

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY

(the “Company”)

and

TEAMSTERS CANADA RAIL CONFERENCE

(the “Union”)

**GRIEVANCES CONCERNING A CLAIM OF MATERIAL CHANGE AS A
RESULT OF THE TERMINATION OF THE CONTRACT TO OPERATE GO
COMMUTER RAIL SERVICE ON THE MILTON CORRIDOR**

SOLE ARBITRATOR: John Stout

APPEARANCES:

For the Company:

David Guerin, Senior Director Labour Relations
Nizam Hasham, Legal Services
Tony Marquis, Senior Vice-President Operations
Tina Sheaves, General Manager Special Projects

For the Union:

Ken Steubing, Caley Wray
John Campbell, General Chair LE-East
Wayne Apsey, General Chair CTY-East
Ed Mogus, Vice General Chair CTY-East
Chris Yeandel, Vice General Chair LE-East

HEARING HELD IN TORONTO, ONTARIO ON APRIL 22, 2017

AWARD

I. INTRODUCTION

[1] The Canadian Pacific Railway Company (the “Company” also referred to as “CP”) and the Teamsters Canada Rail Conference (the “Union”, also referred to as “TCRC”) appointed me to hear and resolve a grievance filed on May 9, 2014.

[2] The dispute between the parties arises under two collective agreements (the “Collective Agreements”). One collective agreement applies to the Company’s eastern employees represented by the TCRC and classified as Conductor, Assistant Conductor, Bagperson, Brakeperson, Car Retarder Operator, Yard Foreman, Yard Helper and Switchtender (CTY-East). The other collective agreement applies to the Company’s eastern employees represented by the TCRC and classified as Locomotive Engineers (LE-East).

[3] The grievance relates to the termination of a contract between CP and Go Transit to operate commuter rail service on the Milton corridor. The Union asserts that the termination of the contract constitutes a material change in working conditions and ought to be dealt with under the material change provisions of the Collective Agreements.

[4] The parties agreed to have the grievance heard on an expedited basis and presented in accordance with the Canadian Railway Office of Arbitration & Dispute Resolution (CROA & DR) rules and style. In this regard, both parties filed extensive written briefs, which were supplemented by brief oral evidence and submissions at the hearing.

II. THE CURRENT DISPUTE

[5] The parties were unable to agree upon a Joint Statement of Issue. Instead, they each filed their own Ex Parte Statement of Issue.

[6] The Union's position is set out in their Ex Parte Statement of Issue, which provides as follows:

On January 26, 2014 the Company advised the Union that the contract with GO Transit would be expiring on December 31, 2014 and would not be renewed. The Union's position is that there will be a permanent loss of work effective December 31, 2014. The Union asserts that the termination of the GO contract therefore constitutes a material change in working conditions and ought to be dealt with under the material change provisions of the Collective Agreements.

[7] The Company disagrees with the Union. The Company asserts, in their Ex Parte Statement of Issue, that the circumstances do not constitute a material change on the basis that they did not initiate any change in working conditions and there are no demonstrable adverse effects. It is also the Company's position that what occurred was a loss of business, which would not trigger the material change provisions of the Collective Agreements.

III. BACKGROUND FACTS

[8] GO Transit is a division of Metrolinx, a Provincial Crown Agency that operates a regional public transportation service in Ontario.

[9] Prior to 2008 the Canadian National Railway Company (CN) operated the vast majority of GO Transit's commuter rail service in the Greater Toronto Area. In 2008, Bombardier took over the crewing of the commuter rail service that had formerly been provided by CN. By 2014, Bombardier crews were operating 1420 trains per week on behalf of GO Transit.

[10] Since 1981, CP operated GO Transit's commuter rail service on their Milton corridor line. Originally, CP unionized employees worked three commuter assignments for GO Transit. By 2014, the CP unionized employees were working eight assignments, utilizing two person crews (eight locomotive engineers and eight conductors). The CP unionized employees operated a total of 80 trains per week.

[11] The GO Transit commuter assignments on the Milton corridor were filed through the exercise of seniority by TCRC represented employees, who would bid twice yearly for the opportunity to perform the work. The equivalent of two additional employees were utilized off the Toronto spareboard, as and when required to supplement GO Transit's crewing needs. In total, of CP's 389 employees in Toronto and London, there were sixteen assigned to work the GO Transit commuter rail service.

[12] On October 11, 2013 Vice President, GO Operations, C. Paul Finnerty, sent a letter to Mr. C. Jones, CP's Director, Business & Network Strategy Eastern Canada. The letter stated as follows:

Demand for GO Transit service continues to grow, with ridership on the network now reaching 65 million per annum. As we continue to increase the number of train trips to meet this demand, we also need to continue to improve our operational efficiency. One of the approaches we have begun to employ is to 'interline' our services. As an example, today we have trains that operate into Toronto along one corridor (e.g. Stouffville) and then continue through to another corridor (e.g. Georgetown). This is achieved as all our service (with the exception of the Milton line) is operated by Bombardier crews who are qualified to operate on all of our service routes. Additionally, having just one service provider would allow us to adjust the crew design to meet the needs of specific services (including 'Customer Service Attendants') and gain the efficiencies of a larger labour pool. The fact that our Milton service is operated by CPR is increasingly impacting our ability to maximize these efficiencies.

The current agreement between GO Transit (Metrolinx) and CPR expires at the end of December 2014 and provides an opportunity to address these issues. Please be advised that, in the context of the next iteration of the Commuter Operating Agreement, we wish to discuss transitioning the operation of GO Trains on the Milton corridor to Bombardier, with a goal of having the transition completed, in tandem with the renewed agreement, by January 1, 2015.

We respect and value the professional working relationship that exists between our two businesses and appreciate the excellent service that CPR has provided, and continues to provide, to GO

Transit. We look forward to working with you on a smooth transition of the operation in order to ensure that our customers are not impacted by this change

[13] On January 26, 2014 the Company informed the Union that GO Transit would not be renewing the contract with CP to crew GO commuter rail service on the Milton corridor.

[14] On February 4, 2014 the Company issued a bulletin informing employees that CP would no longer be operating GO Transit commuter rail service on the Milton corridor effective December 31, 2014.

[15] The Union's Eastern General Chairmen wrote to the Company on March 26, 2014 with respect to the situation. The Union sought particulars of the likely impact on unionized employees and advised of their belief that the issue ought to be addressed under the material change articles found in the Collective Agreements.

[16] In April 2014, the Company became aware of efforts by Bombardier to actively recruit CP employees to join their workforce. On April 4, 2014 CP Vice President Operations Eastern Region, Tony Marquis, wrote to Bombardier Vice President Services North America Transportation, Matt Byrne, to advise of CP's concerns relating to the recruitment of CP's employees.

[17] The Company responded to the Union's March 26, 2014 letter on May 9, 2014, indicating that, in their view, the material change articles did not apply "as this was not a change initiated by the Company". The Company also took the position that no employee would be adversely affected.

[18] The Union filed their grievance on May 9, 2014, alleging that the Company had violated the Collective Agreements by not engaging the material change provisions to address the non-renewal of the GO Transit contract. The

Company denied the grievance throughout the various steps of the grievance procedure.

[19] The Company and the Union met in November 2014 to explore the possibility of submitting an unsolicited bid on the GO Transit commuter rail service work.

[20] The Company produced a "Discussion Paper" on November 27, 2014 with respect to a proposal for "CP crewing of GO Trains". The proposal included 10 "core items" of an agreement with the TCRC that would be necessary in order to begin discussions to make an unsolicited bid. One of the core items was an agreement from the Union that unionized employees would not be allowed to book personal rest.

[21] The Company explained that under the Collective Agreements, unionized employees could book rest after working only one segment of a round trip in commuter service. The Company advised that the ability to book rest after completing only one segment of a round trip caused numerous operating issues. The Company went on to explain that GO Transit was extremely dissatisfied with the ability of CP employees to book rest halfway through their tour of duty.

[22] On Friday November 28, 2014 at 5:26 pm, the Union advised the Company that they "are agreeable, in principal, to work through these ten (10) core items, in an effort to enable a competitive bid to be made by CP to Metrolinx/GO Transit". Mr. Marquis responded at 5:44 pm indicating "To ensure we are clear, I will require the General Chairs to agree that they are in agreement with the ten core items as written in the proposal.

[23] The Union clarified their position in an email on Saturday November 29, 2014. The Union's position was indicated as follows:

I do agree to the core items except for the rest issue. I would rather see this modified to read that an employee cannot book rest past his assignment. If you are prepared to make this part of the core items, I am prepared to work towards an acceptable negotiated agreement for both parties.

[24] Mr. Marquis responded advising that the Company was not in agreement with the Union's position on the rest issue and therefore they would not be moving forward with discussions to submit an unsolicited bid.

[25] At the hearing, Mr. Marquis indicated that, in his view, the only way an unsolicited bid might be successful would be if the Union agreed to concessions that would mirror the Bombardier collective agreement. The Bombardier collective agreement paid an hourly rate as opposed to a mileage based rate. Furthermore, unlike the Collective Agreements between CP and TCRC, the Bombardier collective agreement did not include the ability for employees to book rest.

[26] Mr. Marquis advised that personal rest was a "big problem" for GO Transit. Mr. Marquis also advised that booking personal rest caused operational problems for CP. Mr. Marquis spoke about CP having to "scramble" to cover Friday afternoon commuter service after unionized employees booked personal rest. Mr. Marquis described the personal rest issue as being a "non-starter". Mr. Marquis saw no reason why the Union could not agree to the requirement that employees not be allowed to book personal rest. Mr. Marquis elaborated that he could not fathom why the Union needed a compromise on this core item. Mr. Marquis candidly admitted that he did not trust the Union's motives in seeking a compromise on personal rest. It was Mr. Marquis' opinion, based on his experience with GO Transit, that CP could not make a viable bid without the Union's unequivocal agreement on all ten of the core items.

[27] In terms of material adverse effects, the Union asserts that 16 positions were eliminated due to the Company's failure to renew the GO Transit commuter

rail service on the Milton corridor. The Union argued that the elimination of these positions flowed through to the entire bargaining unit resulting in layoffs.

[28] The Company asserts that there has been no material adverse consequences affected by the expiry of the contract with Go Transit. The Company advised that a total of 53 train and engine unionized employees left employment with CP in 2014. At least nine unionized employees voluntarily left CP to go work for Bombardier. Once the contract with GO Transit expired, the unionized employees who formerly worked the Milton corridor either retired or exercised their seniority in the Toronto and London areas, pursuant to their rights under the Collective Agreements. The Company argues that no employees were laid off as a direct result of the GO Transit contract expiry.

[29] The Union also asserts that CP owns and maintains the majority of the track on the Milton corridor (26 of the 31 miles of rail) and therefore they have some leverage in terms of negotiating with GO Transit.

[30] The Company acknowledges that they own and operate a majority of the track. However, the Company points out that GO Transit has a right of access and the operation of the commuter rail service is regulated by the Canadian Transportation Agency (CTA). In these circumstances, the Company indicated that they really have very little leverage in negotiating with GO Transit.

IV. DECISION

[31] The Collective Agreements have similar language that applies to material changes in working conditions. The relevant articles of the Collective Agreements are as follows:

LOCOMOTIVE ENGINEERS (LE-East)

ARTICLE 34 – MATERIAL CHANGES IN WORKING CONDITIONS

34.01 Prior to the introduction of run-throughs or relocations of main home terminals, or of material changes in working conditions which are to

be initiated solely by the Company and would have significantly adverse effects on Engineers, the Company will:

(1) Give to the General Chairman as much advance notice as possible of any such proposed change with a full description thereof along with appropriate details as to the consequent changes in working conditions, but in any event not less than:

(a) three months in respect of any material change in working conditions other than those specified in subsection (b) hereof;

(b) six months in respect of introduction of run throughs, through a home terminal or relocation of a main terminal;

(2) Negotiate with the Union measures other than the benefits covered by Clause 34.11 of this article to minimize significantly adverse effects of the proposed change on Locomotive Engineers, which measures may, for example, be with respect to retaining and/or such other measures as may be appropriate in the circumstances...

CONDUCTORS TRAINMEN AND YARDMEN (CTY-East)

ARTICLE 72 – MATERIAL CHANGE IN WORKING CONDITIONS

72.01 Notice of Material Change

The Company will not initiate any material change in working conditions that will have materially adverse effects on employees without giving as much advance notice as possible to the General Chairperson concerned, along with a full description thereof and with appropriate details as to the contemplated effects upon employees concerned. No material change will be made until agreement is reached or a decision has been rendered in accordance with the provisions of Section I of this Article.

72.02 Measures to Minimize Adverse Effects

The Company will negotiate with the Union measures other than the benefits covered by Sections 2 and 3 of this Article to minimize such adverse effects of the material change on employees who are affected thereby. Such measures shall not include changes in rates of pay. Relaxation in schedule rules considered necessary for the implementation of a material change is also subject to negotiation...

[32] The material change provisions set out a process for notification and negotiations relating to Company initiated changes in working conditions.

[33] The principles that apply with respect to the material change provisions of the Collective Agreements are well established. In **CROA 1167** Arbitrator David Kates indicated that in order for the notice requirements contemplated under the material change provisions to be triggered, the onus rests on the Union to establish two factors:

- The Union must demonstrate that the alleged changes in working conditions were initiated by the Company and such changes are “material” changes; and
- The Union must also establish that the proposed changes, if implemented, would not only have an adverse effect on the affected employees, but such changes must bear “significantly” adverse effect on the affected employees.

[34] Arbitrator Michel Picher elaborated upon the test in determining if a material change had occurred in **CROA 3083**, where he stated as follows:

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:

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 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. ...

[35] Both parties cited **CROA 3539** as providing guidance in resolving the matter before me. In **CROA 3539**, Arbitrator Picher explained the meaning of material change as follows:

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 indicated 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 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.”

[36] The first issue to be decided is whether the events can be characterized as a material change as contemplated by the provisions of the Collective Agreements. As noted above, the material change provisions are triggered by decisions initiated by the Company, of its own volition, and not by circumstances beyond its control.

[37] In this case, it was GO Transit that made a decision to have Bombardier provide its entire commuter rail service effective January 1, 2015. Go Transit clearly explained their position with respect to having “just one service provider” in their October 11, 2013 letter. In my view, it was clearly the decision of GO Transit to terminate the contract with CP, which not only initiated, but also directly led to the change in working conditions. I find that GO Transit was the controlling party in the decision making process, which directly led to the contract for commuter services on the Milton corridor not being renewed.

[38] I agree with the Company that the decision by GO Transit is substantially similar to a loss of business due to the independent decision of a customer to utilize the services of a competitor.

[39] The evidence is equally clear that subsequent to GO Transit communicating their decision, and after the Union filed their grievance, the Company entered into good faith discussions with the Union with the hope of submitting an unsolicited bid to retain the work on the Milton corridor.

Unfortunately, the parties could not agree on the ten core items that the Company deemed essential. In particular, the parties could not agree on the issue of personal rest.

[40] I do not fault the Union for taking issue with the Company's requirement that unionized employees give up the right to personal rest. However, I also cannot fault the Company for taking the position that they needed the Union's unequivocal agreement to the ten core items in order to pursue an unsolicited bid. I accept the Company's submission that an unsolicited bid required concessions that would put CP on an equal footing with Bombardier.

[41] This situation is somewhat unique in that the circumstances do not involve the Company refusing to make a solicited bid or having the right to in effect exercise a right of renewal or a veto. Rather, in this case GO Transit made a decision not to renew their agreement with CP. Instead, GO Transit decided to utilize the services of Bombardier. The Company explored an attempt to have GO Transit reconsider their decision, but did not ultimately move forward because they did not believe they had the required agreement from the Union.

[42] I agree with the Company's submission that there was no guarantee that GO Transit would have accepted the unsolicited bid, even if the Union had agreed unequivocally to the ten core items.

[43] In my view, the material change provisions are not engaged by the Company's refusal to make an unsolicited bid in these circumstances. Accordingly, I find that the Union has not met the onus of demonstrating that the alleged changes in working conditions were initiated solely by the Company.

[44] In light of my findings that the Company did not initiate the change in working conditions, it is not necessary for me to decide the second issue as to

whether or not the Union has met the onus of establishing significant adverse effects.

V. CONCLUSION

[45] After carefully considering the submissions of the parties, I find that I am compelled to dismiss the Union's grievance.

Dated at Toronto, Ontario this 3rd day of May 2017.

A handwritten signature in dark ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

John Stout - Arbitrator