CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4731

Heard in Montreal, April 14, 2020

Concerning

CAPE BRETON AND CENTRAL NOVA SCOTIA RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Since May 16th, 2016, the Company is denying employee J. Marsh time claims for travel time and automobile expenses when he was recalled to work and required to travel between the terminals of Port Hawkesbury and Stellarton.

JOINT STATEMENT OF ISSUE:

For certain periods of time since May 2016, Mr. Marsh was laid off and recalled to work by the Company. When recalled, he was required to work out of the Stellarton terminal. Mr. Marsh's home terminal is Port Hawkesbury. He submitted claims as per articles 13.6 and 15.5 which were declined by the Company.

The Union contends that on these occasions, Mr. Marsh could not hold work at his home terminal of Port Hawkesbury. When recalled from lay off, he was required to report for work at the Stellarton terminal. Therefore he had to commute a total of 230 kilometers and two and a half hours a day to go to work.

The Union's position is that when recalled, Mr. Marsh was forced by the Company to work out of the Stellarton terminal. Articles 13.6 and 15.5 are clear and Mr. Marsh should be paid the time and kilometers for commuting between the two terminals.

The Company's position is that it did not force Mr. March to work out of the Stellarton terminal. As per article 17.3, the Company used the senior may and Junior must principle to recall Mr. Marsh. Consequently, Mr. Marsh had the opportunity of waiving his recall since there were junior employees available. It was his choice to fill the vacancy in Stellarton. Mr. Marsh exercised his seniority in Stellarton. Therefore, he is not entitled to any reimbursement.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. M. Hallé	**(SGD.) R. McLellan**
General Chairperson	Vice President

There appeared on behalf of the Company:

W. Hlibchuk	– Counsel, Norton Rose Fulbright
R. McLellan	– Vice President, Operations
A. Houde	– General Manager
B. Giroux	– Human Resources

And on behalf of the Union:
F. Shayegh – Counsel, Melançon, Marceau Grenier et Sciortino
J.M. Hallé – General Chairman

AWARD OF THE ARBITRATOR

1. The Company is a subsidiary of Genesee and Wyoming Inc. which owns or leases 116 freight railroads worldwide, organized in locally managed operating regions. With its base of operations located in Stellarton, Nova Scotia, the Company hauls commodity freights such as chemicals, coal, lumber, paper and petroleum products.

2. On December 7, 2006, the Grievor was hired by the Company. He works as a conductor and his home terminal is Port Hawkesbury.

3. The Grievor is laid off and recalled on several occasions to work at the Stellarton terminal. He made travel allowance requests with respect to his commute from his home terminal and his requests have been denied by the Company.

4. Therefore, on or around May 16, 2016, the Grievor is recalled from a lay-off to work at the Stellarton terminal (hereafter the first recall).

5. On or around May 29, 2016, the Grievor submits an expense report and a timesheet report for the pay period of May 16 to May 29, 2016.

6. On May 30, 2016, the company rejects the claim for travel allowance.

7. On June 28, 2016, the Union files a grievance (06/16 Expense Mileage Claim and 17.5 hrs Pay Adjustment) at Step 2 of the grievance procedure, which contests, inter alia, the refusal of the Company to compensate the Grievor for travel allowances.

8. On the same day, the Company provides its reply to the Step 2 grievance which states notably :

> When Mr. Joe Marsh was recalled back to work from layoff status he was ask if he wanted to work out of Stellarton, he said yes he was never (forced). He was then told that he would be on the Stellarton spareboard as conductor. Before calling Mr. Joe Marsh the job was offer to conductor Mr. George MacNeil who waive recall back to work.
> (…)

9. On August 5, 2016, the Union files a grievance at Step 3 :

> This letter constitutes a Step 3 grievance in favour of J. Marsh 4760 and concerns a claim for travelling time and expenses for the period between May 16th an 29th 2016. This grievance is forwarded in accordance with Article 25 of collective agreement #4 between CBNS Railway and the TCRC.

10. On January 10, 2017, by way of a written notice, the Grievor is recalled from lay-off to work at the Stellarton terminal (hereafter the second recall) :

> On Tuesday January 10 2017, Trainmaster Justin Smith tried to notified you by telephone that you were being recalled to active service as an Conductor with the Cape Breton and Central Nova Scotia Railway following a period of lay-off.
>
> With this register letter Cape Breton and Central Nova Scotia Railway is guarantee you ninety (90) calendar days of word as a Conductor.
> (…)

11. The Grievor worked from January 23, 2017, to June 10, 2017 when he was laid off again.

12. On June 26, 2017, the Grievor is recalled from lay-off (hereafter the third recall).

13. On July 24, 2017, he submits an expense report for the pay period of June 26 to July 23, 2017.

14. In a letter dated July 28, 2017, addressed to the Grievor, the Company states:

> … This expense report has been held in a abeyance as you have another claim with the same matter that is in the grievance process and adds you were never forced to the job but you did exercise your seniority to accept the job.

15. The letter erroneously states that the Grievor's home terminal was Stellarton as it is in fact Port Hawkesbury.

16. On February 16, 2017, the Company provides its answer to Step 3 grievance filed by the Union on August 5, 2016.

17. On February 17, 2017, the Union raises the issue with respect to the timeliness of the answer at Step 3 from the Company.

18. On March 27, 2017, the Union writes to the Company to confirm that the original issue pertaining to the pay period of May 16 to 29, 2016, (the first recall) would be resolved, but that the parties agreed to still proceed with arbitration on the merits of the dispute.

19. Subsequently, the parties agreed to put all similar claims in abeyance until the matter proceeded to arbitration and the grievance was deferred to arbitration before the undersigned.

20. Despite the fact that the grievance only relates to the first recall and that the parties' attorneys agreed that all similar claims would be put in abeyance, both parties discussed at great length and produced numerous documents relating only to the two other recalls in their written submissions. Also, the Joint Statement of Issue mentions “for certain periods of time since May 16, 2016, Mr. Marsh was laid off and recalled to work by the Company” and “on these occasions”.

21. In the Memorandum of Agreement establishing the CROA, article 9 states:

> 9. No dispute of the nature set forth in section (A) of clause 6 may be referred to arbitration until it has first been processed through the last step of the grievance procedure provided for in the applicable collective agreement. Failing final disposition under the said procedure a request for arbitration may be made but only in the manner and within the period provided for that purpose in the applicable collective agreement in effect from time to time or, if no such period is fixed in the applicable collective agreement in respect to disputes of the nature set forth in section (A) of clause 6, within the period of 60 days from the date decision was rendered in the last step of the grievance procedure.
>
> No dispute of the nature set forth in section (B) of clause 6 may be referred to the Office of Arbitration until it has first been processed through such prior steps as are specified in the applicable collective agreement.

22. However, in order to help resolve those issues, this decision will also examine the two other recalls, but it will not be part of the formal award.

PRELIMINARY OBJECTION

23. During the hearing, the Union raised an objection regarding the arguments presented by the Company in its written submissions. The objection is to the effects that the arguments raised by the Company went beyond the specific provisions indicated in the Joint Statement of Issue.

24. The Union submits that the Company explicitly refers to section 17.3 as the premise for its position in the Joint Statement of Issue, yet the arguments raised in the latter's written submissions are mostly based on articles 12.8 c), 12.10 and 12.11 of the collective agreement. The Union submits that the Company should be precluded from raising any arguments going beyond the scope of the express provisions indicated in the Joint Statement of Issue.

25. The Union refers to the Memorandum of Agreement establishing the CROA. Articles 10 et 14 states:

> Art. 10: The joint statement of issue referred to in clause 7 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated. In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours' notice in writing to the other may apply to the Office of Arbitration for permission to submit a separate statement and proceed to a hearing. The scheduled arbitrator shall have the sole authority to grant or refuse such application.
>
> Art. 14: The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such

> issues, conditions or questions. The Arbitrator's decision shall be rendered in writing, together with written reasons therefor, to the parties concerned within 30 calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, unless the applicable collective agreement specifically provides for a different period, in which case such different period shall prevail.
>
> The decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement."
> (Underlining added)

26. According to the Memorandum of Agreement establishing the CROA the Joint Statement of Issue "shall contain the facts of the dispute and reference to the specific provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated".

27. In the present case, the Company has indicated in the Joint Statement of Issue:

> As per article 17.3, the Company used the Senior may and Junior must principle to recall Mr. Marsh. Consequently, Mr. Marsh had the opportunity of waiving his recall since there were Juniors employees available. It was his choice to fill the vacancy in Stellarton.

28. In its reply to the Step 2 grievance dated June 28, 2016, the Company made reference to the provisions and principles regarding the exercise of seniority and the "senior may and junior must" principle and to that effect cites articles 12.8 c), 12.10 and 12.11 of the collective agreement.

29. Also, in its letter dated July 28, 2017, the Company writes "You were never forced to the job but you did exercise your seniority to accept the job".

30. In Case **SHP 588**, Arbitrator Michel G. Picher states: “It is well established that a board of arbitration should not be unduly technical in limiting the ability of the parties to deal with the true substance of the matter which gives rise to a dispute at arbitration, particularly where there is no demonstrated prejudice to the opposite party”.

31. At no time did the Union claim to be prejudiced and/or request permission to produce additional proof or arguments to contest the allegations contained in the Company Brief.

32. Consequently the objection is rejected.

DECISION ON THE GRIEVANCE (06/16 Expense Mileage Claim & Pay adjustment Claim (May 16 to May 29 2016)

33. The Grievor is claiming travel expenses following a recall to work at the Stellarton terminal after being laid off. His home terminal is Port Hawkesbury.

34. The Union submissions is that the Grievor was forced to the recall and as such, according to article 17.3 of the collective agreement, has a right to the reimbursement of travel expenses provided in articles 13.6 and 15 of the collective agreement.

35. Article 17.3 reads:

> Article 17 - LAY OFF - RECALL
> (…)
>
> 17.3 Subject to the availability of junior employees, on their own territory, an employee may waive recall without the loss of seniority,

> for vacancies with an expected duration of less than ninety (90) calendar days.

36. On its side, the Company submits that the Grievor voluntarily accepted the posting and that he is ineligible to payment of travel expenses. The Company argues that according to articles 12.8 c), 12.10 and 12.11 of the collective agreement, the Grievor was not forced since he was not a junior employee on the consolidated seniority list.

37. These articles reads:

> Article 12 - POSTING AND FILLING VACANCIES
> (…)
>
> 12.8 Employees listed on Territory ‘’A’’ and Territory ‘’B’’ sonority lists must fill all vacancies on their respective seniority territories before they can exerciseseniority to the other seniority territory as set forth hereunder:
> (…)
> (c) Employees who cannot hold work in their respective seniority territory may exercise seniority to the other seniority territory in order of their standing on the applicable Consolidated Seniority list.
>
> 12.10 If vacancies, as provided for in the preceding Articles subsequently remain unfilled when the procedures specified therein are applied the junior employees on the applicable Consolidated Seniority list will then be placed in such unfilled vacancies, in order of such employee seniority on the applicable Consolidated Seniority list, commencing with the junior such employee.
>
> 12.11 A. For the purpose of filling permanent/temporary vacancies, conductors who are qualified as Locomotive Engineers must take promotion to Locomotive Engineer’s position in seniority order.
>
> B. All employees holding seniority on CBNS on the effective date of the Agreement (January, 2012) are grandfathered and they can use the senior may junior must principle to fill permanent and/or temporary vacancies. All other employees are governed by article 12.11 A to fill permanent and /or temporary vacancies.
> (…)

38. In the present case, given that the situation of lay-off and recall is specifically being addressed in paragraph 17 of the collective agreement, articles 12.10 and 12.11 which refers to posting and filling vacancies are not applicable in the present situation.

39. Article 17.3 gives the employee, under certain conditions, the possibility to waive a recall, without loss of seniority.

40. The Union argues in its submission that three conditions must be meet to waive a recall:

> 46. Article 17.3 is a provision of the Collective Agreement that grants a "waiving right," without loss of seniority, to employees "on their own territory" (1) when the vacancy is "less than ninety (90) calendar days" (2), subject to the "availability of junior employees" (3);
>
> 47.The wording of article 17.3 denotes that there are three cumulative conditions;
>
> 48.Consequently, if one of the conditions is not met, article 17.3 does not apply;

41. In the present case, the expression "on their own territory" used in article 17.3 refers to the availability of junior employees and not to the employee who may waive recall.

42. Consequently, according to article 17.3, an employee may waive recall if 1) there are junior employees available in the territory where the vacancy has to be filled, and 2) if the vacancy is less than ninety (90) calendar days. If those two criteria are not met, the employee may be forced to the recall.

43. Article 13.6 of collective agreement states regarding the reimbursement of travel allowance:

> 13.6 Employees required, by the Company, to travel between terminals to work will be paid at the straight time rate of pay as follows as a travel allowance:
> 1'15'' between Stellarton and Pt Hawkesbury, each way.
> […]
> Automobile mileage applicable as per Article 15 when personal automobile is utilized."
> (Underlined added)

44. Therefore, article 13.6 of the collective agreement applies when an employee is "required by the Company" to travel between terminals for work.

45. In **CROA 2986**, Arbitrator Michel G. Picher had to determine the meaning of a particular provision which called for weekend travel assistance for employees "required" to work away from their home location. He writes:

> "The question then becomes whether the grievor can be said to have been required to take work in Winnipeg, necessitating travel from his home in Beausejour, within the meaning of the "qualification" paragraph of the letter of understanding. The notion of being required can obviously have a number of meanings. It is not disputed that a section forces employee compelled by the Company to work temporarily at some distance from his home would fall within that category. It would also appear to the Arbitrator to be arguable that an employee who is compelled to work at a location other than his home, to the extent that his seniority can obtain him or her no other position, is under a degree of compulsion or requirement which would fall within the paragraph in question.
>
> (...)
>
> From a practical standpoint, he was required to work there, or within the Brandon Seniority District, if he wished to work at all. In either case, he was required to travel from his home at Beausejour to protect the only work he was then able to hold. I am satisfied that in that circumstance Mr. Fuerst can fairly be said to fall within the contemplated scope of the expression "an employee ... required to work away from his home ..." appearing in the letter of understanding of January 11, 1996. That conclusion would plainly not obtain if the

> grievor's seniority could have obtained him work on the Lakehead Seniority District at the times material to this grievance."
> (Underlined added)

46. As depicted in the excerpts above, an employee "forced" to work at a particular location is deemed to be "required" to do so.

47. Consequently, if an employee wants to be reimbursed for his travel expenses, he has to be required (or forced) to the recall by the Company. If the employee has the possibility of waiving the recall according to article 17.3, but decides to accept the employer's proposal, then, he has no right for reimbursement of such expenses.

48. The first criteria according to article 17.3 to allow an employee to waive a recall is the availability of a junior employee in the territory where the vacancy has to be filled.

49. The Company has recognized in the Joint Statement of Issue that "Mr. Marsh had the opportunity of waiving his recall since there were junior employees available" and in its written submission "on each of the recalls since May, 2016, there has always been a junior employee under the Grievor on the seniority list", the first criteria of article 17.3 is consequently satisfied for all three recalls.

50. The second criteria being that the vacancy must be of less than 90 days.

FIRST RECALL OF MAY 16 TO MAY 29, 2016

51. According to paragraph 10 of the Company Brief, “on or about May 16, 2016, to May 29, 2016, the Grievor worked at the Stellarton terminal after having been offered and accepted to fill a vacancy as a conductor for less than 90 days”.

52. Accordingly, the two criteria of article 17.3 are satisfied for this period. The Grievor had the possibility to waive the recall and therefore is not entitled to reimbursement of travel expenses for the said period.

53. Consequently the grievance is dismissed.

SECOND RECALL OF JANUARY 23, 2017 TO JUNE 10, 2017 – NOT COVERED BY THE GRIEVANCE

54. As for the second recall, the written notice dated January 10, 2017, clearly provides that the Grievor will be filling a vacancy for at least “ninety (90) calendar days of work”.

55. As stated in the Company brief, the Grievor worked 138 calendar days at Stellarton further to his recall in January 2017.

56. The Union has produced the job bulletin, issued by the Company on January 23, 2017, pertaining to the vacancy (ST17-001) which confirmed the Grievor’s filling the vacancy starting January 23, 2017 with the mention “forced” after the Grievor’s name.

57. In its letter dated July 28, 2017, the Company reiterates that the Grievor was contacted on January 10, 2017, to fill a vacancy with the guarantee of at least “ninety (90) calendar days of work”, which is identical to the language used in the written notice of January 10, 2017.

58. The Company has produced a letter addressed and signed by the Grievor on January 23, 2017, which reads as follows:

> Monday, January 23, 2017
> Mr. Joe Marsh
> Conductor
> CBNS railway
>
> This letter is to confirm that you are accepting an offer of a position as conductor from lay off with a guarantee of at least 90 calendar days of work starting in Stellarton, Nova Scotia on Monday, January 23, 2017.
>
> By signing this letter, you acknowledge the said above. It is your responsibility to present yourself for work at Stellarton for Monday, January 23, 2017. A copy of this letter will be placed in your employee file.
>
> Signature: Joseph S. Marsh date Jan 23 2017
> Justin Smith
> Trainmaster
> CBNS railway

59. The Company interprets this letter as an acknowledgment that the Grievor was accepting that he was returning to work voluntary and not being forced.

60. The Company also submits that it asked the Grievor to sign this acknowledgment in order to avoid any confusion and to ensure the Grievor recognized that by voluntarily accepting to be recalled he would not be entitled to any expenses.

61. This interpretation of the letter is not retained, although this letter mentions that the Grievor is accepting an offer, there is no mention of returning to work voluntarily and not being forced, and no renunciation to claim travel expenses.

62. Given that the recall was for at least 90 days, the Grievor had no possibility to waive the recall and was required to fill the vacancy during January 23, 2017, to June 26, 2017.

63. For these reasons, according to the present arbitrator, the Grievor should be entitled for travel expenses during the second recall given that he was "forced" to accept the unbid vacancy and, as such, was eligible to benefit from the travel allowance provisions of the Collective Agreement.

THIRD RECALL FOR JUNE 26 TO JULY 23, 2017 – NOT COVERED BY THE GRIEVANCE

64. The third recall, was made by a verbal notice over the phone call initiated by Trainmaster Everett Sullivan.

65. The Company has produced an email dated June 27 2017, in which Mr. Sullivan states:

> FYI,
> I called Joe Marsh on Thursday June 22nd, 2017, at 09:32 hour offering Joe work in Stellarton starting on Monday June 26th, 2017. At no time was Joe forced to the job. He was offer [sic] work on the Stellarton spareboard as a conductor and he accepted the position. He was not offered 90 days work.

66. No other proof was provided by the parties regarding the said recall.

67. According to the present arbitrator, given the fact that the Grievor was not offered 90 days of work for the said recall and that he had the possibility to waive the recall and consequently had not been “forced”, the Grievor should not be eligible for the travel expenses for the period of June 26 to July 23, 2017.

68. **CONSEQUENTLY**, THE CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION:

DISMISSES the grievance 06/16 - Expense Mileage Claim & Adjustment Claim (May 16 to May 29, 2016).

May 14, 2020

SOPHIE MIREAULT
ARBITRATOR