SUPREME COURT OF NOVA SCOTIA

Citation: *Canadian National Railway v. Teamsters Canada Rail Conference*, 2017 NSSC 117

Date: 20170508
Docket: HFX449181
Registry: Halifax

Between:

Canadian National Railway

Applicant

v.

Teamsters Canada Rail Conference
and Marilyn Silverman, Arbitrator

Respondents

LIBRARY HEADING

Judge:	The Honourable Justice Michael J. Wood
Heard:	April 26, 2017, in Halifax, Nova Scotia
Written Decision:	May 8, 2017
Subject:	Judicial Review
Summary:	CN and the Union had a dispute about the scope of work that could be required of crews of incoming trains at the Halifax terminal. CN felt that switching of cars and delivery of some to the Halifax Intermodal Terminal was necessary for the requirements of the service and should be done by incoming crews. The Union said this should be done by yard crews. Matter went to hearing with CROA arbitrator who found in favour of the Union based upon interpretation of collective agreement.

CN sought judicial review alleging decision unreasonable on basis of inconsistent findings and failure to follow earlier arbitration decisions.

Issues: Was the arbitrator's decision reasonable?

Result: Court examined nature of CROA process. This is specialized tribunal responsible for resolving disputes in railway industry. Hearings are short and awards brief. Although concise the award here answered the question in dispute and was similar to other decisions by CROA arbitrators.

Arbitrator applied test found in earlier decisions which dealt with collective agreement provisions in issue and this was reasonable.

Overall award fell within range of reasonable outcomes and judicial review was dismissed.

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Decision

Judge: The Honourable Justice Michael J. Wood

Heard: April 26, 2017, in Halifax, Nova Scotia

Counsel: Richard Charney, Daphne Fedoruk, and Richard M. Dunlop,
for the Applicant
Ken Stuebing, for the Respondent
(Teamsters Canada Rail Conference)
Marilyn Silverman, Arbitrator (not participating)

By the Court:

[1] The arbitration award which led to this judicial review dealt with determining the dividing line between work to be done by a conductor on an incoming train, after arrival at its destination at the Halifax terminal, and the yard crews employed in that location.

[2] Between December 2010 and March 2014, Conductor Blair Hubley filed 124 grievances against Canadian National Railway ("CN") alleging that he was required to perform work after the arrival of his train in Halifax which was not authorized under the collective agreement governing his employment. CN and the Teamsters Canada Rail Conference ("the Union") agreed to refer one of the grievances to arbitration in order to resolve the issue.

[3] On May 2, 2012, Mr. Hubley was assigned to train Q120, traveling from Toronto to Halifax. That train was being run on a "conductor only" basis, which meant that no assistant conductor was part of the crew. There are special provisions in the collective agreement that deal with conductor only trains.

[4] The Halifax terminal consists of multiple yards including the Rockingham Yard and the Halifax Intermodal Terminal ("HIT"). An intermodal terminal is where containers are removed from rail cars and transferred to other modes of transportation, such as truck or ship.

[5] When train Q120 arrived at the Halifax terminal on May 2, 2012, Mr. Hubley was instructed to "yard" his train in the Rockingham Yard by pulling into track RH15, splitting the cars into two blocks, and transferring one to track RH10 and the other to RH11. He was then told to pick up the cars from RH10 and take them to track RG10, which is also in the Rockingham Yard. Once there, Mr. Hubley was required to take the locomotive engine around the cars and shove them from that location to track RY02 at the HIT where he left them.

[6] According to CN, when Mr. Hubley set off the two blocks of cars on tracks RH10 and RH11 he was doing so in compliance with Article 7.9 of the collective agreement, the relevant portions of which are as follows:

> 7.9 (d) in the application of the provisions of Article 41, when employees in road service are instructed to yard their train in a particular track at a terminal and such track will not hold the entire train, they will double over surplus cars or a designated cut of cars to another yard track. In cases of yard

> congestion where there is insufficient room to double over all cars to one track it will be necessary to double over to more than, in the manner described above, to effectively yard the train. Employees (including those working in a conductor only operation) required to double over designated cuts of cars will be paid 12½ miles in addition to all other earnings for the tour of duty.
>
> (e) upon arrival at the objective terminal, road crews may be required to set off 2 blocks of cars into 2 designated tracks.

[7] Mr. Hubley was paid the extra compensation referred to in Article 7.9(d).

[8] When Mr. Hubley was instructed to take the block of cars from track RH10 and deliver it to the HIT, CN says this was authorized by Article 11.7 which outlines the conditions for running a train with a "conductor only" crew. The relevant provision reads:

> 11.7(d) Notwithstanding the provisions of Article 41, such trains are not required to perform switching in connection with their own train at the initial or final terminal; if switching in connection with their own train is required at the initial or final terminal to meet the requirements of the service, (except to set off a bad order car or cars or lift a bad order car or cars after being repaired), the conductor will be entitled to a payment of 12½ miles in addition to all other earnings for the tour of duty.

[9] Mr. Hubley was paid the additional compensation referred to in this article.

[10] The Union filed a grievance on behalf of Mr. Hubley alleging that the work involved in taking the block of cars to the HIT was beyond that required under Article 11.7(d). It said this work should have been done by yard service employees and CN was therefore in breach of Article 41 which defines their work. That article provides in part:

> 41.1 Except as provided in Article 12 of Agreement 4.16, the following will apply: switching, transfer and industrial work, wholly within the recognized switching limits, will at points where yard service employees are employed, be considered as service to which yard service employees are entitled, but this is not intended to prevent employees in road service from performing switching required in connection with their own train and putting their own train away (including caboose) on a minimum number of tracks. Upon arrival at the objective terminal, road crews may be required to set off 2 blocks of cars into 2 designated tracks.

[11] Disputes between CN and the Union concerning the administration of collective agreements in Canada are dealt with by the Canadian Railway Office of

Arbitration & Dispute Resolution ("CROA"). A CROA arbitrator dealt with the Hubley grievance and found that CN was in breach of Article 41.1 of the collective agreement because the instruction to Mr. Hubley to transfer the block of cars to HIT was not necessary to meet the requirements of the service as set out in Article 11.7(d).

[12] CN challenges the arbitration award on the basis that the arbitrator made unreasonable and inconsistent factual findings and failed to set out any logical process leading to her conclusion. CN also alleges that the arbitrator unreasonably failed to follow prior arbitral decisions defining the tasks which fall within the requirements of the service under Article 11.7(d).

Nature of CROA

[13] CROA is a specialized tribunal devoted to resolving employment disputes in the railway industry in Canada. Both parties have provided copies of numerous awards issued by CROA arbitrators. From a review of these and hearing the submissions of counsel it is apparent that CROA is intended to provide a fluid and efficient mechanism to manage employment relations in a complex industry. CROA provides mediation services and conducts arbitration hearings. In some cases the process combines mediation and arbitration. In all cases the focus is to provide direction to the parties with respect to the interpretation and administration of the applicable collective agreements.

[14] CROA arbitration hearings generally involve written submissions which include both argument and evidence, which are supplemented by oral presentations. That was the process followed for the Hubley grievance.

[15] CROA arbitration awards are typically brief and focus on the specific issue to be decided. They will usually be issued quickly, often within a couple of weeks.

Decision of Arbitrator Silverman

[16] At the arbitration hearing the Union disputed CN's assertion that the work performed by Mr. Hubley was needed to meet the requirements of the service as referenced in Article 11.7(d) of the collective agreement. In support of their position they relied on a number of CROA arbitration awards including *AH-560*, *AH-583*, and *AH-606*.

[17] The Union also argued that the transfer of cars by Mr. Hubley was not switching in relation to his own train as permitted by Article 41.1. In support of that position they relied on awards in *CROA 2099* and *CROA 3182*.

[18] CN's submission to the arbitrator was that the directive to Mr. Hubley to move the block of cars to the HIT was justified under Article 11.7(d). It said delivery at HIT is highly time sensitive and the terminal had requested that cars be spotted upon their arrival in Halifax, which is what Mr. Hubley was directed to do. CN also argued the award in *AH-583* determined that setting off cars in an intermodal facility at the final terminal was in keeping with the concept of meeting the requirements of the service and this conclusion should be applied to the Hubley grievance.

[19] CN also argued that the award in *CROA 4151* supported its position that the directions to Mr. Hubley were permissible. That decision held that marshalling involved in setting off cars for delivery to other destinations was incidental to the exercise of setting two blocks of cars on two tracks under Article 7.9(e).

[20] After setting out the parties' joint statement of issue and summarizing each of their positions, the arbitrator concluded as follows:

> To the extent the Company's case is that the switching at Halifax yard was to meet the requirements of service, I reject that proposition. As was held stated in *AH-606*:
>
> > … The Company's representative submits that in that situation drawing cars from all three tracks was necessary "… to meet the requirements of service" within the meaning of article 11.7(d), so that it was permissible.
> >
> > The Arbitrator cannot agree. It is well settled that the concept of "the requirements of the service" is not the equivalent of the arrangement which would best suit the convenience or efficiency of the Company. While customer service might have a bearing, it is generally external factors, such as safety regulations or operating rules which are intended to be caught by the phrase "the requirements of the service".
>
> I find that the work required of Conductor Hubley after he placed cars in RH10 and RH11 was neither necessarily incidental to, nor a requirement of service, such as would fall within the Collective Agreement interpretation suggested by the Company. He had put his train away at his destination yard. Any further movement properly fell to the yard crew. After he moved the cars in those two tracks, Conductor Hubley was asked to perform a further and new task, to bring the cars around to the HIT so they would be ready for future movement out of the yard.
>
> This application of the facts in this case and the Union's position is consistent with the one expressed in *CROA&DR 3182*:

> … the Arbitrator has some difficulty appreciating how the Company can assert that the movement of cars from one point inside the switching limits of Montreal to another point for furtherance onward by another road crew can be said to be switching "… in connection with their own train"

An in *CROA&DR 2099* where the arbitrator held that, "the fact that the …… cars were set off in a track convenient to their future movement on another train does not change the essence of what transpired."

Accordingly, the grievance is allowed in part. I find that Conductor Hubley was asked to do more than the designated two cuts on the occasion set out in the facts relied on for this determination. I find that the Company has violated Article 41.1 of the collective agreement. Although the Union suggests that I not remit the matter of damages back to the parties for determination, I am doing so in order for the parties to arrive at a precise calculation of what is owed for the violation on each of the days grieved. I remain seized in the event they are unable to resolve this matter.

Standard of Review

[21] The parties agreed that the standard of review is reasonableness which the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, described as follows:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] In the later decision of *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Supreme Court provided additional guidance on how a reviewing court should approach the assessment of reasonableness. In that decision the court made the following comments:

> 13 This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using

concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. That was the basis for this Court's new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*'s conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).

14 Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses -- one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at s. 12:5330 and 12:5510). It is a more organic exercise -- the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

16 Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

17 The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[23] A reasonableness review does not involve dissecting the tribunal’s decision in a search for contradictions or mistakes. The Supreme Court of Canada described the

exercise as follows in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC 34:

> 54 The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. In this case, the board's conclusion was reasonable and ought not to have been disturbed by the reviewing courts.

Positions of the Parties

CN Position

[24] CN alleges that the arbitrator engaged in an unreasonable interpretation of the collective agreement and the award lacks sufficient justification, transparency and intelligibility. It focuses on the arbitrator's comment that Mr. Hubley was instructed to "bring the cars around to the HIT so they would be ready for future movement out of the yard." CN says the reference to future movement out of the yard was inconsistent with the arbitrator's finding that the Halifax terminal was the final destination. The finding by the arbitrator that Mr. Hubley had "put his train away" on tracks RH10 and RH11 is said to be an error because the final destination was the Halifax terminal which included the HIT.

[25] Another ground of review raised by CN was the unreasonable failure to follow prior arbitral jurisprudence. The three awards which CN says should have been followed are *AH-583, CROA 4025*, and *CROA 4151*.

Union Position

[26] The Union says that Arbitrator Silverman's decision was reasonable and that she properly interpreted the concept of requirements of the service found in Article 11.7(d). The arbitrator's quote from *AH-606* sets out the well settled interpretation of that phrase. The Union says the award falls within the range of acceptable outcomes in light of the deference owed to the arbitrator under the reasonableness standard of review.

Analysis

[27] As the Supreme Court of Canada has indicated, the assessment of the reasonableness of a tribunal's decision is an organic exercise which should focus on the outcome and the process by which it was arrived at. What is sufficient will vary depending upon the parties and the tribunal. The relationship between CN, the Union, and CROA, is of long standing and includes many awards arising out of CN's railway operations. The objective of the CROA arbitration process is to provide an efficient solution to the dispute in question and guidance for the ongoing relationship. Awards are very brief but answer the point in issue. This expectation can be seen in a review of the arbitral awards that have been provided to me. Such a philosophy was described in the following terms by the Supreme Court in *Newfoundland and Labrador Nurses' Union*, *supra*:

> 23 The arbitrator in this case was called upon to engage in a simple interpretive exercise: Were casual employees entitled, *under the collective agreement*, to accumulate time towards vacation entitlements? This is classic fare for labour arbitrators. **They are not writing for the courts, they are writing for the parties who have to live together for the duration of the agreement. Though not always easily realizable, the goal is to be as expeditious as possible.** (**emphasis added**)

[28] The award of Arbitrator Silverman is a response to the submissions of the parties at the hearing. The position of CN was that the movement of the block of cars from track RH10 to the HIT was permitted under Article 11.7(d) of the collective agreement, and it paid Mr. Hubley the premium set out in that provision. In accordance with that article, CN argued that the transfer was necessary to meet the requirements of the service.

[29] CN also made two further arguments in support of their position. The first was that the process of transferring the cars to the HIT was incidental to the instruction received, relying on *CROA 4151*. The other was that Article 41.1 allowed them to direct Mr. Hubley to carry out switching of his own train which included delivery of blocks of cars to different locations in the destination yard according to *CROA 4025*.

[30] In light of the language of Article 11.7(d) the interpretation of what is meant by the requirements of the service is central to this judicial review. This provision specifically applies to conductor only trains and, by its terms, supersedes the general provisions of Article 41.1. Whether the switching done by Mr. Hubley was incidental to the CN instruction or in relation to his own train is irrelevant if that instruction to move the cars to the HIT was not authorized under article 11.7(d). As conceded by Mr. Charney on behalf of CN at the hearing, if the arbitrator's decision on this point is reasonable, CN's application for review must be dismissed.

[31] There were three prior arbitration awards which the parties refer to on the issue of meeting the requirements of the service. They were all decided by Arbitrator Picher. The first in time was *AH-560*, which dealt with conductor only agreements in western Canada that included the concept of requirements of the service. With respect to the meaning of that phrase the arbitrator said as follows:

> However, "hook and haul" is not an absolute rule. In that regard, particular attention must be paid to the language of article 15.2 (b) (iv) which reads as follows:
>
> > (iv) If switching in connection with their own train is required at the initial or final terminal to meet the requirements of the service, (except to set off a bad order car or cars or lift a bad order car or cars after being repaired), the conductor will be entitled to a payment of 12-1/2 miles in addition to all other earnings for the tour of duty;
>
> The foregoing article clearly contemplates situations in which conductor only crews are required to perform switching at initial or final terminals. Firstly, it is paramount that such switching must be "in connection with their own train". They are not to perform switching intended for the purposes of another train or yard movement. Secondly, such switching must be necessary "to meet the requirements of the service", subject to the exceptions expressly enumerated with respect to bad order cars.
>
> After careful consideration, the Arbitrator is satisfied that the phrase "the requirements of the service" can involve some regard for the requirements of the Company or of the Company's customers. I am compelled to conclude that the intention of the phrase "to meet the requirements of the service" obviously includes those circumstances where, by legal regulation or otherwise, certain cars or commodities, for example cars containing hazardous goods, must be marshalled at a certain position within the consist of a train. …

[32] The next award is *AH-583* which resulted from a mediation/arbitration process which arose out of continuing disagreements following the decision in *AH-560*. The parties agreed to place fact situations before Arbitrator Picher with a view to obtaining rulings from which guiding principles could be derived. The position of the Union was that CN had given an overly broad meaning to the concept of requirements of the service as discussed in *AH-560*.

[33] One of the scenarios presented to the arbitrator in *AH-583* involved a very short timeframe between the arrival of one train and the departure of another, which would incorporate some of the same cars. The arbitrator concluded that this time pressure justified the switching being carried out by the incoming conductor as a requirement of the service. His reasoning was as follows:

> The Arbitrator must agree with the Company that **the short lapse of time between the arrival and placement of traffic in ER-03 and the ordering of train A-439-81-26 did make it impracticable to double over that traffic into one of the other tracks containing segments of Conductor Yarema's train. That fact, coupled with the fact that the train itself could not fit in any one of the tracks does, in the Arbitrator's opinion, bring this scenario within the contemplation of article 15.2(b)(iv).** This was switching in relation to the conductor's own train made necessary to meet the requirements of the service by reason of the exigencies of time. In the result, no violation of article 15 of the collective agreement is disclosed. It may be noted that in the instant case there was a lapse of approximately one hour and twenty minutes between the placement of the incoming cars and the time ordered for the grieving conductor's train. **The Arbitrator is satisfied that that lapse of time did justify the move required by the Company. I make no comment as to the point in time at which the Company would have incurred the obligation to move the recently arrived traffic so as to minimize the moves of the conductor-only crew. In such circumstances the merits of specific cases must be determined on their own particular facts.** Clearly, however, there would be a point at which the lapse in time between the arrival of the traffic and the assembling of the departing train would require the Company, presumably by the use of yard engines, to move the recently arrived cars into another track so as to conform with the requirement of using the minimal number of tracks contemplated in article 15.2(b)(ii). The two hours and thirty-five minutes of greater lapse time in the Gaborieau scenario discussed above, with the different conclusion that the Company did commit a violation, should be instructive in that regard. It should also be noted that in the review of the materials concerning this grievance the Arbitrator respects the without prejudice nature of the settlement discussions which occurred between the parties, a principle apparently overlooked in the Union's brief. (**emphasis added**)

[34] Another scenario considered in *AH-583* involved the delivery of a block of cars to an intermodal facility. The arbitrator's decision discussed the issue as follows:

> In keeping with the principles governing the scenario of Conductor Zarecki, described above, the Union does not object to the designated cut which was first given to Conductor Lintick. Nor does it object to the fact that Conductor Lintick was next instructed to set off cars at the intermodal yard or facility. It is the events at the intermodal facility which give rise to the grievance of Conductor Lintick. In effect, it does not appear disputed that all of the cars which Conductor Lintick set off in intermodal facility could have been set off into a single track on one side of the intermodal pad. However, to facilitate unloading and to increase the efficiency of operations the Company instructed Conductor Lintick to make two separate set offs at the intermodal facility, one in each track on either side of the intermodal pad. In other words, cars which could have fit into a single track were set off into two separate tracks purely for reasons of greater efficiency.

> The Company submits that that instruction was permissible as it constituted switching at the final terminal "to meet the requirements of the service" as contemplated within article 15.2(b)(iv).
>
> With respect, the Arbitrator cannot agree. To interpret the words as the Company would have it would, I think, be tantamount to stating that conductor-only road crews can be compelled to perform yard work whenever it is more efficient for them to do so from the standpoint of customer service. That is clearly not the tenure of the language of article 15. In the Arbitrator's view, the requirement to separately set off cars at the intermodal facility, albeit in one track if a single track will accommodate them, is manifestly in keeping with meeting the requirements of the service as contemplated within sub-paragraph (iv). However, the separate breaking up and marshalling of cars to separate positions on the intermodal pads is of a different order of work, going beyond the requirements of the service to what is in effect the undue performance of yard work in dismantling a train, beyond the contemplation of the Conductor-Only Agreement.

[35] This is the portion of *AH-583* which CN says the arbitrator should have applied to the Hubley grievance.

[36] The third award is *AH-606*, which involved an interpretation of Article 11.7(d) of the same collective agreement applicable to Mr. Hubley. The grievance involved a complaint that the conductor was required to assemble the train from cars found on three tracks when it should have been two. After reciting the basic facts and the provisions of the collective agreement, Arbitrator Picher's decision was as follows:

> In the presentation of its case the Company presents the alternative fact situation involving Conductor D. Griffin, departing Macmillan Yard on October 18, 2008. It appears that in that case Conductor Griffin was required to extract the cars of his train from three separate tracks. Two of the tracks apparently contained segments of two other trains, respectively, which cars were fully brake tested and prepared to go. The third track, referred to as the Hump Track, contained the balance of the cars which would make up the train. The Company's representative submits that in that situation drawing cars from all three tracks was necessary "… to meet the requirements of the service" within the meaning of article 11.7(d), so that it was permissible.
>
> The Arbitrator cannot agree. It is well settled that the concept of "the requirements of the service" is not the equivalent of the arrangement which would best suit the convenience or efficiency of the Company. While customer service might have a bearing, it is generally external factors, such as safety regulations or operating rules which are intended to be caught by the phrase "the requirements of the service". That is reflected, in part, in *AH-560* where the arbitrator commented:
>
> > … I am compelled to conclude that the intention of the phrase "to meet the requirements of the service" obviously includes those circumstances where,

> by legal regulation or otherwise, certain cars or commodities, for example cars containing hazardous goods, must be marshalled at a certain position within the consist of a train. …
>
> The rule in article 11 of the collective agreement is, in my opinion, clear. Presumptively, at the initial terminal cars are to be placed in the minimum number of tracks for departure. The limitation is to the number of tracks necessary, to be limited only by the possible insufficiency of track length to hold the fully assembled train. In the case at hand there was clearly no insufficiency of track space to accommodate the train of Conductor Stevenson, or the train of Conductor Griffin, from being contained in two tracks. Nor, for the reasons touched upon above, can I find that any switching was required to meet the requirements of the service within the exception provided in sub-paragraph (d) of article 11.7.
>
> For the foregoing reasons the grievance must be allowed. The Arbitrator finds and declares that on both examples reviewed above the Company violated article 11 of the collective agreement. It should, in the circumstances disclosed, have assigned an assistant conductor to the train in question. Alternatively, it can be found that there was a violation of article 44, in that the Company failed to have the necessary yard switching work performed by yard service employees.
>
> The matter is remitted to the parties for discussions with respect to the appropriate remedy. I retain jurisdiction in the event of their inability to reach agreement upon that question.

[37] CN argues that the portion of the award in *AH-583*, dealing with the scenario involving Conductor Lintick, has decided that movement of a block of cars to an intermodal facility meets the requirements of the service criteria and Arbitrator Silverman was unreasonable in not following this decision. I disagree. The question of whether Conductor Lintick was required by the collective agreement to move the cars to the intermodal facility was not in issue, the point had been conceded by the Union and therefore is of little precedential value in other circumstances. The dispute was over whether further switching at the intermodal facility was authorized under the agreement and the arbitrator said it was not.

[38] The three awards by Arbitrator Picher taken as a whole make it clear that he is of the view that the question of the requirements of the service must be determined based upon the individual circumstances and, in particular, external factors, such as safety regulations, operating rules, and time constraints. There is nothing in any of these awards to suggest that transfer of cars to an intermodal facility will meet the requirements of the service criteria in all cases.

[39] Arbitrator Silverman's award is concise in its discussion of the requirements of the service issue. She identifies the test which she is applying from *AH-606* and

then states the conclusion that, in this case, the CN direction to deliver cars to HIT did not meet that criteria. The work was to be done by the yard crew.

[40] CN points out that the award does not include any explanation or justification for reaching this conclusion. That is not surprising given the nature of the CROA process and the brevity of awards from that tribunal. The arbitrator was answering the issues as presented to her and, in my view, that is sufficient.

[41] CN refers to two other prior awards which they think should have been followed, *CROA 4025* and *CROA 4151*. In neither of these was there an issue about what constitutes the requirements of the service. In *CROA 4025* the engineers' collective agreement permitted the employer to direct the deposit of car blocks to different locations within the destination yard as part of switching in relation to one's own train under Article 41.1. The grievance was upheld because the marshalling required by CN went beyond the scope of work permitted under the agreement.

[42] In *CROA 4151* the arbitrator was required to apply article 7.9(e) of the collective agreement to work done separating cars destined for Saint John, Moncton and Halifax. The work was done in the Moncton terminal and the Halifax cars had to be reassembled into a train to continue on. The switching involved was held to be incidental to the authorized work under Article 7.9(e) and therefor the responsibility of the incoming crew.

[43] The arbitrator mentions both *CROA 4025* and *CROA 4151* in her decision but applies Article 11.7(d), which governs Mr. Hubley's train, using the test for requirements of the service set out by Arbitrator Picher in *AH-606*.

[44] If the arbitrator had clearly departed from prior arbitral jurisprudence, I agree with CN that an explanation should be provided. In this case Arbitrator Silverman was applying the well established concept of the requirements of the service as described in *AH-606* and, in the circumstances, need not justify or explain her rationale in any more detail than she did.

[45] CN spent considerable effort challenging what it called irreconcilable inconsistencies in the award. These relate to the reference to Mr. Hubley placing the train at the HIT for "future movement out of the yard" which CN suggests contradicts the finding that Halifax was the destination terminal. They say Arbitrator Silverman then considered inapplicable awards dealing with switching related to trains which were to be taken onward by another crew.

[46] In my view CN is attempting to dissect the award in a search for error. As a CROA arbitrator Ms. Silverman would be very familiar with intermodal facilities such as the HIT. They are found throughout the CN rail system and represent locations where rail delivery stops and containers are transferred to truck or vessel transport. Once offloaded, the cars would be moved out of the HIT and I assume that is what the arbitrator is referring to, not delivery of the loaded cars by another road crew to a different destination.

[47] The awards which CN suggests demonstrate the award's internal conflict are *CROA 2099* and *CROA 3182* which relate to the permitted scope of switching one's own train under Article 41.1 in the destination terminal. In *2099* setting aside a block of cars which would be moved onward by another crew was permitted and in *3182* collecting and transferring such a block to another yard within the terminal was not. These awards illustrate the factual analysis which goes into determining when switching no longer relates to one's own train under 41.1 and were presumably included in the award to respond to CN's arguments at the arbitration hearing.

[48] Even if the arbitrator could have been clearer in the language used to describe the delivery of cars to the HIT, by indicating that future movement would take place after offloading, this does not affect her analysis of the key issue, which is the application of Article 11.7(d).

Conclusion and Disposition

[49] The arbitrator's award, although brief, is responsive to the issues and arguments presented by the parties. It satisfies the objectives of the CROA process by providing an answer to the particular dispute in a timely fashion. The interpretation of the collective agreement language related to requirements of the service is well established in prior arbitral jurisprudence. It is primarily a question of fact which depends on the particular circumstances under consideration. The arbitrator's conclusion, that the transfer of the block of cars from RH10 to the HIT should have been done by yard crews, and not Mr. Hubley, falls within the range of acceptable outcomes available to her.

[50] For the above reasons I will dismiss the application for judicial review. If the parties are unable to reach an agreement on costs they may make written submissions within 30 days of the date of this decision.

Wood, J.