Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Teamsters Canada Rail Conference,

complainant,

and

Canadian Pacific Railway Company,

respondent,

Board File: 30114-C

Teamsters Canada Rail Conference,

applicant,

and

Canadian Pacific Railway Company,

respondent.

Board Files: 30136-C, 30734-C
Neutral Citation: 2015 CIRB **755**
January 9, 2015

Appearances

Mr. Nizam Hasham, for the Canadian Pacific Railway Company;
Mr. Denis W. Ellickson, for the Teamsters Canada Rail Conference.

[1] On September 5, 2013, the Teamsters Canada Rail Conference (TCRC or the union) filed an unfair labour practice complaint with the Canada Industrial Relations Board (the Board), alleging that the Canadian Pacific Railway Company (CP Rail or the employer) had violated sections 36(1)(*a*) and (*d*), 56, 94(1)(*a*) and 94(3) of the *Canada Labour Code* (*Part I–Industrial Relations*) (the *Code*) by using management employees to perform bargaining unit work (Board file no. 30114-C). On September 20, 2013, the union filed an application for an interim

order restoring the union's access to the employer's management information system and the production of records related to the crewing of trains by managers since September 5, 2013 (Board file no. 30136-C).

[2] The Board was made aware that, in 2011, the parties had been before it with respect to a similar complaint alleging that managers were doing bargaining unit work. That complaint (Board file nos. 28757-C and 28758-C) was resolved through a protocol signed by the parties on June 8, 2011. The Board therefore notified the parties in November 2013 that it had placed the union's complaint and application in abeyance for a period of four months and requested that the parties endeavour to resolve their differences through mediation. When the mediation efforts were unsuccessful, the Board held an oral hearing in Calgary, Alberta on September 8–12, 2014 and in Toronto, Ontario, on December 3–5 and 9–10, 2014.

[3] In the course of the hearing in Calgary, the union brought an urgent motion for an interim order prohibiting the employer from using management employees to operate trains until the merits of the instant complaint had been heard and determined. By order dated September 17, 2014 (Board order no. 741-NB), the Board ordered the parties to continue to comply with the provisions of their June 8, 2011 protocol until such time as the Board rendered a decision with respect to Board file no. 30114-C, or the parties entered into a new memorandum of agreement resolving the issues that gave rise to this complaint, or the requirements of section 89(1)(*a*) to (*e*) of the *Code* had been met. On October 27, 2014, the union filed an application requesting that the Board file order no. 741-NB in the Federal Court of Canada pursuant to section 23(1) of the *Code* (Board file no. 30734-C). Given that the hearing on the merits of the union's complaint was still in progress, the Board decided to hold this application in abeyance pending determination of Board file no. 30114-C.

I. Background and Facts

[4] CP Rail is a Class I railway with operations from Montréal, Quebec to Vancouver, British Columbia. Pursuant to a certification order issued by the Board in March 2004, the TCRC represents a bargaining unit composed of some 3400 running trades employees working on CP Rail's Canadian operations. Although there is a single bargaining unit, the union and the employer, for historical reasons, are parties to four collective agreements, which apply respectively to the eastern and western locomotive engineer (LE) and conductor, trainmen and yardmen (CTY) employee groups. These collective agreements expire on December 31, 2014 and the parties are currently engaged in negotiations for their renewal.

[5] One measure of a railway's performance is its operating ratio – the percentage of revenues used to operate the railway (operating expenses divided by revenues). A lower percentage normally indicates higher efficiency in the operation of the railway. CP Rail's adjusted operating ratio was 81.7% in 2009 and 77.6% in 2010, significantly higher than its major competitor in Canada, the Canadian National Railway Company. Following a very public proxy battle for control of CP Rail that took place in 2012, new management was installed in June 2012 and took immediate steps to improve the railway's performance. Within 18 months, CP Rail's adjusted operating ratio had improved to an all-time record for the company of 69.9%. Management's objective for 2014 was to reach an operating ratio of 65% or better. Many of the initiatives undertaken by CP Rail to accomplish this improvement, including hiring freezes, the wholesale cancellation of local agreements and running longer trains with fewer locomotives over more efficient routes, has had significant consequences for the members of the TCRC's bargaining unit. They have also resulted in a number of complaints to the Board by the union, including this one, alleging that in its pursuit of operating efficiencies, the employer has engaged in unfair labour practices.

[6] In the instant case, the union alleges that the employer has violated the *Code* and the collective agreements by using managers to operate trains when bargaining unit members are available to do the work. As noted above, this is not the first time that this issue has arisen between the parties. A similar complaint was resolved in the context of a Board proceeding in 2011. The June 8, 2011 protocol agreed to by the parties to resolve the earlier complaint reads as follows:

> Re: CIRB Complaint # 28757-C and 28758-C
>
> Dear Sirs:
>
> This is in regards to recent discussions concerning the use of Management personnel to perform bargaining unit work, CIRB files 28757-C and 28758-C. As we have indicated to you on several occasions, it is the neither our preference, nor our long term objective, for management employees to perform bargaining unit work. As you are aware, we are currently hiring new employees at an unprecedented rate to address the situation.
>
> We will follow the following protocol with regard to future instances involving 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 unavailable, the Vice Local Chairman will be notified. If the Vice 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.

I trust that this forms a full and final resolve to the outstanding grievances and CIRB complaints #28757C and 28758-C. Please indicate the same by signing below.

(signed)

Alia Azim Garcia
Director, Labour Relations

(signed)

Dave Able
General Chairman, Locomotive Engineer

(signed)

Dave Olson
General, Chairman, CTY

(sic)

[7] In Board order no. 741-NB issued on September 17, 2014, the Board directed the parties to continue to comply with this protocol.

[8] The evidence before the Board indicates that the number of employees in the union's bargaining unit has decreased significantly over the past six years, from 4,492 at the end of 2009 to 3,439 at the end of 2014. Exhibit 26-8 provides the following information:

	2009	2010	2011	2012	2013	2014 (as of Dec. 2)	2015 (projected)
Total no. of B.U. members at year end	4492	4221	4518	4467	3802	3439	
No. of active BU members at year end	3418	4146	4518	4046	3619	3392	3861
No. of BU members hired during the year	15	246	1040	506	0	535	848
No. of employees on lay-off at year end	1074	75	0	421	183	47	

[9] The statistics for 2009 reflect the fact that a large number of running trades employees had been laid off during the global economic crisis of 2008. The numbers in 2010 and 2011 illustrate

the implementation of a management decision to overstaff by 20% in order to ensure that sufficient crews were available to provide service to customers. The numbers for 2013 and 2014 reflect the hiring freeze that was put in place when the new senior management took over the railway in mid-2012.

[10] The Board was informed that the employer has a modelling system to determine its hiring needs, but that there are many variables that affect the employer's ability to have sufficient crews in the right locations at the right time. In particular, the employer points out that it is difficult to recruit and retain crews in certain locations such as Fort Steele and Revelstoke, British Columbia, and Calgary and Edmonton, Alberta. Based on its current forecasts of future needs, CP Rail states that it is in a hiring mode, and projects that it will hire 848 running trades employees in 2015. However, it notes that the training is rigorous and not every new hire is successful in obtaining certification.

[11] The employer's witnesses indicated that one delay can have a cascading effect on train movements, as train crews reach their maximum duty hours. The employer's witnesses indicated that when union crews are not available, they may try to call employees who are not subject to call, and will use a management crew only as a last resort.

[12] The employer witnesses also indicated that, since at least the time that CP Rail entered into the June 8, 2011 protocol with the union, the employer has used a "Management Crew Train Order Checklist" that is completed whenever a management crew is used. The Board was provided with samples of this checklist (see Exhibits 25-14 to 25-25). The employer admitted that it does not provide copies of this checklist to the union. The union confirmed that it had never seen this checklist before the Board's proceedings.

[13] The employer provided the Board with a copy of a report on the use of management crews between January 1 and November 23, 2014 (Exhibit 26-7). This report shows that the use of management crews was 0.32% in 2014. This represents an increase of more than 50% from 2013, when the use of management crews was less than 0.2% of all crew starts across the system. The report also demonstrates that there are certain terminals where the use of management crews is more prevalent than others, exceeding 1% of all crew starts. The employer confirmed that these statistics do not include management training activities or manager "assistance" to crews.

II. Positions of the Parties

A. The Union

[14] The union asserts that all four collective agreements prohibit any individuals who are not in the bargaining unit from performing any bargaining unit work. However, it admits that the June 8, 2011 protocol applies only to the Western LE and CTY employees. The union explains that, historically, the use of management staff to operate trains has not been a problem in Eastern Canada.

[15] The union provided examples of a variety of situations in which managerial staff have been performing bargaining unit work. These incidents can be categorized as follows:

a. Cases in which managers operated trains when bargaining unit personnel were ready and available to do the work;
b. Cases in which bargaining unit personnel were scheduled to work and were replaced by management personnel in training;
c. Cases in which bargaining unit personnel have been asked to train management personnel;
d. Cases in which management personnel performed work ancillary to the operation of trains, such as lining switches, arming SBUs and setting handbrakes, moving trains within the yard, assembling trains, and performing other shop/yard duties, a number of which were formerly performed by bargaining unit personnel in Utility positions that the employer has now abolished.

[16] The union asserts that it has been difficult to gather accurate and complete information regarding the magnitude of the employer's use of managerial personnel, as its access to the Crew Management Application (CMA) has been restricted and, in any event, certain information is not entered into CMA. It is therefore compelled to rely on anecdotal evidence. The union notes that it has also filed individual and policy grievances regarding the use of management personnel in the circumstances outlined above, the abolition of the Utility positions and the requirement to train management personnel to operate trains. However, the union submits that the grievance procedure cannot address the issues arising from the employer's systemic actions adequately, appropriately or in a sufficiently timely manner.

[17] The TCRC contends that the employer has created a manpower shortage by failing to recall employees on lay-off and to hire a sufficient number of employees to meet operational requirements. The union alleges that the employer's decisions to abolish positions and lay-off employees in order to "run lean" have caused a shortage of unionized staff. It contends that there is a direct correlation between the reduction in the number of bargaining unit employees and the increase in the use of manager crews. It submits that the employer should be prevented from using managers to perform any bargaining unit work.

[18] The union alleges that the employer's actions violate sections 36(1)(*a*) and (*d*), 56, 94(1)(*a*) and 94(3) of the *Code*. The union submits that, cumulatively, the employer's actions impact the integrity of the bargaining unit and strike at the heart of the union's bargaining rights. It seeks an order directing the employer to cease and desist from allowing non-bargaining unit members to perform bargaining unit work and to pay damages, including full compensation to any affected bargaining unit member, and the union's legal costs.

B. The Employer

[19] The employer submits that all of the matters raised by the union can be dealt with through the grievance arbitration procedure, and that the Board should defer to that process.

[20] CP Rail notes that it has the ability to abolish positions as it sees fit. It advises the Board that it conducted a review of the Utility position and determined that there was insufficient work in the few terminals where the position existed to justify a full-time dedicated position. It submits that managers have always assisted train crews in the yard, when departing the yard, en route or at the final terminal, whether by lining switches, arming SBUs and other activities that ensure timely and efficient train operations. It states that such assistance does not constitute doing bargaining unit work, but is within the normal duties performed by these managers.

[21] In any event, the employer does not interpret the June 8, 2011 protocol as an absolute prohibition on the use of managers to perform bargaining unit work. The employer points out that the protocol indicates that management crews will be used when no bargaining unit employees are available to ensure that customer expectations are met and that CP Rail remains competitive. While acknowledging that it has called out management crews to ensure customer service where required, the employer submits that their use is minimal. It acknowledges that the use of management crews is more prevalent in some terminals and suggests that this is due to crew shortages in those locations. It advises that employees on lay-off have been offered

temporary relocations to other terminals that have manpower shortages, but that employees have been reluctant to accept these opportunities.

[22] The employer indicates that crew shortages can occur when there has been a major line outage, which results in a requirement for additional crews on a short-term basis to clear backlogs. It asserts that it normally follows the process set out in the protocol to advise local union officers when a management crew must be called out to operate a train. This process was intended to allow the union representatives to satisfy themselves that there were no bargaining unit personnel available to do the work. The employer admits that mistakes may occur, but if a TCRC crew was available and a management crew was called in error, the union members are entitled to file a claim for compensation.

[23] The employer asserts that it has the right to train managers to operate trains. The employer has implemented a policy requiring all managers to qualify as conductors and/or locomotive engineers, in order to ensure that they are thoroughly familiar with railway operations. As there are no provisions in the collective agreement regarding the training of managers, the employer asserts that bargaining unit members can be required to provide such training.

[24] The employer asks that the complaint be dismissed.

III. Analysis and Decision

[25] While the Board appreciates that CP Rail is under new management that has a mandate to improve the company's profitability, it is compelled to observe that the changes that management wishes to make must respect the labour relations regime embodied in the *Code*. As the Board noted in *Canadian Pacific Railway Company*, 2013 CIRB 679, when it filed Board order no. 699-NB in the Federal Court:

> [29] The Board's mandate is to encourage constructive labour-management relations, in accordance with the Preamble to the *Code*. In the circumstances of this case, the Board has not been persuaded by the employer's argument that there is no useful purpose to be served by filing the order. Constructive labour-management relations require that the employer and the union jointly negotiate the terms and conditions of employment that will apply to the members of the bargaining unit and, in so doing, conduct themselves in a reasonable manner. In addition to interfering with the administration of the union and the representation of employees by the union, CP Rail's wholesale cancellation of local rules, which have been negotiated and agreed to by the parties over many years, for the purpose of replacing them with managerial directives, is clearly not conducive to constructive labour relations. By its actions, the employer has made it virtually impossible for the labour-relations system to work as it should. It has done so at a time when the union and its members have no means by which to compel bargaining, as there is a collective agreement in place and the employees are prohibited from legally engaging in collective job action. In the Board's view, the only

> mechanism currently available to cause the employer to engage in meaningful bargaining with the union regarding the system-wide changes that it wishes to make is the filing of Order no. 699-NB in the Federal Court.

[26] Similarly, in *Canadian Pacific Railway Company*, 2014 CIRB 713, the Board observed:

> [21] This is clearly a case where the interests of constructive labour relations would be better served by a dialogue between the parties, aimed at working out a compromise that both can endorse. The Board strongly encourages the parties to endeavour to resolve the issues giving rise to the related unfair labour practice complaint, failing which the hearing will proceed on April 14, 2014 as scheduled.

[27] The instant case is another example of the poor labour relations environment at CP Rail, with both parties attributing the worst possible motives to the other. A fundamental change in the labour-management relationship is required at all levels within both organizations, to one that is based on mutual respect. The Board was struck by the differences in the approach to the conduct of labour-management relations by senior management in Eastern and Western Canada. While spectacular performance results have been achieved by the employer nation-wide, the manner in which those results have been attained is markedly different. The evidence from CP Rail's Director, Labour Relations, Mr. John Bairaktaris, suggests that senior management in Western Canada either lacks adequate knowledge of the provisions in the collective agreements or does not hesitate to breach these provisions when they impede the achievement of CP Rail's efficiency goals. This has resulted in numerous grievances and a poor working relationship with the union. In contrast, the Senior Vice-President for Eastern Operations, Mr. Anthony Marquis, made it clear from the beginning of his tenure that he wants better labour relations at the front-line. He holds regular meetings with the union's Local Chairmen and routinely validates that his instructions to local managers are being carried out. He has also made it clear that he does not want to use management crews, and becomes personally involved every time a management crew is called out in order to determine why a union crew was not available. He reviews the crewing model at least once per month, to ensure that adequate union crews are available and proactively plans for crew shortages. As a result, management crews are rarely used in Eastern Canada and most issues are resolved without the need to escalate them to the level of the General Chairmen and Senior Vice-President. It goes without saying that the Board considers the second approach to be more consistent with the constructive labour-management relationships envisioned by the *Code*.

[28] There is very little jurisprudence in the federal jurisdiction regarding the issue of bargaining unit work. In *Verspeeten Cartage Ltd.*, 2004 CIRB 270, a case involving the employer's efforts

to contract out bargaining unit work, the Board conducted a review of such jurisprudence on the topic as existed at the time. The Board concluded as follows:

> [128] It is therefore incumbent upon the Board in applying section 94(1)(*a*) of the *Code* to ask two questions, and a negative answer to either one will be indicative of a violation of the section if there has been employer participation in or interference with the administration of a trade union.
>
> [129] The first question is whether there has been anti-union animus. The second, if there is not, is whether the interests of the employer in all the circumstances justify the interference with bargaining rights that has occurred.

[29] As noted above, the Board has found very different approaches within CP Rail towards its dealings with the union. In the Board's view, the manner in which the employer has behaved in Western Canada demonstrates a lack of consideration for the labour-management relationship, but it does not rise to the level of anti-union animus.

[30] In the absence of a finding of anti-union animus, the Board must proceed to a balancing of the employer's interests and those of the union.

[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 sections 36(1)(*a*) and 94(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 indicates that it has also been followed in Eastern Canada.

The employer has admitted that instances have occurred in which this protocol has been breached. However, the Board has been persuaded that the breaches are not as prevalent as the union suspects. 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 Board is not persuaded that the employer is deliberately causing crew shortages through its hiring practices; in the Board's view, the employer's crewing model has either not yet been perfected and/or the current formula is inadequate on its own and requires the kind of proactive planning that Mr. Marquis conducts in Eastern Canada. The Board was impressed with the amount of effort that goes into determining whether a union crew is available, as evidenced by the detail contained in the "Management Crew Train Order Checklist" that is completed each time a management crew is called out. The Board believes that, if the union had access to this information, it would be able to satisfy itself that the employer is complying with the protocol and the number of grievances would be reduced significantly. The Board hereby orders that the union be provided with a copy of the completed Management Crew Train Order Checklist each time a management crew is used.

b. Cases in which bargaining unit personnel were scheduled to work and were replaced by management personnel in training

While the Board recognizes that the employer's interest in having managers qualified to operate trains, this interest must be balanced against the union's interest in the integrity of its bargaining unit. In the Board's view, the employer's practice of relieving unionized crews of their assignments in order to train managers contravenes the recognition of bargaining unit work embodied in the union's certification order and violates sections 36(1)(*a*) and 94(1)(*a*) of the *Code*. The employer is hereby directed to cease this practice.

This does not mean that the employer cannot train its managers; the Board is confident that CP Rail is capable of finding efficient ways to provide managers with the road experience they require to qualify as conductors and engineers without displacing union members from bargaining unit work.

c. Cases in which bargaining unit personnel have been asked to train management personnel

As both parties pointed out, the collective agreement is silent as to the training of managers. The Board appreciates the employer's desire to ensure that managers are fully familiar with railway operations but it also understands the union's very real concern that the training of managers will result in the creation of a pool of trained strike-breakers in the event of a lawful work stoppage. While an employer is entitled to continue to operate its business during a labour dispute, the union and its members are under no obligation to assist the employer in this endeavour. The Board therefore orders that the employer cannot compel union members to participate in the training of managers.

d. Cases in which management personnel assist train crews

The evidence before the Board was that managers have historically performed work ancillary to the operation of trains, such as lining switches, arming SBUs, setting handbrakes and performing other minor duties in the yard, on an *ad hoc* basis. The Board accepts CP Rail's evidence that it conducted a thorough review of the Utility positions that existed and determined that there was not sufficient work to justify retaining full-time positions to perform this work. Although the Board recognizes these activities as bargaining unit work, so long as they remain a minor and incidental aspect of the manager's work, the Board finds that the practice has historically been condoned by the union and does not amount to a breach of the union's bargaining rights under the *Code*. However, should the volume of such ancillary work increase to a level that justifies a full-time bargaining unit position in a particular location, the Board expects that the employer would re-establish the position.

[32] In light of paragraph 31(*a*) of this decision, the Board declines to issue the interim order requested by the union in Board file no. 30136-C. Given the Board's rulings with respect to the union's unfair labour practice complaint, the time limits incorporated in Board order no. 741-NB and the current status of negotiations, the Board also dismisses the union's application that Board order no. 741-NB be filed in Federal Court (Board file no. 30734-C).

[33] This is a unanimous decision of the Board.

[34] The parties will find attached an Order setting out the Board's directions to the employer.

_____
Elizabeth MacPherson
Chairperson

_____
Daniel Charbonneau
Member

_____
Robert Monette
Member