CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4892-PO

Heard in Montreal, January 11, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Preliminary Objections concerning the Policy grievance regarding T&E Availability Standard for Canada

THE UNION'S EXPARTE STATEMENT OF ISSUE:

At issue is the Company's latest initiative by way of Bulletin in regard to the T&E Availability Standards in Canada.

Union's Position:

The Union has completed a thorough review of these standards assessing your position to that of the Collective Agreement, CROA Awards and the Canada Labor Code. Following our review, the Union cannot agree that these standards meet any of the requirements. As a result, the Union cannot agree for numerous reasons.

The Bulletins list the Company's view of negotiated and legal opportunities to legitimately remove themselves from the working board. The Union cannot agree with the list, the Company is well aware and familiar that Arbitrator Kaplan awarded a clause that allows our members to book unfit without reprisal.

The Union remains appalled that the Company has now arbitrarily decided to investigate and discipline our members who are legitimately ill longer than two days in a calendar month. It is unconscionable to reasonably contemplate that any illness our members may suffer has a calendar or is only worthy of two days without facing disciplinary action; despite the fact that medical documentation is provided when requested.

In addition, the Bulletin has identified that Medical documentation will not be accepted to excuse these absence categories except in extraordinary circumstances involving a documented medical emergency.

The Union again cannot agree, the Canada Labor Code under Section 239 is clear that employees cannot be disciplined for legitimate illness, nowhere does it empower the Company's OHS department to determine what medical circumstances will be accepted as medical emergencies.

Further, the Union contends that if there is any request from the Company for medical information then payment under Appendix 34 of the MOS would apply regardless of the time of request.

The Union also contends that the Company's initiative violates the well understood doctrine of the KVP award that need not be repeated. This award is clearly the required base line when it is the Company's decision to implement a policy.

The Company has stated there are no examples of any violations, one simply looks at the multitude of grievances and will see employees disciplined for booking sick, booking unfit.
Based on the reasons as stated, the Union requests that the Company immediately rescind the published Bulletin, as it represents policies which violate the Collective Agreement, arbitral jurisprudence and the Canada Labor Code.

We further request the Company cease and desist from enforcing this, or any other attendance management policies in violation of any of our members negotiated or statutory rights.

The Conductors (CTY West) and Locomotive Engineers West are interested parties in the proceedings between the Conductors (CTY East) and Locomotive Engineers East, and CP Rail. We are therefore requesting that they be granted intervenor status for all of the proceedings in this case.

The Union seeks a finding that the Company has violated the Collective Agreements and other relevant provisions as indicated above, and an order that the Company cease and desist its ongoing breaches as described, cease enforcing these arbitrary policies and rescind the published bulletin as well as any other attendance management policies. The Union also requests that the Company remedy any member affected which could include but is not necessarily limited to lost wages, costs, and/or damages, and to otherwise make any negatively impacted employee whole.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

The Company objects to all unspecified allegations that the Bulletin violates the Collective Agreement, CROA Awards and Section 239 of the Canada Labour Code. In failing to specify which Articles, Awards or subsections of the Canada Labour Code have allegedly been violated, the Union has prejudiced the Company in its ability to consider and respond to the Union's allegations.

The Grievance procedure contained in the Collective Agreement and CROA&DR Memorandum of Agreement require "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 violation**" to have gone through the final step of the grievance procedure and be in the Ex Parte Statements of Issue between the parties. The Company reserves the right to object should the Union raise any arguments or provisions not contained in the final step of the grievance procedure or in the Ex Parte Statements of Issue.

The Company further objects to the Union's request for "the Company to cease and desist from enforcing this, or any other attendance management policies in violation of any of our members negotiated or statutory rights". There are no provisions within the Collective Agreement for submission of a grievance encompassing a request for the Company to "cease and desist". The Union's request is an attempt to seek relief for allegations which have found to be invalid by other arbitrators. This request also encompasses a request for relief from Company Policy(ies) which are not even in existence and therefore without progressing such through the grievance process.

In response to the Union's alleged disagreement with the list of absences permissible absences, the Company identifies that the Bulletin clearly provides "**examples of negotiated and also legal absence categories that will not result in discipline**". As identified by the word *examples*, this is not an all-inclusive list.

Regarding the Union's contentions related to those employees "who are legitimately ill

longer than two days in a calendar month", this allegation is without merit. This is fully addressed within the Bulletin itself and arbitral jurisprudence supports discipline in the event such absences are found to not be legitimate or, in certain circumstances, in cases of innocent absenteeism. In this respect, each individual case must be evaluated on its own merits as they have been to date.

"*Appendix 34 - Letter – Periodic Medical Examinations – Clarification"* of the 2007 Memorandum of Settlement between the parties explicitly relates to Periodic Medical Exams and outlines very specific requirements as to when these payments would apply. The Company maintains that through the grievance procedure and the CROA&DR Memorandum of Agreement, 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." On this basis, Appendix 34 must stand and the Union's contention must be declined.

The Union also argued KVP has not been met; however, has failed to provide any rationale or details in support of this allegation. While the Company denies all such allegations, the Company is prejudiced by this failing and objects to the advancement of such an argument. The Company reserves the right to object should the Union raise any provisions not contained in the final step of the grievance procedure or in the Ex Parte Statements of Issue.

The right to regular attendance is implicit within the employment contract itself, as in the often quoted Massey-Ferguson Industries Ltd. And U.A.W., Local 458 (1972), 24 L.A.C. 344. In that case, Arbitrator Shime identified two criteria for discipline based on attendance.

a) the employee's past record of absenteeism is undue or excessive: and

b) there is no reasonable prospect for Improvement in the foreseeable future.

Further, Arbitrators have long recognized that employers have greater latitude when dealing with employees whose absences are sporadic and unpredictable, since this causes increased difficulty in scheduling work.

Based on the foregoing as well as the reasons outlined within the Company's grievance responses, the Company disputes all allegations raised by the Union and requests the Arbitrator dismiss the Union's grievance in its entirety.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey –and– **E. Mogus**	**(SGD.) L. McGinley**
General Chairperson CTY-E –and– LE-E	Director, Labour Relations

There appeared on behalf of the Company:

L. McGinley	– Director, Labour Relations, Calgary
A. Harrison	– Manager, Labour Relations, Calgary
S. Oliver	– Manager, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, CTY-E, Smiths Falls
E. Mogus	– General Chairperson, LE-E, Oakville
D. Fulton	– General Chairperson, CTY-W, Calgary
G. Lawrenson	– General Chairperson, LE-W, Calgary
J. Hnatiuk	– Vice General Chairperson, CTY-W, Calgary
H. Makoski	– Vice General Chairperson, LE-W, Winnipeg

AWARD OF THE ARBITRATOR

Context

1. In January 2017, the Company introduced a T and E Availability Standard Canada (see Tab 1 Company documents) with respect to Company expectations concerning attendance and availability of Locomotive Engineers, Conductors, Trainpersons and Yardpersons.

2. The Union promptly filed grievances concerning the new standard (see Tab 2, Company documents). Ultimately, a joint filing was done by all four General Chairmen, accepted by the Company on a without prejudice basis.

3. The Parties were unable to agree to a Joint Statement of Issues, so each filed an Ex Parte Statement (see Tabs 3-4, Company documents).

4. The Union seeks to have the Availability Standard struck down and for a cease and desist order to be entered. The Company strongly objects, and invokes a preliminary objection on multiple grounds. This decision deals only with that preliminary objection. The merits of the matter are to be dealt with later.

Preliminary Objections

Position of the Company

5. The Company makes a number of general submissions underlying its objections, before making more specific submissions about particular Union submissions. These submissions are found at pp. 5-12 of the Company Brief, together with their Reply Brief and will not be repeated.

6. Generally, however, the Company submits that the parties are bound by the collective agreement and CROA Rules and that arbitral jurisdiction flows from the Rules and the collective agreement. The collective agreement at article 40.02 and the Rules at paragraph 10 both require that the provision allegedly violated be identified.

7. The Company argues that the Union has largely failed to identify any particular violation of the collective agreement and are now precluded from doing so, as doing so now would violate paragraph 9 of the Rules, which prohibits novel arguments being raised when they have not been canvassed during the grievance process (see SHP 599, CROA 2891,3265 and 3708). The Company argues that permitting the Union to effectively amend their claim now would be prejudicial to it.

8. The Company submits that the jurisdiction of the arbitrator is limited by paragraph 6 of the Rules to deciding the meaning or alleged violation of provisions of the collective agreement. As none have been properly alleged here, the Company argues that I am without jurisdiction.

Position of the Union

9. The Union submissions concerning the Company objections are largely set out in their Reply Brief and will not be repeated.

10. Generally, however, the Union submits that the issue in dispute is whether the Bulletin passes the KVP test of reasonability. All of the Union arguments are in relation to that single issue. It argues that there is no requirement for grievances to be lengthy or highly detailed. It notes that there were no objections to the Union positions made in the grievance responses of the Company.

11. The Union submits that the Court of Appeal in Blouin Drywall set out the requirement for arbitrators to deal with the real issues between the parties and not to allow those issues to be obscured by procedural objections.

Analysis and decision

12. CROA arbitrators have had multiple opportunities to consider the interplay between the statutory and jurisprudential framework and the CROA Rules (see AH 756-P, CROA 4347, AH 809).

13. Arbitrator Stout provides a good overview of this framework in AH 756-P at paragraphs 22-30:

> [22] It is trite to say that an arbitrator's jurisdiction is derived from the applicable labour relations statute, in this case the *Canada Labour Code* R.S.C 1885, c.L-2 (the "Code"), and the collective agreement.
>
> [23 In this case, the Code provides for the resolution of all differences by arbitration or otherwise and sets out the powers of an arbitrator. The relevant provisions are as follows:
>
> **Provision for final settlement without stoppage of work**
> **57(1)** Every collective agreement shall contain a provision for the final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.
> **…**
> **Powers of arbitrator, etc.**
> **60(1)** An arbitrator or arbitration board has
> (a) the powers conferred on the Board by paragraphs 16(a), (b), (c) and (f.1)
> (a.1) the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is conflict between the statute and the collective agreement;
> (a.2) the power to make interim orders that the arbitrator or arbitration board considers appropriate;
> (a.3) the power to consider submissions provided in the form that the arbitrator or the arbitration board considers appropriate or which the parties agree;
> (a.4) the power to expedite proceedings and to prevent abuse of the arbitration process by making orders or giving directions that the arbitrator or arbitration board considers appropriate for those purposes; and
> (b) the power to determine any question as to whether a matter referred to the arbitrator or arbitration on board is arbitrable.
> **Power to extend time**
> (1.1.) The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.
>
> [24] The requirement of a labour relations dispute resolution process, such as arbitration, is a matter of public policy in all jurisdictions across Canada and it is a necessary component of maintaining peaceful labour relations during the life of a collective agreement. In this case, like most others, the parties also have included a grievance procedure, which is a mechanism for processing and resolving complaints before they are referred to arbitration.

[25] It is not open to parties to exclude the possibility of filing a grievance and referring it to arbitration, see *Parry Sound (District) Social Services Administration v. OPSEU, Local 324* [2003] 2 SCR 157. However, the parties are free to craft a grievance procedure to meet their own specific needs and provide that compliance with the grievance procedure is a pre-condition to submitting a matter to arbitration.

[26] In *Canadian Broadcasting Corporation v. N.A.B.E.T.* (1973), 4 L.A.C. (2d) 263, Arbitrator Shime describes the traditional categories of grievances arising under a collective agreement:[1]

- Individual employee grievances where the subject-matter of the grievance is personal to the employee.
- Group grievances where a number of employees with individual grievances are joined together in filling their grievances. This type of grievance is really an accumulation of individual grievances.
- Union or policy grievances where the subject matter of the grievance is of general interest and where individual employees may or may not be affected at the time that the grievance is filed;
- There is a hybrid type of grievance which is a combination of the policy and the individual grievance. In this type of situation, although one individual may be affected, he may affected in a way that is of concern to all members of the bargaining unit. Thus, the individual may grieve on the basis of how he is particularly affected while the union may also grieve citing the individual case as an example of how certain conduct may affect the members of the bargaining unit generally.

[27] In each case, it is the particular language of the collective agreement that must be reviewed to determine if the parties have agreed to different definitions, processes, or procedures for different types of grievance, see Brown and Beatty *Canadian Labour Arbitration, 5th Edition*, 2:59 and 2:60.

[28] The Ontario Court of Appeal decision in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters & Joiners of America, Local 2486* (1975), 8 O.R. (2d) 103 (C.A.), is considered the leading case with respect to the interpretation of a grievance article in a collective agreement. In that case, the Court of Appeal found that it is reasonable to interpret grievance provisions broadly and in conformance with their intended purpose so that a union may file a grievance on behalf of their members, independent of their members right to grieve. In terms of the form of a grievance, Justice Brooks stated:

> …these cases should not be won or lost on the technicality of form, rather on the merits and as provided in the contract and so the dispute may be finally and fairly resolved with simplicity and dispatch.

[29] This broad and liberal interpretation of grievance procedure articles has been subsequently endorsed by the Ontario Divisional Court in *Re*

[1] This list is not exhaustive; for example, it is now well accepted that any employer may also file a grievance under a collective agreement.

> *Communications Union Canada and Bell Canada* (1976), 71 D.L.R. (3d) 632 (ON SCDC), where they added:
>
> > Nothing can be more calculated to exacerbate relations between employers and employees, than to be told that their differences, plainly designed to be finally settled by arbitration as the statute requires, cannot be examined because of a defect in form.
>
> [30] The Supreme Court of Canada also endorsed the broad and liberal approach to interpreting and determining compliance with procedural requirements found in a collective agreement. In *Parry Sound (District) Social Services and OPSEU, Local 324, supra,* Justice Iacobucci endorsed the view that procedural requirements should not be strictly enforced in those instances where the employer suffers no prejudice.

14. The matter has now been brought forward on the basis of the CROA Agreement between the Parties. This Agreement contains multiple requirements, to which the parties have agreed:

> 6. The jurisdiction of the arbitrators shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of a bargaining agent, being a signatory hereto, of;
> (A) disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and;
> (B) other disputes that, under a provision of a valid and subsisting collective agreement between such railway and bargaining agent, are required to be referred to the Canadian Railway Office of Arbitration & Dispute Resolution for final and binding settlement by arbitration;
> but such jurisdiction shall be conditioned always upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this agreement.
>
> 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.

10.The signatories agree that for the Office to function as it is intended, good faith efforts must be made in reaching a joint statement of issue referred to in clause 7 hereof. Such statement 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.

11.The arbitrator shall not decide a dispute without a hearing. Each party attending a hearing shall submit to the arbitrator and the other party a written statement of its position together with the evidence and argument in support thereof a minimum four (4) business days (Monday to Friday) in advance of the scheduled hearing.
Upon receipt of the arbitration briefs, if necessary, each party will follow up with the submission of a written rebuttal a minimum two (2) days in advance of the hearing. Replies will be limited to three (3) pages.
Hearings will be scheduled for one-hour duration to allow each party to present their arguments, which includes no more than fifteen (15) minutes for rebuttal, if necessary, in order to ensure timely, expedited hearings.
In cases involving witnesses, hearings will be scheduled for ninety (90) minutes duration and allowing each party forty-five (45) minutes to present its arguments, including rebuttal. The parties will be required to notify the Office of Arbitration when a witness will attend no later than 10 business days after the schedule has been released.
Submission schedule:
For cases scheduled on Tuesday, parties will submit briefs on the Wednesday before arbitration week, with replies on Friday before arbitration week.
For cases scheduled on Wednesday, parties will submit briefs on the Thursday before arbitration week with replies on Monday of arbitration week.
For cases scheduled on Thursday, parties will submit briefs on the Thursday before arbitration week with replies on Monday of arbitration week.
All submissions are to be filed with the Office no later than 6pm EST.

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 45 calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute,

> or 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.

15. As Arbitrator Clarke noted in AH 809, the arbitrator's broad remedial powers must be read in conjunction with a need to enforce disclosure principles to avoid unfairness:

> 52. Third, an arbitrator's remedial powers come from the *Code*'s requirement that parties to a CA use arbitration to resolve "all differences". The facts demonstrate that a difference exists between the parties regarding the application of the CA to the WPP in Chapleau. The TCRC has the right to ask an arbitrator whether CP violated the CA.
> 53. Fourth, there may be situations where prejudice occurs if a party first raises at the arbitration stage a novel issue or a type of extraordinary remedy, such as a cease and desist order, or perhaps punitive or aggravated damages[2]. Reserving the right to add more issues or allegations does not avoid this important principle. As AH 68923 noted, raising a novel issue can undermine the fairness of a railway arbitration:
>
> > 31. The arbitrator agrees with the sentiments expressed by these experienced railway arbitrators. The situation may well be different in regular arbitration where the parties have not negotiated the types of procedures which exist in this expedited regime. A regular labour arbitration system can also take many days to hear a single grievance, which allows for more leeway than does the parties' expedited regime in this case.
> > 32. The parties benefit from an extremely efficient expedited arbitration system. In order to obtain those benefits, they have negotiated clear provisions which require that all issues be identified and discussed during the grievance procedure. A vague oral reference to alcohol and 3 AA meetings during the investigation, especially given the IBEW's burden of proof for prima facie discrimination, infra, was insufficient for CN to know that Mr. S alleged that his rights under the CHRA had been violated. Documentation was only produced for this issue roughly 18 months after Mr. S's termination.
> > 33. There is further prejudice which can arise from the addition of a new issue close to the arbitration date. CN could not explore that issue during its investigation or conduct a timely supplementary investigation. The arbitrator notes further that the CHRA contains time limits for complaints.
> > 34. The IBEW expanded its grievance beyond that which was discussed throughout the grievance procedure. The arbitrator accordingly upholds CN's objection. This conclusion, however,

[2] See a general discussion at Canadian Signals and Communications System Council No.11 of the IBEW c. Canadian Pacific Railway Company 2021 CanLII 70484

> would not apply to situations where a party was willfully blind to a clear duty to accommodate situation.
>
> 54. The arbitrator agrees generally with the TCRC's reference to *Blouin Drywall24*, though that decision must be read consistently with the important disclosure principles underpinning the parties' railway model of arbitration.

16. In certain cases, objections have been upheld preventing a party from introducing a novel issue at arbitration, when not previously the subject of discussion between the parties (see for example, CROA 2571 and 4263). To do otherwise would be to "lie in the weeds" and thereby cause prejudice to the other party, who would be taken by surprise.

Specific Objections

17. The Company advances twelve separate objections to portions of the Union Brief, together with the more general objections noted above. Counsel for the Company provided a helpful summary of the objections at the Hearing, which I will follow. I will deal with the specific objections in turn. The numerical references are to the challenged paragraphs in the Union Brief.

A. 24-84 and subsequent references (e.g. 109)-ten "examples"

18. The Union provides ten examples of discipline being imposed, based on the T and E Availability Standards Bulletin, which it alleges are "manifestly unjust, unreasonable, and run contrary to all authorities on the subject of rest and booking sick or unfit."

19. The Company objects to consideration of these examples, as none have been adjudicated, and each case must be decided on its own merits.

20. I agree with the Company position that the use of these examples is highly problematic.

21. Firstly, none of the examples were put forward during the grievance process, which thereby deprives the Company of the opportunity to effectively respond. The Company is both taken by surprise and prejudiced.

22. Secondly, the examples have not been adjudicated, so their probative value is necessarily low. While the examples are led by the Union to buttress their position, it is possible that an arbitrator will find in favour of the Company. It is simply too early to say.

23. Thirdly, it is possible for the Union to make the same arguments using decided cases, as indeed it has elsewhere in its Brief (see CROA 1854, 2248, 3232, 3252, 1759, 4441, 3618, 4524 and 4604).

24. On the merits, I will therefore not take into consideration the above paragraphs.

B. 90 and 138-139-July 19, 2017 Bulletin Re: Q & As

25. The Union files Bulletin #SI-047-17 Availability Standard Q & A from CP South. It does so to point out what it alleges to be a misapplication of the jurisprudence and incorrect in law.

26. The Company objects to reliance on this Bulletin Q & A, as it was produced subsequent to the contested Bulletin and is not referenced anywhere in the grievance documentation.

27. In my view, this is a good illustration of the difficulties of presenting such a policy grievance within the confines of the CROA Rules. In an ordinary arbitration, subsequent fact evidence which sheds light on the application of the contested Bulletin would be admissible, subject to any necessary accommodations to ensure no surprise or prejudice. Here, however, the CROA Rules 9 and 14 clearly require matters to be brought forward during the grievance process and JSI or Ex Parte Statement of Issues.

As this was not done here, I am prevented by the Parties' CROA Agreement from considering the document.

C. Starting at 93-Arguments relating to KVP that the Bulletin is unreasonable, unclear, arbitrary and contrary to applicable statutes and regulations.

28. The Company argues that the KVP doctrine had not been clearly addressed in the grievance documentation and that the Union should be prevented from arguing it now.

29. The Union submits that the KVP doctrine is central to its policy grievance and that it is entirely appropriate that it be permitted to advance the argument.

30. In my view, the matter was addressed during the grievance process and it is appropriate for the Union to continue to advance that argument.

31. The Union grievance explicitly notes that "the Company's initiative violated the well understood doctrine of the KVP award that need not be repeated. This award is clearly the required base line when it is the Company's decision to implement a policy."

32. In at least one of the Company third level responses, KVP is cited directly:

> A Rule unilaterally introduced by the company, and not subsequently agreed to by the Union, must satisfy the following requisites:
> 1. It must not be inconsistent with the collective agreement.
> 2. It must not be unreasonable.
> 3. It must be clear and unequivocal
> 4. It must be brought to the attention of the employee affected before the company can act on it.
> 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
> 6. Such rule should have been consistently enforced by the company from the time it was introduced.

33. In the Union Ex Parte Statement of Issue, it once again argues that the KVP test has not been met. In the Company Ex Parte Statement of Issue, it notes that the Union

relies on the KVP requirements but “has not provided any rationale or details in support of this allegation”. It reserves its rights if the Union raises provisions not contained in the grievances or Statement of Issue.

34. Thus from a review of the grievance correspondence and the Statements of Issue, it is clear that the Parties knew that the issue between them concerned the new Bulletin and whether the Bulletin had infringed the requirements set out in the KVP award. At least with respect to this core issue, there would be no surprises or prejudice caused to either party. In my view, with respect to this issue, the CROA Rules have been respected.

35. This objection is therefore dismissed.

D. 96-103- “Competing Authorities”

36. In these paragraphs, the Union points to various authorities, such as the Company Fatigue Management Plan, the Health and Safety Policy, a Covid Bulletin, Transport Canada’s Duty and Rest Period Rules for Railway Operating Employees and the Canadian Rail Operating Rules to demonstrate a conflict between these authorities and the Availability Bulletin. The Union argues that such conflicts confirm that the Bulletin cannot be considered reasonable pursuant to the KVP requirements.

37. The Company argues that these authorities were never raised during the grievance process or in the Statement of Issues and may not be brought forward now.

38. In my view, as set out above, the Parties were well aware of the issue of whether the Availability Bulletin met the KVP requirements. Both sides are aware of the requirements, including the requirement that the policy be reasonable.

39. As other arbitrators have noted, it is not always easy to distinguish between issues and arguments. New issues may not be raised in a Brief, which have not previously been raised in the grievance process and JSI. There is more flexibility,

however, with respect to additional arguments concerning known issues. As Arbitrator Clarke noted in AH 726-P, references to Rules or Regulations not previously raised may be permitted when done by way of context:

> 31. The arbitrator upholds the IBEW's objection, in part. The Rule G allegations in CN's Brief are new and were never raised during the investigation, in Form 708 or in the Step 2 grievance response. The JSI similarly does not contain any reference to that ground. CN cannot add a new ground based on Rule G to this arbitration.
> 32. Moreover, the JSI already suggests that a vital issue before the arbitrator arises from the impact of an employee fleeing the scene of an accident. CN described this issue in the JSI and highlighted that Mr. Kossey's actions prevented it from determining the "root cause of the accident":
>
> > The Company maintains the Grievor operated the vehicle while he admittedly was not feeling well. The grievor struck a concrete block, continued to operate the vehicle that had sustained extensive damage, fled the scene, failed to report the incident and was absent without authorization. The grievor deprived the Company with the ability to test him for drugs and alcohol and determine the root cause of the accident.
>
> 33. CN's position throughout the process is incompatible with the novel allegation in its Brief concerning Rule G and suggestions Mr. Kossey was impaired.
> 34. <u>However, the arbitrator is not prepared to order than any paragraphs possibly related to Rule G be struck from the Brief. The challenge is that Rule G and other policies can form a relevant backdrop when an employee fled the scene of the accident and prevented the usual testing.</u> In CROA 4695-P, *supra*, Arbitrator Weatherill noted that the evidence may not necessarily change, even if an arbitrator has struck a novel issue from the arbitration:
>
> > The Grievor was investigated with respect to a positive substance test and following that, was discharged for violation of the Company's Alcohol and Drug Policy. He was not discharged for a violation of Rule G. It may well be that the drug and alcohol policy contains prohibitions that overlap with those of Rule G. **it has been very well established in labour arbitration cases over many years that in discipline cases, an employer is limited to proof of the offence or offences set out in the notice of discharge. In my view, that principle should be followed in this case, and whether or not it makes a substantial difference in the thrust of the evidence presented, it is my ruling that the Company may not advance the additional charge of violation Rule G in making its case in support of its decision.** (Emphasis added).

> 35. In sum, the arbitrator will not consider any CN allegations that Mr. Kossey violated Rule G or was impaired. CN had not advanced this position throughout the grievance process and in the JSI.
> 36. But the arbitrator will not strike the paragraphs in the Brief since some may arguably be relevant for context.

40. Here, once the Union has put into issue the KVP requirements, it cannot have been a surprise to the Company that the Federal Rules and its own policies on fatigue management would be examined. I find that the issue is the reasonability of the Availability Bulletin; the arguments are with respect to comparisons with applicable authorities. References to "competing authorities" may be done for the purposes of context only.

41. Accordingly, this objection is dismissed.

E. 106-Alleged failure to make a distinction between culpable and non-culpable absenteeism

42. In paragraph 106, the Union argues that the Availability Bulletin makes no distinction between culpable and non-culpable absenteeism, its application results in the discipline of employees with legitimate illnesses, and hence the Bulletin must be struck down as unreasonable.

43. The Company argues that the Union never implied or argued this in the grievance correspondence or in the Ex Parte and are precluded from doing so now.

44. In my view, the grievance documentation and the Ex Parte are sufficiently clear that the Union takes the position that non-culpable absences should not be the subject of discipline. In the grievance correspondence, repeated in their Ex Parte, the Union notes: "the Canada Labour Code under Section 239 is clear that employees cannot be disciplined for legitimate illness…"

45. I note that in the paragraph immediately following the contested paragraph 106, the Union explicitly quotes Section 239 of the Code, which prohibits discipline for absences due to illness or injury, subject to certain conditions.

46. I find that the Union has clearly advanced the argument concerning the unreasonability of discipline for legitimate illness, both during the grievance process and in its Ex Parte Statement. Accordingly, this objection is dismissed.

F. 108-Canada Labour Code amendments

47. In paragraph 108 of the Union Brief, it sets out recent amendments to the Code which provide further protections to employees with respect to medical leave.

48. The Company objects to this reference, as the amendments occurred after the filing of the grievances and Ex Parte Statement and is mentioned in neither. It therefore contends that the amendments to the Code are not properly in issue.

49. In my view, the Company is correct in objecting to the amendments, as they were not in force at the time of the Bulletin or the grievances. That being said, the underlying argument of the Union, that legitimate illnesses cannot be the subject of discipline, can still be made based on the pre-existing Code.

50. Accordingly, the objection is maintained, and I will not consider paragraph 108.

G. 110-The Union cites a different section of the Bulletin in its brief than previously referred to

51. The Union at paragraph 110 cites a lengthy portion of the Bulletin relating to absence categories which will be treated as “more serious offences”.

52. The Company objects as it alleges that the paragraph relates to a section of the Bulletin not previously contested.

53. I cannot agree with the objection.

54. The Union specifically contests the absence categories treated as more serious offences in its grievance:

> With respect to Locomotive Engineers not working as such, the Union objects to, and has grieved, the Company's actions of misrepresenting employees being unavailable as missing calls and further; handled such unavailability as a serious offence….The CTY Collective Agreement is clear when Locomotive Engineers, not working as such, are not available for service they are not liable for discipline.

55. In the Union Ex Parte Statement, it also refers to the Arbitrator Kaplan awarded clause which it alleges allows employees to book unfit without reprisal.

56. The absences noted in the Bulletin and the "unfit" justification are at the heart of the dispute between the Parties. There can be no surprise to the Company of the Union position in paragraph 110 that the Bulletin is contrary to the "unfit" justification found in the Collective Agreement.

57. The objection is dismissed.

H. 111-112-Allegations relating to the Bulletin reference to "serious offences:, alleged lack of discretion and alleged mandatory discipline as a result of the Bulletin

58. In paragraphs 111-112, the Union contests the Company assertion that the listed absences should be treated as serious offences, and argues that each case should be determined on its merits, as otherwise there would be an improper fettering of discretion. It further asserts that even where the Bulletin does provide discretion, managers treat these absences as providing for mandatory discipline.

59. The Company argues that these arguments are not true, have never been previously advanced and should be set aside.

60. In my opinion, the argument with respect to the serious nature of the offences may proceed. It was referenced specifically in the grievance documents (see objection G above).

61. However, the distinction drawn in paragraph 112 between the wording of the Bulletin and the practice of managers to treat the absence as requiring mandatory discipline is problematic. Firstly, I see no reference to this argument in the grievance documents or in the Union Ex Parte. Secondly, even if it had been referenced, I am not sure that this would advance the Union position that the Bulletin should be struck down. If the Bulletin provides for discretion, which is not exercised by managers, the remedy would appear to be to strike down the decision, rather than the Bulletin. The Union policy grievance seeks to strike down the Bulletin on KVP principles, not on its improper application by management.

62. Accordingly, the objection is partially maintained.

I. 113-Alleged assertion relating to Company's refusal of medical documentation

63. In paragraph 113, the Union disputes the Company's assertion that it can refuse medical documentation to support an employee booking unfit except in "extraordinary circumstances" involving a "medical emergency". It argues that this is contrary to the Code, collective agreement and jurisprudence.

64. The Company submits that a plain reading of s. 239(1) of the Code does not prevent this and is a novel argument.

65. In my view, the Union argument may proceed, as it is clearly not a novel argument.

66. The Union Ex Parte clearly sets out:

> "The Bulletin also provides that Medical documentation will not be accepted to excuse these absence categories except in extraordinary circumstances involving a documented medical emergency.

> The Union again cannot agree, the Canada Labor Code under Section 239 is clear that employees cannot be disciplined for legitimate illness…"

67. Once the Parties proceed to submissions on the merits, the Company will certainly be able to advance arguments about the proper interpretation of Section 239 of the Code. However, it cannot prevent the Union from doing the same.

68. Accordingly, the objection is dismissed.

J. 114-Union comments relating to Unfit

69. In paragraph 114, the Union asserts that the Company may not discipline an employee for booking unfit or sick and alleges that the Bulletin may have a chilling effect on employees making such claims.

70. The Company submits that this matter has been previously the subject of a withdrawn policy grievance (see paragraphs 60-61 of the Company Brief and Tab 12 of the Company documents). As such, the Company argues that the paragraph should be struck.

71. In my view, the Union argument in paragraph 114 is simply a repetition of its central thesis that the Kaplan clause permits employees to book unfit, and that the Bulletin infringes the KVP principles. The policy grievance to which the Company refers relates to an earlier 2015 Bulletin, rather than the 2017 Bulletin which is the subject of the present policy grievance.

72. Accordingly, the objection is dismissed.

K. 120-T&E Rule Book

73. Paragraph 120 of the Union Brief consists almost entirely of a quotation from the Company Rule Book which requires employees to be "fit and rested" when coming to work.

74. For the reasons given to objections D and J, I find that this reference is permitted and the objection is dismissed. Once again, the requirement to report to work "fit and rested" is at the core of the Union objection to the new Bulletin. A reference to the Rule Book is not therefore a new issue.

L. 137-This is a statement in relation to Appendix 34, not an argument

75. In paragraph 137, the Union seeks payment under Appendix 34 of the Collective Agreement for the provision of medical information requested by the Company.

76. Any finding concerning the necessity of payment will require an analysis of Appendix 34. The Company does not appear to object to that argument on the merits. In my view, paragraph 137 is no more than a remedy being sought by the Union. While it may not advance the required analysis, it is not offensive of the Rules, and the objection is dismissed.

Conclusion

77. I remain seized with respect to any questions of interpretation or application of this Award.

78. I remain seized with respect to the merits of the grievance.

March 4, 2024

JAMES CAMERON
ARBITRATOR