CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4881-S

Heard in Edmonton, July 9, 2025

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:
UNION'S EXPARTE STATEMENT OF ISSUE

Remedy for the violation of Article 96 of the 4.16 Collective Agreement as outlined in **CROA 4881**.

On March 7, 2024, the Arbitrator upheld the Union's grievance in CROA 4881 and ordered the remedies set out at paragraphs 87 to 91 of that award. The Arbitrator also retained jurisdiction "to address any issues relating to the implementation and application of this Award" and "to correct any errors or omissions, to give it the intended effect."

To date, the Company has refused to compensate the Grievor with the value of one extra day representing his missed PLD on the basis that the Company no longer employs the Grievor. The Union disagrees that this disentitles the Grievor from a remedy and asserts that the Grievor is entitled to the value of one day at his regular daily wage rate, a basic day at Road Switcher Conductor Rates of pay, or such other compensation as the Arbitrator deems appropriate, to be paid directly to the Grievor. In the alternative, if Mr. Pinkerton is not possible to locate or unresponsive, the Union requests that the value of the monetary remedy be awarded to the Union.

The Union further respectfully requests an Order and Declaration from the Arbitrator that your original Declaration in CROA 4881 – that the Company breached Article 96 of the Collective Agreement when it required the Grievor to work beyond the time when his PLD was due to begin – was declaratory relief applying to the interpretation generally of Article 96 of the 4.16 Collective Agreement and was not solely limited to a declaration regarding Mr. Pinkerton's PLD on November 30, 2015.

The Union further renews its requests for a damages remedy under Addendum 123 and for a cease-and-desist order to issue, based on the Company's unreasonable and bad faith interpretation of your award in CROA 4881 as well as its continued practice of calling employees for assignments which would require employees to work beyond the time when their PLDs are due to begin.

The Union also submits that taking such a strict, unreasonable and bad faith position on your award is an unreasonable and arbitrary exercise of management rights and a breach of the legal duty of honest performance in contractual relations. The Company's position on your award also constitutes a failure to act honestly with the Union concerning its performance of its contractual obligations and its implementation (or lack thereof) of your award, and requests a damages remedy and cease and desist order on that basis as well.

The Union also requests that the Arbitrator continue to remain seized.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE

The parties dispute whether the Company has properly interpreted and reasonably complied with CROA 4881.

On March 7, 2024, the Arbitrator made an Award in respect of a grievance filed by the Union on behalf of Mr. Tyler Pinkerton #162861.

As a preliminary issue, the Arbitrator found that although the Union was entitled to file a grievance in that instance at Step 3 of the grievance procedure set out in Article 84 of the 4.16 Agreement, the Arbitrator still found that "a dispute **must** be processed through the 'last step' of the grievance procedure before it can be heard" (para 46).

The Arbitrator found that the Company "does not have discretion to require an employee to work beyond when a PLD is to begin." The Arbitrator found that neither damages nor a cease-and-desist order was appropriate. However, the Arbitrator awarded one extra PLD for the grievor, Mr. Pinkerton.

Finally, the Arbitrator retained jurisdiction "to address any issues relating to the implementation and application of this Award" and "to correct any errors or omissions, to give it the intended effect." (Emphasis added.)

Company's Position:

As a preliminary matter, the Company submits that the supplemental hearing should be limited to clarifying the Award in CROA 4881, including issues related to its implementation and application. The purpose of a supplemental hearing is to allow the parties to seek clarification or direction in respect of an award. Parties cannot relitigate the original dispute or seek to extend the Award to matters, including other pending grievances, not before the Arbitrator at first instance through additional argument or evidence.

The Company submits that it has made reasonable efforts to comply with the Award in CROA 4881. Firstly, as it relates to Mr. Pinkerton, the Company submits that it made reasonable efforts to satisfy Mr. Pinkerton's right to receive an extra PLD. The Company attempted to arrange with the Union for Mr. Pinkerton to take his extra PLD. However, the Union and Company disagreed whether the PLD should be paid or unpaid; at the time of Mr. Pinkerton's grievance, PLDs were unpaid. Mr. Pinkerton was discharged prior to this issue being resolved.

Apart from Mr. Pinkerton, the Company has made changes to its practices to adhere to the spirit of the award from a broader perspective. Further, the Award confirmed the Company may contact an employee who has requested a PLD for work provided the employee is off-duty prior to the commencement of the PLD. Consistent with the Award, when employees are contacted for work opportunities prior to a PLD, the Company makes reasonable efforts to get them off-duty before the time their PLD is due to commence.

If there are instances where the Union alleges that the Company has failed to adhere to the CROA 4881 Award, then the Union must follow the grievance procedure set forth in the 4.16 Agreement. Under the CROA Rules (sections 6 and 9), for the Arbitrator to have jurisdiction, the parties must complete the grievance procedure. This has not occurred with respect to the non-party employees in respect of whom the Union alleges the Company has failed to adhere to CROA 4881.

If the Union takes issue with the manner in which the Company has interpreted CROA 4881, then the appropriate remedy in a supplemental hearing is for the Union to seek clarification of the award, not for it to seek to introduce fresh evidence related to new matters and non-parties and, on the basis of alleged misapplication of the award in respect of those non-parties, to seek damages and a cease-and-desist order.

Any evidence of non-parties is inappropriate to introduce in a supplemental hearing. The Union's request to demonstrate alleged non-compliance in this way will inherently require the Arbitrator to apply CROA 4881 to the unique facts and circumstances of new matters in dispute and non- parties. Such evidence is being proffered without the Company having had the benefit of reviewing or investigating the allegations, and without the benefit of considering the unique

circumstances of each case. Thus, the scope of the supplemental hearing and scope of relief sought by the Union is inappropriate and exceeds the Arbitrator's jurisdiction in this matter.

To allow the Union to bring its grievances in this manner would be to deprive the Company of its rights under the 4.16 Agreement and to violate the requirements set out in sections 6 and 9 of the CROA Agreement. As the Arbitrator stated in CROA 4881 at paragraph 46: "reviewing the CROA Agreement, I am satisfied that it requires that a dispute must proceed through the 'last step' of the grievance procedure before it can be heard."

For the Union:
(SGD.) J. Lennie
General Chairperson

For the Company:
(SGD.) S. Matthews
Senior Manager Labour Relations

There appeared on behalf of the Company:

P. Brasch	– Counsel, Norton Rose Fulbright, Calgary
S. Poletto	– Co-Counsel, Norton Rose Fulbright, Calgary
R. Singh	– Senior Manager Labour Relations. Edmonton
W. Abdelaal	– Director CMC, Edmonton

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, CTY-C, Hamilton
G. Gower	– Vice General Chairperson, CTY-C, Hamilton
E. Page	– Vice General Chairperson, CTY-C, Hamilton
R. Donegan	– General Chairperson, CTY-W, Saskatoon
M. Kernaghan	– General Chairperson, LE-C, Trenton
P. Boucher	– National President, TCRC, Ottawa

AWARD OF THE ARBITRATOR

[1] **CROA 4881** was issued by this Arbitrator on March 7, 2024. That Award determined an interpretation question regarding Article 96 of Agreement 4.16, relating to "*Personal Leave Days*". Jurisdiction was retained to *"…address any issues relating to the implementation and application of this Award" as well as to correct errors or omissions"* to "*give it the intended effect*" (at para. 91).

[2] An issue has arisen between the parties which involves both the implementation and the application of **CROA 4881**.

[3] Having retained jurisdiction for issues which flow from the implementation and application of **CROA 4881,** this Arbitrator is not *functus officio*: *Brown and Beatty,*

Canadian Labour Arbitration, section 1:39. However, a supplementary hearing is not an opportunity for the parties to "*relitigate the original dispute…[i]t is not an opportunity to have my findings or determinations challenged or revisited by way of supplemental argument"*: *CPKC and IBEW, Council No. 11; 2016-646* (2016).

[4] The first sentence of Article 96.1 states: "*Employees will, at their discretion, be entitled to take up to and including a maximum of 12 cumulative unpaid personal leave days per calendar year as provided herein*. Article 96.2 provides that "*Notice in respect of this leave will be given as follows…*" and sets out certain notice provisions, depending on how many personal leave day(s) are taken.

[5] **CROA 4881** determined:

a. "While the Company can call the Grievor in to work *during* the notice period for a PLD, he must be assigned work that can be *completed by the time his PLD is to begin.* Any other interpretation would render 96.2(1) meaningless*"* (at para. 60; emphasis in original).

b. "To find a competing meaning, I would have to imply a discretion to the Company to which the parties did not agree. I note specifically that the parties did not negotiate any limitation on the ability of an employee to take that PLD – such as that "regard must be given to the requirements of the Company's operations", or that the "Company retains discretion as to whether the PLD is granted and must exercise that discretion reasonably" as they could have done, and as is often seen (at para. 77).

c. "In my view, the Company has fettered its right to call an employee to work *over* the time a PLD is to start. While I agree with the Company that an employee is "available for work" *during* the four hour notice period, they are not "available for work *beyond* that four hour notice period, as they are to be on a PLD at that point in time, having given the appropriate notice (at para. 80 9 (emphasis in original).

d. The Company has also argued the Union's interpretation would not make sense given the Company's industry – as it is very difficult to find "short service" work of four hours or less. That may well be, but the Company must be held to what it chose to negotiate – for its own reasons – in Article 96. It is not for an Arbitrator to speculate why the Company failed to retain the flexibility it now argues it requires (at para. 81).

e. If the Company's interpretation were to be preferred – that it could call an employee in to work even if that work continued *past* the notice period and into the PLD – then Article 96.2(1) would be rendered meaningless. The Company could always circumvent that day by assigning the employee work which extended *beyond* the notice period, so long as it did so before

the PLD was due to start. That would result in an "empty" ability to use a PLD on four hours' notice. It is a fundamental canon of construction in contract interpretation that an interpretation must not be preferred which renders the words used by the parties meaningless" (at para. 82, emphasis in original).

f. As the Company's argument would strip Article 96.2(1) of any meaning – and I have found the Company did not retain discretion as argued – I cannot accept the Company's interpretation reflected the parties' mutual objective intention (at para. 83).

[6] Declaratory relief was provided at paragraph 88:

> I find and declare that the Company breached Article 96 of the Collective Agreement when it required the Grievor to work beyond the time when his PLD was due to begin.

[7] The Union has alleged the Company is not complying with **CROA 4881**. It argued that while the Company was entitled to contact employees during the notice period under that Award, it was not allowed to require them to accept such calls "*if*" that work would not be completed before the PLD was set to begin. The Union argued that its employees are still being required to either work at a point in time *after* their PLD day(s) was/were to commence, and if they do not, they risked "*refusing*" a call or being found as "*AWOL status*" and subject to Investigation. It provided several examples where this had occurred - not to resolve those individual situations - but to illustrate the Company had failed to comply with the Award. The Union maintained the Company does not have discretion to attempt to "*strike a balance*" for itself after **CROA 4881** as it argued, but was required to comply with the Award and <u>not</u> work employees into the time period their PLD was to start. The Union also raised concerns with the explicit and implicit pressure which resulted from the Company's policy of calling employees to give up their PLD's. It noted it was not permissible for the Company to negotiate directly with employees regarding their right to a PLD day under Article 96, as the Union alone was the exclusive bargaining agent for those employees; and the party to the Collective Agreement. It argued the Company was acting in bad faith in not complying with **CROA 4881**.

[8] The Union argued that remedies which were not awarded in **CROA 4881** – including a "*Cease and Desist Order*" and damages a- re now appropriately awarded,

given that the anticipated compliance - which this Arbitrator expected of the Company (at para. 89) - has not materialized.

[9] The Company argued that given its size and complexity, it is making "*reasonable efforts*" to comply with **CROA 4881**. It argued it *was* entitled to call employees during the notice period under the findings in the Award. The Company denied acting in bad faith or in a discriminatory or arbitrary manner in interpreting the Award and Article 96. It pointed out that over 7000 PLD days were given so far in 2025, and that the Union has only referred to a very few examples, representing a very low percentage of those total days. While the Company took issue with the Union relying on specific examples of where employees have been required by the Company to work past the point when their PLD was to begin, the Company also sought to rely on evidence that employees were refusing to respond to calls during the notice period, which did not comply with **CROA 4881**. It noted that it will call an employee and *ask* the employee who has served PLD notice to work, and offer to have the PLD cancelled and returned if the employee agrees to work. The Company relied on the use of the word "*required"* in paragraph 88 as it argued this was not "*requiring"* an employee to work, but was rather *asking* an employee if he or she wanted to cancel a PLD and work instead. The Company also argued that its policy of inquiring of employees if they wanted to keep their PLD or work, sought to "*strike a balance*" between its legitimate business interests and the interests of its employees.

Analysis

[10] As a starting point, CROA Arbitrators very often reserve jurisdiction for the implementation and application of their Awards. Supplemental hearings are not uncommon in this expedited process. That the parties may need assistance to ensure the appropriate implementation of an Award is not unusual in this industry or in this expedited arbitration process.

[11] Compliance with any Award from this Office - by all parties involved - is expected and anticipated. Such compliance provides "*protection of the administrative decision-making process"* as that phrase was coined by the Supreme Court of Canada: *WCB v. Figliola* [2011] 3 S.C.R. 422 at 452.

[12] In addressing the implementation of **CROA 4881**, it is important to first confirm that when an Arbitrator of this Office makes a determination of what a particular word or phrase in a Collective Agreement means; or how that phrase is to be applied; that Award is binding *for what that word or phrase means or how it is to be applied* until either a) the Award is set aside on appeal or that finding is stayed pending that appeal; or b) the parties choose to negotiate other language.

[13] While the Company relied on **AH641** for the *limitation* of an Award's application, that was an Award dealing with a material change. Material change is a very specific type of issue in this industry, subject to specific provisions in the Collective Agreement. This Arbitrator is very familiar with such provisions, having recently determined both **AH892** and **AH902**. I do not read **AH641** as a precedent for limiting the *ratio* of an interpretation decision to only the situation before the particular Arbitrator. In fact, that Award is support for a finding that if an Arbitrator *intends* the precedential value of his or her Award to be limited – the Arbitrator will specifically note that result. **CROA 4881** did not contain such language.

[14] **CROA 4881** is a binding decision issued by this Office, interpreting a clause in the Collective Agreement. It was determined in that Award that the Company was not entitled to require an employee to work *beyond* the point in time a PLD was set to begin. It was determined that if the Company called an employee for work during the *notice* period that was permitted, *if* the employee *completed* that work *by the time the PLD was to begin* (at para. 81).

[15] As noted clearly in the quoted excerpts, above, that Award clearly determined the Company did *not* retain for itself discretion for *when* an employee chooses to use those day(s), so long as the required notice is given and an allotment is available. That discretion belonged to the employee.

[16] If the Company is booking an employee to work during the notice period when it cannot ensure that employee will complete that work before the PLD is to begin, that practice would be in breach of Article 96: para. 81. There is no ability – in implementing **CROA 4881** – for the Company to work that employee and – if that work goes over the

PLD – to "*give the day back*". Following such a practice would therefore not be appropriately implementing **CROA 4881**.

[17] Leaving aside the live issue of whether a PLD can even *be* cancelled by an employee - as the Company maintained - **CROA 4881** clearly stated that the Company had not retained any flexibility for itself relating to PLD's under Article 96, for its own operational reasons or otherwise.

[18] The word "*required*" as used in the conclusion sentence in paragraph 88 does not change that result. That Award also noted: "*It is not for an Arbitrator to speculate why the Company failed to retain the flexibility it now argues it requires* (at para. 81).

[19] It follows that an employee would not properly be subject to Investigation for choosing to say "*no*" to the Company's request and using their booked PLD day. A practice of Investigating those employees who do not work over when their PLD time is set to begin – when the Company has not booked them for short work to end before that time - would not be an appropriate implementation of **CROA 4881.**

[20] However, that is not the only issue with the Company contacting employees to work over their PLD.

[21] The Union has a compelling argument that by communicating directly with employees to negotiate a different result than that which flows under the Agreement – and to put those days "*back in the bank*", the Company is inappropriately attempting to negotiate directly with employees. The Union is the exclusive bargaining agent of the employees, and the party under the Collective Agreement.

[22] In the implementation and application of **CROA 4881**, the Company is not free to unilaterally attempt to "*strike a balance*" to obtain for itself to gain the very flexibility which **CROA 4881** found it did not retain for itself. The place to obtain that flexibility is at the bargaining table.

[23] The Union has urged that remedial relief which was not ordered in **CROA 4881** be imposed on the Company, given the expected compliance has not occurred.

[24] In determining the appropriate relief in **CROA 4881,** it was noted that Article 96 had been subject to several arbitration decisions since it was added in 2005; and that

these provisions were subject to interpretation (at para. 89). It was determined it was not appropriate to order the "*extraordinary*" remedy of a "*cease and desist order*" (as that remedy was described in **CROA 5050**) *since it was found the Company should be given the opportunity to comply* (emphasis added).

[25] Relief was not ordered in CROA 4881, as it was determined the Company should be given an opportunity to comply in implementing and applying the Award. However, the Award did not foreclose that remedial relief if the Company did not appropriately implement **CROA 4881**, given that the lack of a remedy was specifically tied to the Company's compliance. While this supplemental Award should serve to address any misunderstandings between the parties resulting from the application and implementation of **CROA 4881,** if it does not, I remain seized for addressing any remaining issues for how **CROA 4881** and **CROA 4881-S** are implemented – or not being implemented – by the parties. Any further determinations may involve revisiting remedial relief given the connection of that relief to the Company's compliance, stated in **CROA 4881**.

I continue to remain seized of jurisdiction to address any questions relating to the application and implementation of **CROA 4881** and **CROA 4881-S**, and also to correct any errors; and address any omissions; to give it the intended effect.

August 6, 2025

CHERYL YINGST BARTEL
ARBITRATOR