



Canada Industrial Relations Board

Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8

Édlfice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Fax/Télécopieur: 613-995-9493

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BY FAX

Mr. Nizam Hasham
Legal Counsel - Litigation and Labour
Canadian Pacific Railway Company
Toronto Yard, General Yard Office
2025 McCowan Road
Toronto, Ontario
M1S 5K3 **403-205-9202**

Mr. Denis W. Ellickson
CaleyWray
Labour/Employment Lawyers
Suite 1600
65 Queen Street West
Toronto, Ontario
M5H 2M5 **416-366-3293**

Dear Sirs:

In the matter of the *Canada Labour Code (Part I-Industrial Relations)* and an application for a declaration of unlawful strike filed pursuant to section 91 of the *Code* by the Canadian Pacific Railway Company, applicant; Teamsters Canada Rail Conference, respondent. (30767-C)

Further to the hearing held in the above-noted matter, the parties will find enclosed the Reasons for decision issued by a panel of the Canada Industrial Relations Board composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members.

To comply with section 20 of the *Official Languages Act*, the Reasons will be translated and published on the Board's website at www.cirb-ccri.gc.ca. A copy may be obtained upon written request to the undersigned.

Sincerely,



Justine Abel
Acting Executive Director and Senior
Registrar

c.c.: ESDC-Labour Program (Fax: 819-997-1693)
Ms. Natalie Zawadowsky (CIRB-Toronto)
Encl.



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Reasons for decision

Canadian Pacific Railway Company,

applicant,

and

Teamsters Canada Rail Conference,

respondent.

Board File: 30767-C

Neutral Citation: 2015 CIRB 754

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 November 19, 2014, the Canadian Pacific Railway Company (CP Rail or the employer) filed an application with the Canada Industrial Relations Board (the Board) for a declaration of illegal strike, alleging that certain members of the Teamsters Canada Rail Conference (TCRC or the union) were engaging in unlawful activity contrary to sections 89 and 91 of the *Canada Labour Code (Part I—Industrial Relations)* (the *Code*), and seeking a cease and desist order. The Board, composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members, conducted an oral hearing in Ottawa, Ontario, on December 22 and 23, 2014.

I. Background and Facts

[2] CP Rail is a Class I railway with operations from Montréal, Quebec to Vancouver, British Columbia. It has 28 terminals at various locations across Canada. 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 (locomotive engineers, conductors, brakemen, yardmen, etc.) working on CP Rail's Canadian operations. The union and the employer are parties to four collective agreements, the terms of which will expire on December 31, 2014. At the time of the Board's proceedings, the parties were engaged in collective bargaining for renewal of those agreements, subsequent to the union's service of a notice to bargain on the employer on September 1, 2014.

[3] The employer alleges that members of the TCRC working from the Fort Steele, British Columbia terminal are engaging in a pattern of booking rest in unison and pursuant to a common understanding, and have effectively slowed down operations at the terminal. The employer contends that this concerted activity is making it extremely difficult for operations to continue without the use of managerial personnel. The parties are concurrently before the Board with respect to an unfair labour practice complaint filed by the TCRC regarding the employer's use of managerial personnel to operate trains; a decision in that matter had not yet been issued when the instant application was filed with the Board.

[4] Under the terms of their respective collective agreements, employees are entitled to book rest, either at their home terminal or at an away terminal. However, the employer's records indicate that, since approximately July 2014, the amount of rest that Fort Steele employees are booking has increased significantly and exceeds the average rest taken at any other terminal in the country. The employer alleges that the Fort Steele employees are booking maximum rest between shifts in order to express their dissatisfaction with a number of changes that the employer has implemented. According to the employer, the lack of a sufficient number of available crews has caused a number of trains to be held up, both at Fort Steele and at away from home terminals, with a negative impact on customer service.

II. Positions of the Parties

A. The Employer

[5] The employer explains that it has announced and/or implemented a number of changes affecting employees at Fort Steele over the past several years, all of which have been resisted by the union. These include:

- relocation of the home terminal from Cranbrook to Fort Steele;
- implementation of a fatigue management plan in the form of time pools;
- giving notice of a material change affecting coal train operations, ultimately resulting in the termination of the Sparwood Run-through Agreement and establishment of road switcher assignments in Sparwood.

[6] The Sparwood Run-through Agreement was cancelled as of June 9, 2014. One effect of the cancellation was to change the compensation structure that had been in place for crews working the coal trains, with a concomitant decrease in the employees' incomes. The employees made no secret of their opposition to the changes, and were vocal at town hall meetings held by the employer in June 2014 to explain the reasons for the change.

[7] The employer states that there was a spike in the number of hours of rest in-between employees' tours of duty that was booked at both the home and away terminals after the Sparwood Run-through Agreement was cancelled, and presented the following chart (Exhibit 1-25):

***Average Number of Hours of Rest Booked Home and Away
Fort Steele and Revelstoke, B.C.: comparison of 2013 and 2014***

area	home/away	year	Jan	Feb	Mar	Apr	May	Jun
Fort Steele	Home	2013	15:55:53	18:21:01	20:46:29	19:40:53	18:06:08	18:31:55
		2014	18:56:18	18:23:08	18:47:13	19:05:46	19:04:01	20:51:49
Revelstoke	Home	2013	24:10:39	24:13:04	21:32:38	24:04:22	24:04:47	23:32:04

		2014	21:05:43	21:26:38	22:32:37	23:00:00	22:56:03	22:54:58
area	home/away	year	Jul	Aug	Sep	Oct	Nov	Dec*
Fort Steele	Home	2013	18:30:24	18:04:58	18:38:13	18:52:21	19:55:24	18:37:46
		2014	22:07:13	22:40:29	23:13:48	23:23:09	22:43:59	20:56:28
Revelstoke	Home	2013	24:01:28	23:50:02	21:50:25	20:43:14	20:28:17	20:44:19
		2014	22:35:00	21:59:24	20:59:58	20:47:25	21:08:23	20:43:08

area	home/away	year	Jan	Feb	Mar	Apr	May	Jun
Fort Steele	Away	2013	2:53:31	3:11:23	3:50:21	3:23:16	3:10:58	3:23:07
		2014	3:46:33	3:53:52	3:44:25	3:41:05	3:40:53	5:53:08
Revelstoke	Away	2013	3:28:33	3:17:55	3:22:00	3:11:21	2:52:47	2:30:09
		2014	3:33:02	4:59:41	6:34:29	6:50:55	6:58:29	7:16:34
area	home/away	year	Jul	Aug	Sep	Oct	Nov	Dec*
Fort Steele	Away	2013	3:28:14	3:20:06	3:43:15	3:41:19	3:08:40	2:52:43
		2014	7:27:49	7:40:03	7:52:16	7:57:54	7:15:48	5:41:31

Revelstoke	Away	2013	3:10:02	3:01:55	3:41:02	3:30:35	3:16:13	3:26:31
		2014	6:58:50	6:31:11	5:49:50	5:21:03	5:11:12	4:59:35

*Data to December 15, 2014. Revelstoke was used for comparative purposes because the employer had initially been of the opinion that a concerted effort was taking place at that terminal as well, but CP Rail withdrew that allegation in a letter to the union dated November 17, 2014.

[8] Concurrent with the increase in the number of hours of rest being booked by Fort Steele crews has been an increase in the number of times that crews were forced to work shifts of more than ten hours duration, with consequent "over hours" payments, and a marked increase in the use of managers to operate trains.

[9] The employer contends that the only logical explanation for the significant increase in the number of hours of rest that is being booked in Fort Steele since June 2014 is that there is a concerted effort being made by employees to book maximum rest and thereby reduce the availability of crews to do the work. It asks the Board to issue a declaration of illegal strike and a cease and desist order as well as other remedies, including an order for costs against the union.

B. The Union

[10] The union denies that the Fort Steele employees are engaging in an unlawful work stoppage and notes that the employer has not alleged or demonstrated that the union is participating in or condoning any unlawful activity. The TCRC asserts that the increase in rest required by the crews has taken place coincident with a number of major changes affecting those crews. These include a number of new operating practices that make it difficult or impossible for employees to predict when they will be called for duty, increase the amount of time that employees are held at away terminals and increase the length of their shifts. The union points out that employees are required to be fit and ready when called to work, and can be disciplined or terminated for reporting to work in an unfit condition. It contends that employees are protecting themselves by booking maximum rest, as is their right under the collective agreement, in order to ensure that they are rested, fit and ready when called.

[11] The union submits that the collective agreements provide that employees have the right to book up to 24 hours rest at home terminals and up to 8 hours rest at away-from-home terminals. In cases where the exercise of these rights disrupts operations or is used in an unwarranted

manner, the collective agreement provides a mechanism for resolution. The TCRC notes that, in the past, employees have been disciplined for booking excessive rest. The union indicates that the resolution mechanism prescribed in the collective agreement, which involves discussions between the General Manager and the appropriate General Chairperson, was not used by the employer with respect to its concerns regarding Fort Steele. The parties were engaged in collective bargaining in Calgary, Alberta on November 3, 2014, when CP Rail representatives first approached the union's western General Chairmen regarding the employer's concerns over the booking of maximum rest at Fort Steele and Revelstoke. At that point, the employer did not suggest that the employees were engaging in concerted action. Nevertheless, the General Chairmen consulted the local union representatives by telephone on November 3, 2014 and were satisfied that the amount and frequency of rest booked by union members had not changed in any meaningful way in a number of months.

[12] It was not until the employer sent a follow-up letter on November 6, 2014, that the allegation of concerted activity was put to the union. In response, the union pointed out that, at the June 2014 town hall meetings, the employer's Senior Vice-President, Guido DeCiccio, had assured employees that they were entitled to book rest and should do so if necessary. On November 13, 2014, the western General Chairmen sent a bulletin to all local chairs and union members in Fort Steele and Revelstoke, reminding them of their obligations and that any job action taken in concert or in accordance with a common understanding that is designed to restrict or limit output was prohibited at the time. On November 19, 2014, in response to further communications from the employer regarding the situation in Fort Steele, the western General Chairmen advised CP Rail's Director of Labour Relations that they were leaving the national negotiations in Toronto to go to British Columbia in order to investigate the employer's allegations of illegal activity. Nevertheless, the employer filed the instant application with the Board on November 19, 2014.

[13] At meetings with the local membership held on November 20 and 21, 2014, the General Chairmen informed employees that any concerted activity would be illegal and would have serious consequences. The General Chairmen left those meetings with the impression that employees were booking rest for their own personal reasons, and not as a result of any concerted effort.

[14] The union notes that the cancellation of the Sparwood Run-through Agreement has generated a number of grievances, but that those matters are being dealt with through the grievance arbitration process. It asks the Board to dismiss the employer's application.

III. Analysis and Decision

[15] For the purposes of the *Code*, the term "strike" is defined as follows:

3.(1) In this Part,

...

"strike" includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output.

[16] Given that the parties in this matter have not yet completed all of the steps outlined in section 89(1) of the *Code*, any concerted job action by employees that is designed to restrict or limit output would, by definition, be unlawful.

[17] In *Canadian National Railway Company* (1989), 79 di 82; and 90 CLLC 16,010 (CLRB no. 770) (*CNRC 770*), the predecessor to this Board, the Canada Labour Relations Board (CLRB), suggested that it is usually relatively easy for the Board to spot concerted activity, even when it is disguised as the lawful exercise of individual rights or a sudden concern for safety and strict adherence to rules. The CLRB indicated that the concentration of the job action and its timing relative to other events such as ongoing negotiations, changes in dispatch rules or other events having a negative impact on the work force, leave little room for doubt as to the nature of the activities. In *CNRC 770*, the CLRB had evidence before it, including adoption by the union of a motion for a work-to-rule campaign and a massive, well-orchestrated slowdown, that permitted the CLRB to conclude that the respondents and their members were engaged in concerted activity that was designed to restrict or limit output.

[18] The circumstances in this case are not so clear-cut. The employer has suggested one possible interpretation for the increase in hours of rest booked by Fort Steele crews in the latter half of 2014, but the union has suggested other plausible reasons for the change. The Board notes that the impugned conduct commenced approximately one year after the company's notice of material change was first issued, but well before the union gave notice to bargain and the parties commenced collective bargaining. It is evident that the union has not promoted or

condoned any concerted activity by the employees, as was the case in *CNRC 770*; on the contrary, the union in this case has gone to significant lengths to ensure that its members in Fort Steele are aware of their statutory and contractual obligations.

[19] The employer asserts that the trend to increased booking of rest commenced in June 2014, coincident with its cancellation of the Sparwood Run-through Agreement and implementation of changes to the manner in which unit coal train crews are compensated. The employer's General Manager, Western Region, Dan Sewell, testified that, at the town hall meetings the employer held in June 2014, employees expressed their concern that the changes would impact their ability to earn a living, and that they would have to work more to earn the amounts they had previously been paid.

[20] Mr. Sewell has been a railroader for some 38 years and once worked in the bargaining unit represented by the union. In the course of his testimony, Mr. Sewell made an observation that mirrors the Board's experience in these matters, namely that when crews aren't happy, they book rest to express their dissatisfaction by disrupting schedules but, once they have made their point, they move on. Such manifestations of disagreement with employer decisions are normally short-lived because they have negative consequences for the employees' livelihood as well. In the instant case, the trend that the employer has identified had endured for some five months by the time of the Board's proceedings. When employees are on rest, they are not paid. It is counter-intuitive that employees who are concerned about their ability to earn a living would, over a lengthy period of time, engage in behaviour that further reduces their income and keeps them away from home any longer than necessary.

[21] The employer and the union agree that recruiting and retaining running trades employees at Fort Steele has been a challenge for some time. Although the employer has attempted to recruit more staff, a number of the new hires either did not pass their medical examinations or did not complete training. The employer admits that the problem of insufficient crew availability in Fort Steele that has led to train delays and the use of management crews is not due solely to the booking of rest, but is also partially attributable to the scheduling of annual vacation and earned days off.

[22] Under the circumstances, the Board is unable to accept the employer's conclusion that the Fort Steele employees are engaging in concerted activity that is designed to restrict or limit output. On the basis of the evidence before it, the Board finds that the union's explanation for the trend observed by the employer is more plausible. The employees' inability to determine,

with any certainty, the time that they will be called to work, coupled with the serious consequences of reporting for work in an unfit condition, are leading to a situation in which many employees in Fort Steele feel it is necessary to book maximum rest in order to protect themselves. The collective agreements are clear that employees must be the judge of their own condition. It is not for the Board to substitute its judgment for that of the individual employees as to their fitness for work.

[23] On the basis of the evidence before it, the Board is unable to find that the increase in the booking of rest by CP Rail employees in Fort Steele constitutes a strike within the meaning of the Code. The employer's application is therefore dismissed.

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



Elizabeth MacPherson
Chairperson



Andre Lecavalier
Member



Norman Rivard
Member