CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4882

Heard in Calgary, November 14, 2023

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union's appeal of the Company's declination of yard rates provided for in Article 11.3 of Agreement 1.2 by Locomotive Engineer J. Baumgardner, when he incurred over 5 hours of time at the turn around point at Allen Mine on March 01, 2016.

The Union also contends that the Company breached its requirement to respond to the grievor's time claim within the 20 days allotted to it, thereby triggering Article 91.5.

JOINT STATEMENT OF ISSUE:

On March 01, 2016 Locomotive Engineer Baumgardner was ordered in turn around service at Saskatoon on train TB75851 27. Mr. Baumgardner was required to run 34.5 miles to MT 158.8 Watrous Subdivision where he then left the main line onto the Allen industrial spur. Mr. Baumgardner serviced the Potash Mine, setting off empty cars and picking up loaded cars from the industry tracks, from 0220 until 1140. Mr. Baumgardner submitted a claim for 9 hours and 20 minutes at yard rates under Article 11.2 and Article 11.3 when he accrued over 5 hours at his turn around point.

Mr. Baumgardner's working time claim was advanced by the Union at Step II and was not responded to, triggering the provisions of Article 91.5.

The Company's position is that yard rates are only applicable when claimed at a CN Yard, and that Article 11.2 provides for payment at the turnaround point.

The Union insists that the there is no requirement for a turn point to be a "CN Yard". The Union refers to the heading of Article 11 to buttress the position that Article 11.3 is applicable to Mr. Baumgardner's time at his turn point at Allen mine.

It is the position of the Union that the Company has erred in its application of Article 11.3 and that the Company has also breached Article 91.5 when failing to respond within 28 days of receiving the Union's Step II time claim grievance.

In resolution, the Union seeks to have the Arbitrator reimburse Mr. Baumgardner for the earnings that were deducted, as well as a declaration that he Company knowingly disregarded the provisions of Article 11.3 and a declaration that the Company breached Article 91.5 when it failed to respond to the Union's grievance of working time claim within the allotted 28 days.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) K.C. James	**(SGD.) J. Girard**
General Chairperson LE-W	VP Human Resources

There appeared on behalf of the Company:

S. Fusco	– Senior Manager, Labour Relations, Edmonton
I. Muhammed	– Labour Relations Manger, Edmonton
D. Weston	– Labour Relations, Edmonton

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
K.C. James	– General Chairperson, LE-W, Edmonton
C. Rutzki	– Local Chairperson, LE-W, Melville
C. Giesbrecht	– Local Chairperson, LE-W, Saskatoon
N. Irven	– General Secretary Treasurer, Saskatoon
M. Kernaghan	– General Chairperson, LE-C, Trenton
R. S. Donegan	– General Chairperson, CTY-W, Saskatoon

AWARD OF THE ARBITRATOR

Issue and Summary

[1] The Grievor is a Locomotive Engineer. The Grievor received payment under Article 11.2 of Agreement 1.2 (the "Collective Agreement") for Freight Service for more than nine (9) hours of work he performed at the Allen Mine in Saskatchewan, on March 1, 2016.

[2] The Union has alleged he was improperly paid for that work.

[3] The issues between the parties are:

a. Was the Grievor improperly paid; and

b. whether the Company breached Article 91.5 regarding timing of its denial of the Grievor's claim

[4] For the reasons which follow, the Grievance is allowed. While I am satisfied it is Article 16 which governs the Grievor's pay for his work at the Allen Mine Site and not Article 11.3, the Company failed to respond to the Step Two Grievance as required by Article 91.1. The agreed upon remedy under Article 91.5 is triggered, which is payment of the time claim.

Facts

The facts are not in dispute and are summarized in the Joint Statement of Issue, above. On March 1, 2016, the Grievor was called at the home terminal of Saskatoon for Train TB75851. This was turnaround freight service via the Allen Potash Mine.

[5] There is no dispute the Allen Mine was the "turnaround point" for this service. The spur off the mainline to the Allen Mine is 1.4 miles long.

[6] At the Allen mine, the Grievor set off 21 empty cars and then "lifted" (picked up) 170 loaded cars from the tracks. The Grievor submitted a claim for 9 hours and 20 minutes at "yard rates" for this work, under Article 11.3.

[7] That claim was denied. The Company recovered $84.13 from the Grievor on the basis that "yard rates" did not apply to the Grievor's work.

Collective Agreement Provisions

> Article 11 – Detention and Switching at Initial and Final Terminals and at Turnaround Points
>
> 11.1 [passenger service]
>
> 11.2 Locomotive engineers will be paid on the basis of 12-1/2 miles per hour at the applicable rate at initial terminals from the time due to leave shop or other designated track or change-off point until departure at outer switch; at final terminals from the time of arrival at outer switch until arrival on shop track or other designated track or change-off point, and at turnaround points from time of arrival until departure at outer switch. Outer switch means the switch normally used in heading into the yard and road mileage commences and ends at the outer switch.
>
> 11.3 Locomotive engineers required to perform yard work at any one yard in excess of five (5) hours in any one day will be paid at yard rates per hour for the actual time occupied. Time paid under this paragraph will be in addition to payments for road service and may not be used to make up the basic day.
>
> …
>
> Article 16 – Switching Industrial Spurs – Freight Service
>
> 16.1 Locomotive engineers required to switch en route industrial spurs over one mile in length, and provided that such work is performed not less than one mile from the mainline, will be paid at the rate of 12-1/2 miles per hour, as per class of service for all time so occupied, in addition to pay for trip. Time paid under this article will not be used to make up the basic day but will be deducted when computing overtime.
>
> (Refer letter 2 September 1976 – Switching Aquitaine, Grizzly Sulphur and Alwinsal Mines Spurs Addendum No. 29)
>
> Addendum 29

[letter to General Chairperson of the Union; September 2, 1976]

In response to the Brotherhood's request during the recently concluded negotiations for a change in the method of compensating locomotive engineers who are required to switch industrial spurs, the Company indicated they were prepared to write to you regarding payment for three spurs of extraordinary length located on the Prairie and Mountain Regions.

Accordingly, because of the length of the industrial trackage on the Brazeau subdivision which is commonly known as the Aquitaine Spur (27 miles); on the Sangudo subdivision which is commonly known as the Grizzly Sulphur Spur (14.6 miles); and on the Watrous subdivision which is commonly known as the Alwinsal Mines Spur (16.7 miles); and notwithstanding the provisions of Article 18, the Company is prepared to compensate movements undertaken on this trackage on the basis of actual miles plus detention and switching at the turnaround point. Such time will not be used to make up the basic day but will be deducted when computing overtime.

Article 91 – Grievance Procedure

91.1 A grievance concerning the interpretation or alleged violation of this agreement shall be processed in the following manner:

(a) Step 1 Presentation of Grievance to Immediate Supervisor

Within 28 calendar days from the date of cause of the grievance the employee or the local chairman may present the grievance in writing to he immediate supervisor…..The supervisor will give his decision in writing within 28 calendar days of receipt of the grievance…

(b) Step 2 Appeal to District Superintendent (Transportation)

…The decision [of the Company] shall be rendered in writing within 28 calendar days on receipt of the appeal. In case of declination, the decision will contain the Company's reason(s) in relation to the written statement of grievance submitted.

91.4….Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may, except as provided in paragraph 91.5, be progressed to the next step in the grievance procedure.

91.5 **In the application of paragraph 91.1 of this article to a grievance concerning an alleged violation which involves a disputed time claim, if a decision is not rendered by the appropriate officer of the Company with the time limits specified, such time claim will be paid.** Payment of time claims in such circumstances will not constitute a precedent or waiver of the contentions of the Company in that case or in respect of other similar claims [emphasis added]

> 91.6 Once a time claim has been declined, or altered, by an immediate Supervisor or his delegate, it will be considered as having been handled at step one of the grievance procedure.

Arguments

[8] The Union argued the Grievor was entitled to be paid for his work under the "yard rates" noted in Article 11.3. It argued that the Allen Mine site was a "yard" as there was no limitation in Article 11 that a "yard" had to be a CN yard. It argued the Grievor was performing "yard" work at the Allen Mine when he set off and lifted cars for that customer. The Union also argued that a requirement for payment of the Grievor's claim was triggered under Article 91, as the Company had not met the 28 day restriction to respond to the Grievor's claim.

[9] The Company argued that the Allen Mine customer location is not a "yard". It argued prior jurisprudence has already contemplated what a "yard" is for the purposes of Article 11, and what work is paid as "yard" work under Article 11.3. Its position was that the setting off of empty cars and the lifting of loaded cars at a customer location are not duties which are associated with typical work performed by a yard service employee under Article 11.3. It urged that Article 16 applied and not Article 11.3. It also argued that it fulfilled the requirements of Article 91.6 as it responded to the Grievor's initial claim by denying that claim.

Analysis and Decision

[10] This is a contract interpretation Grievance. The "modern principle" of contract interpretation was first adopted by the Supreme Court of Canada in 1998.[1] While the parties provided jurisprudence regarding this principle, the most recent – and binding – authority is that Court's own 2014 decision in *Sattva Capital Corp. v. Creston Moly Corp*[2]. All jurisprudence which pre-dates *Sattva* must now be read in light of its direction.

[11] As very recently and succinctly summarized by the Federal Court of Appeal in *Waldron v. Canada*, *Sattva* requires an adjudicator to determine the "objective

[1] *Re Rizzo & Rizzo Shoes Ltd 1998 CanLII 837*. The principle was developed by Professor Driedger and adopted by the Court.

[2] 2014 SCC 53.

intentions of the parties" by "reading the contract as a whole, giving the words used their ordinary and grammatical meaning, and doing so consistently with the surrounding circumstances or factual matrix".[3] As noted by Professor Sullivan, the "plain and ordinary meaning" of a word or phrase is the meaning that "spontaneously comes to mind".[4]

[12] Rules of construction have developed for interpretation issues, including that all words are presumed to have meaning; different words are presumed to have different meaning; specific articles take precedence over general articles; a meaning which leads to an absurdity is to be avoided; words must be interpreted in a manner which results in harmony between provisions.

[13] *Was the Grievor Improperly Paid?*

[14] As noted in the JSI, the Grievor was called to freight service on March 1, 2016. The Allen Mine was the turnaround point and also the point at which the Grievor was required to perform significant duties. The Grievor claimed for 9 hours and 20 minutes at yard rates for his work at this industrial site.

[15] While Article 11.2 sets out how pay is calculated for time at turnaround points – and the Allen Mine is a turnaround point – the parties also negotiated a more specific article for "Switching Industrial Spurs – Freight Service", which is the subject of this dispute. That Article is Article 16. Article 16 specifically addresses what payment is to be made for switching work at industrial sites, when the spur is more than a mile in length, as it was in this case. I am satisfied the wording of Article 16 is specific to industrial spurs, is clear and concise and is not ambiguous.

[16] I am satisfied the Grievor satisfied the criteria for Article 16 to apply. He was :

a. a locomotive engineer; who was

b. "required to switch en route industrial spurs";

c. "over one mile in length"; and

[3] *Waldron v. Canada (Attorney General)* 2024 FCA 2 at para. 74
[4] *Statutory Interpretation in a New Nutshell; Canadian Bar Review,* vol. 82, p. 51; at p. 59

d. "…such work [was] performed not less than one mile from the main line".

[17] Article 16 states that when those conditions are met, the Grievor was "entitled to be paid at the rate of 12-1/2 mils per hour, as per class of service, for all time so occupied, in addition to pay for trip…".

[18] Both the rate in Article 11.2 and Article 16 is 12-1/2 miles per hour.

[19] There are two decisions from this Office which closely align with this fact situation. **CROA 1412** is the authority which is closest. In that case, the assignment of the grievor was Calder to Calder via the Beamer spur. The Beamer spur was also his turnaround point. In that case, the grievor spent six hours and 45 minutes working on that industrial spur. Like the Grievor in this case, he claimed yard rates under Article 11.3.

[20] The arbitrator did not allow the claim. He found the grievor was

> …doing what he was obliged to do…He was making the necessary stops on the Beamer Spur where the industrial businesses and undertakings requiring freight service were located. And, of course, at those points the grievor was performing the required, scheduled duties that were set out in his timetable. In short, the grievor's scheduled work while, in part, on the Beamer Spur was involved in performing freight service. Accordingly, for that period of time he was governed for pay purposes by article 16.1 of the collective agreement…[5]

[21] In **CROA 1683**, the grievor was ordered in turnaround freight service "from Melville to Melville via the Rocanville Mine Site. He made a claim at yard rates. That arbitrator applied **CROA 1412** and quoted Article 16.1 as the "separate provision for certain work performed on spurs". The arbitrator did not find that the Rocanville Mine Site was a "yard" and denied the grievance.

[22] I can see no distinctions between those decisions and the grievance before me.

[23] The only other arrangement the parties negotiated regarding work at industrial sites is contained in Addendum 29, and it also supports this interpretation. That Addendum is incorporated by reference into Article 16. By that Addendum, the parties specifically noted there were industrial spurs which were of *considerable* length (between 14.6 and 27 miles) in the Prairie and Mountain Region. For those

[5] p. 2

spurs, the Company was willing to compensate movements "on the basis of actual miles plus detention and switching at the turnaround point". The industrial spur in this case was not listed as one of those spurs. I accept that if the parties intended that same result to apply to this industrial spur, it would have been included.

[24] The Union relied on **CROA 811**. In that case, the grievor spent six hours in Calder Yard before departing. Article 16 was not considered as it was not work done on an industrial spur, so that case can be distinguished factually.

[25] That does not end this issue between these parties, however. The Union has argued a penalty provision exists in the Agreement under Article 91.5 for the Company's failure to respond to the Grievance at Step Two.

Was Payment Under Article 91.5 Triggered?

[26] The Union argued this time claim was not paid in a timely manner, as there was no response to the Union's Step II grievance. It argued Article 91.5 provides that the claim is to be paid when no response is given.

[27] I am persuaded the Union is correct in this interpretation.

[28] Article 91.1 provides for the grievance to be considered at three stages: (a) Step One and (b) Step Two and (c) Step Three. At each stage, the Company is required to give a response to the grievance within 28 days.

[29] Under Step Two, the Company is also required to give "written reasons".

[30] The Company provided its Step One response to this Grievance when it denied the time claim: Article 91.6. It did not provide a response at Step Two or Step Three.

[31] Article 91.5 contains the obligation if a response is not given for a "disputed time claim" under Article 91.1.

> In the application *of paragraph 91.1* of this article to a grievance concerning an alleged violation which *involves a disputed time claim,* if a decision is not rendered by the appropriate officer of the Company *within the time limits specified*, **such time claim will be paid** [emphasis added].

[32] A "plain and ordinary" meaning must be given to these words.

[33] Certain criteria must be met for the time claim to be paid under Article 91.5. As a preliminary point, while the Article refers to the application of "paragraph 91.1", I am satisfied this is a reference to *Article* 91.1.

[34] The issue must also involve a disputed time claim. I am satisfied this Grievance involved a "disputed time claim". The Grievor claimed for his time at a certain rate and the Company did not agree that was the appropriate rate for his work and drew back the extra amount claimed.

[35] "Time limits specified" must also be missed. In this case, the Company did not provide any response to Steps Two or Three within the time limits specified in Article 91.1(b) and (c).

[36] By Article 91.5, the parties have negotiated what happens for this type of claim when the "time limits" are not respected: "…such time claim will be paid".

[37] The parties could have limited the application of the Article 91.5 penalty to the situation where it is only the time limits under Article 91.1(a) – the Step One process – that have been missed. That is the Company's argument. However, that interpretation is not consistent with the "plain and ordinary meaning" of the words the parties used. The parties have stated that Article 91.5 applies to "the application of paragraph [Article] 91.1…". It is not limited to Article 91.1(a).

[38] The Company argued that Article 91.6 applied and so Article 91.5 was not triggered.

[39] I must read these two Articles together in a manner that gives meaning to both and allows them to work together harmoniously.

[40] The difficulty I have with the Company's argument on this point, is that to reach the effect the Company seeks, I must imply limiting words into Articles 91.5 and alter the wording of Article 91.6 to reach that result.

[41] If Article 91.5 stated "…if a decision is not rendered by the appropriate officer of the Company *at Step One*…within the time limits specified….such claim will be paid", that would lead to the result the Company seeks. It does not. If Article 91.6 had stated "Once a time claim has been denied…it will be considered as having been handled at *every* step of the grievance procedure", that would lead to the

interpretation the Company seeks. It does not. Or, if the parties had agreed that time claims cannot be *advanced* past Step One that would also reach the result the Company seeks. The parties did not make that agreement.

[42] I have no jurisdiction to amend, modify, add to or alter this agreement. I must give both Article 91.5 and 91.6 a plain and ordinary meaning that allows the provisions to work together harmoniously.

[43] I am satisfied Article 91.6 refers to *what constitutes* a Step One answer and not that *only* a Step One answer is required for a disputed time claim. When the claim is initially denied, that is considered a Step One response. No other response is necessary at Step One. However, Article 91.6 does not prevent a grievance from being advanced past Step One.

[44] This interpretation allows that provision to work harmoniously with Article 91.5, which does not limit its application to only Step One, but rather anticipates a penalty for when the "time limits" of "[Article] 91.1…" are not satisfied: That claim is to be paid. This interpretation allows both articles to work together harmoniously.

[45] In this case, while I agree the Grievance *was* initially "handled" at *Step One* by the denial, the Union then advanced the Grievance to Step Two, and - when it did not receive an answer - to Step Three. The Company did not respond at either step. Notably, the Company did not suggest to the Union that it did not have a right to progress the Grievance past Step One.

[46] Article 91.5 applies. The time claim must be paid.

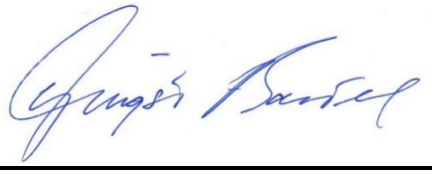
Conclusion

[47] Article 16 applies. While the Grievor was entitled to be paid 12-1/2 miles per hour for the time he spent working at the Allen Mine on March 1, 2016, pursuant to that Article and not at "yard rates"; and while the Grievor received that payment, the Company failed to respond to the Step Two and Step Three of the Grievance. Article 91.5 has been triggered and the Company bears a responsibility to pay the time claim *as presented*.

[48] The Grievance is allowed.

[49] The Grievor is entitled to the payment claimed.

[50] I retain jurisdiction to address any questions regarding the implementation of this Award, and to correct any errors or omissions to give it the intended effect.



February 19, 2024

CHERYL YINGST BARTEL
ARBITRATOR