:

Three times this year the Crew office called two Engineers for light Budd car (light engine) movements. The first was on April 4, 2000 I was called along with Tom Adkins to deadhead to Pemberton to pick up two Budd cars and bring them to North Vancouver. The second was on July 30, 2000 I was deadheaded to Lillooet to meet up with John Ruddell and brought two Budd cars south to North Vancouver. The third was on August 8, 2000 Sandy Grewal and Pat Masse were called to bring the Budd car light engine from North Vancouver to Squamish.

In terms of the language, the Union, as stated, read the phrase, "pusher engines and light running engines" as reflecting an intention to require two engineers on all engines engaged in pusher duties and, as a separate obligation, on all engines running light. The submission of the Union was that using the term, "light running engines", must be read as intending a distinction between "pusher engines" and "light running engines" which can only be accommodated by requiring the

manning of all engines running light with two engineers. The interpretation of the Railway, said the Union, would require that the phrase "light running engines dispatched will be manned by two engineers" to be limited to pusher engines despite the clear language used.

For its part, the Railway said that the phrase in question must not be interpreted in a vacuum. It must be read, first in the context of Article 2, said the Railway, and then in the context of the collective agreement as a whole. The Railway did not deny that there are occasions when Budd Cars operating light have been operated by two engineers or that there are circumstances in which other engines running light are manned by two engineers. But, said the Railway, those instances are the exception, not the rule. Its position was that light running engines may or may not be manned by two engineers. In practice, said the Railway, in every case the decision is based on operational circumstances, not Article 2.5.2. That provision, said the Railway, is clearly limited to pusher service.

The Railway relied on a prior decision between the parties in BC Rail Ltd. and The Council of Trade Unions on BC Rail (Detouring Award), November 27, 1998 unreported and the principles of interpretation reviewed in that decision. In particular, it was noted that the principles governing the use of extrinsic evidence in British Columbia were those set out by the Labour Relations Board in its decisions in University of British Columbia and Canadian Union of Public Employees, Local 116, [1977] 1 C.L.R.B.R. 13 (Weiler) and The Corporation of the

District of Burnaby and Canadian Union of Public Employees, Local 23, [1978] 2 C.L.R.B.R. 99 (Weiler).

The Railway saw a parallel between the issues raised in the Detouring Award and the position taken by the Union in this dispute. Its position was that the language of Article 2.5.2 is at least ambiguous and would require clear and convincing extrinsic evidence of either bargaining history or practice to support the interpretation advanced. The Railway noted in that context that the only provision of the collective agreement which requires the assignment of two engineers to a light running engine is in the pusher service article and that it is clearly confined in the context of that article to pusher engine services.

The Railway speculated that the use of term, "light running engine", in the context of Article 2 was a recognition that in pusher service, engines run light whenever they are not actively engaged in pushing trains and that the insertion of "light running engines" in Article 2.5.2 serves to require that they be operated with two engineers both when engaged in pusher duties and when running light coincidental with those duties.

Decision

In this dispute the Union sought to establish evidence of past practice to support its interpretation. However, evidence of past practice is only of assistance where it meets the test articulated in the authorities with respect to consistency. Here the evidence fell far short of meeting that

criteria. The weight of the extrinsic evidence of practice falls to be determined on the basis of the instructions given in District of Burnaby. On p. 102 the Board wrote:

If the board is going to draw inferences, in our view it should have the background and the basis on which the parties were in fact operating. All this means is that we should have a complete understanding of the way in which the parties carried out their bargain if we are to "have regard to the substance of the matters in dispute". (emphasis added)

In context, the Board was adopting reasoning which reflects an arbitral consensus with respect to the use of evidence of past practice. That consensus was succinctly summarized in Dominion Consolidated Truck Lines Limited and Teamsters Union Local 141, (1981) 28 L.A.C. (2nd) 45 (Adams), where Arbitrator Adams wrote on p. 49 as follows:

Rather we would find that where parties in collective bargaining refer to a "practice" they are referring to the accepted "way of doing things"; their uniform and constant response to a recurring set of circumstances ... But regardless of how it is initiated, like all binding past practices, the course of conduct must occur with sufficient regularity, and continue long enough to be accepted by both parties as the normal way of operating presently and in the future ... The party asserting a practice bears the burden of proving it by clear and definite testimony. (emphasis added)

The evidence of practice relied on by the Union does not meet that test. That is, it did not consist of "clear and

definite testimony" which would support the conclusion that "the basis upon which the parties were in fact operating" with respect to the operation of light running engines, including Budd Cars, was to assign their operation to two engineers. The evidence supported the conclusion that there were occasions when two engineers were assigned to the operation of light running engines but there was no evidence that assigning two engineers was the "uniform and constant response" of the parties to "the recurring set of circumstances" relating to the operation of light running engines.

That is, there was no indication that the assignment of two engineers to operate light running engines was "a course of conduct" that occurred "with sufficient regularity" and continuity "to be accepted by both parties as the normal way of operating". In short, the Union, as "the party asserting [the] practice" failed to meet "the burden of proving" the practice upon which it relied. The Union established that there are occasions when Budd Cars and other light running engines are manned by two engineers. But the Union did not refute the Railway's assertion that Budd Cars and other engines run light without two engineers.

In any event, the structure of the collective agreement mitigates against the interpretation advanced by the Union. The arbitral authorities make it clear that in the ordinary course it is the right of an employer to determine how work will be performed within a bargaining unit and restrictions on that right should appear in language that is either express or arises by necessary implication from the language selected.

In that context, both Article 2 and the structure in which it appears mitigates against the Union interpretation.

Article 2 consists of terms and conditions expressed as having application to Pusher Service. The Union interpretation would have application to all forms of service. To reach that conclusion, it would be necessary to ignore the limitations clearly implied with respect to Article 2. It would also be necessary to ignore the fact that the agreement is broken into components of service, including "Road Service"; "Snow Plow Service"; "Yard Service"; "Work Train Service"; and "Miscellaneous Service".

As stated, within that structure, Article 2 is limited to "Pusher Service". Hence it would be necessary to find that a provision which, by necessary implication, has been confined to Pusher Service, nevertheless has application to any service involving an engine running light. The language relied on by the Union, when read in the context in which it appears in the collective agreement, is inconsistent with that interpretation and the practice of the parties. In the result, the grievance is dismissed.

DATED at the City of Prince George, in the Province of British Columbia, this 9th day of November, 2001.

"H. Allan Hope, Q.C."

H. ALLAN HOPE, Q.C. - Arbitrator