CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5000-PO

Heard in Edmonton, February 13, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's probationary release of Conductor Powar.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On August 10, 2023, Conductor Powar was issued a letter informing him that he was being released as probationary employee without a formal investigation.

It is the Union's position, however not limited hereto, that the Company violated Article(s) 82, 85, 85.5, Addendum(s) 123 and 124 of Collective Agreement 4.16 as well as Arbitral Jurisprudence, when the Company released Conductor Powar following a formal investigation.

The Union additionally contends that the discipline ought to be declared *"void ab initio'* on the basis that the Company violated Article(s) 82 as the Company failed to hold an investigation in a fair and impartial manner.

The Union submits that during the course of the Formal Employee Statement there is not one piece of evidence submitted by the Company that supports the assertion that a switch was actually run through, in fact the alleged switch is not even identified, Conductor Powar only acknowledges that he was not in compliance with CROR 104 and CROR 114, because he was told that he had run through the switch.

The Union argues that the outright release of an employee who is two shifts away from the end of his probationary period as was in this instance is punitive, excessive, arbitrary, disproportionate, discriminatory and in bad faith.

The Union further argues that the Company failed to adhere to the Brown System of Discipline as set out in Addendum 124 of the 4.16 Collective Agreement.

The Union seeks to have Conductor Powar reinstated to his employment, compensated for all lost wages, benefits and pension entitlement since the time of his discharge. Alternatively, the Union seeks to have the discipline reduced to a level that the arbitrator deems appropriate.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Conductor Powar commenced his employment with CN on June 27th, 2022. Upon successful completion of the theoretical portion of the Conductor Training Program, he began the

practical portion of his training within the terminal of Toronto South. He became qualified as conductor on January 27th, 2023.

On August 10th, 2023 Conductor Trainee Powar was released from the CN Conductors Training Program due to unsuitability of the role of conductor.

COMPANY'S POSITION:

The Company disagrees with the Union's position in its entirety. The decision to release Mr. Powar was in no way arbitrary. Further, the decision was due to his unsuitability for the position of Conductor, specifically due to performance deficiencies and the fact he had multiple CROR violations and safety infractions.

Mr. Powar was not discharged twice. The issuance of CN Form 780 was an administrative error, and the employee was released under Article 58.1 – probationary period.

The Company denies Union's argument that Mr. Powar was discharged solely for running through a switch, within yard limits. The Company submits that is well within its rights to release Mr. Powar during his probationary period, contrary to the Union's grievance. It has previously been recognized in the jurisprudence that the standard of proof required to establish just cause with respect to the release of a probationary employee is substantially lighter than for that a permanent employee.

The Company denies Union's argument pertaining to the investigation not being fair and impartial.

The Company further denies the allegation that the Collective Agreement was violated or that the articles relied on by the Union are relevant or that a Remedy under Addendum 123 is applicable.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Lennie	**(SGD.) I. Muhammad**
General Chair	Labour Relations

There appeared on behalf of the Company:

I. Muhammed	– Manager Labour Relations, Toronto
R. Singh	– Manager Labour Relations, Toronto
S. Fusco	– Senior Manager, Labour Relations, Montreal
K. MacDonell	– Senior Manager, Labour Relations, Edmonton

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, CTY-C, Smiths Falls
K. James	– General Chairperson, LE-W, Edmonton
T. Russett	– Vice General Chairperson, LE-W, Edmonton
R. Donegan	– General Chairperson, CTY-W, Saskatoon
M. Anderson	– Vice General Chairperson, CTY-W, Edmonton
M. Rutzki	– General Secretary Treasurer, CTY-W, Melville

AWARD OF THE ARBITRATOR

Facts, Issue and Summary

[1] The facts are not in dispute and can be succinctly stated.

[2] The Grievor was hired as a Conductor trainee on June 7, 2022. He began his practical training of 90 tours of duty on January 27, 2023.

[3] The applicable collective agreement is 4.16 (the "Agreement"). Also at issue are the terms of the Memorandum of Agreement establishing the CROA&DR[1] (the "CROA Agreement").

[4] On August 10, 2023, the Company released the Grievor from the Conductor Training Program due to unsuitability.

[5] On September 26, 2023, the Union filed its Step 3 grievance challenging this probationary release of the Grievor.

[6] On November 24, 2023, the Company responded to the Step 3 Grievance, declining the appeal. It also attached a proposed Joint Statement of Issue ("JSI").

[7] In its Brief, the Company argued it provided this proposed JSI "in the event the Union intended to progress the matter to Arbitration".

[8] Three days later, on November 27, 2023, the Company filed notice that it intended to proceed to arbitration on the basis of an *ex parte* Statement of Issue ("ExSI"). It noted it was providing 48 hours notice to the Union before proceeding on an ex-parte basis.

[9] No application was made by the Company to this Arbitrator under the CROA Agreement, on 48 hours notice to the other party, to proceed on an *ex parte* basis[2].

[10] The Union responded that the Company had not filed the notice to arbitrate and JSI in compliance with Article 84.4 of Agreement 4.16 and that the Union had 30 days to respond to the JSI. The Union did not accept the 48 hours notice.

[1] As amended, last amendment in November of 2023.
[2] Item 10 of the CROA Agreement.

[11] On November 30, 2023, the Company filed its ExSI with the CROA Office and copied the Union.

[12] On January 23, 2024, the Union submitted its ExSI.

[13] The Union filed a preliminary objection and requested this hearing to address the objection, separate from the merits.

[14] I accept the following facts as providing context to this dispute:

a. In **AH579,** Arbitrator Picher determined that the Company had not waived the time limits for proceeding to arbitration contained in Article 84.4 of Agreement 4.16.

b. On January 26, 2011, the parties entered into an agreement which allowed either party to file a notice of arbitration with the other, which had the effect of "freezing" the time limits.

c. That agreement was cancelled by the Company in 2014, but reinstated in June of 2022 (the "June 2022 Agreement").

d. The June 2022 Agreement states:

> The parties have agreed to eliminate the requirement to [in Article 84.4] to file such "request for arbitration" with the Canadian Railway Office of Arbitration & Dispute Resolution (CROA&DR), and file such "request for arbitration" with the other party only. The parties further agree that this request will be done through the Company's Grievance Tracking System (GTS)[3].

e. Under the CROA Guidelines, disputes are scheduled on a "first-in-first-out" basis, but there is an exception that disputes involving terminations of employment have priority in scheduling.

f. The CROA Agreement forms part of Agreement 4.16: Article 84.4 "Note".

[15] The issue to be determined is:

a. Has the Company fulfilled the requirements of the Agreement and the CROA Agreement for advancing this Grievance to this Office on an *ex parte* basis?

[3] P. 2.

[16] For the reasons which follow, I find the answer to that question is "no". The preliminary objection is sustained.

Analysis and Decision

[17] This Grievance raises issue with the requirements of Article 84 of Agreement 4.16.

[18] It also places into issue the CROA Agreement[4], in a situation when one party intends to proceed on an *ex parte* basis over the objection of another party.

Relevant Provisions

Agreement 4.16 (as amended by the June 2022 Agreement)

84.2(c) Step 3 – Appeal to Vice-President

(1) within 60 calendar days of the date of decision under Step 2 the General Chairman may appeal the decision in writing to the Regional Vice-President. The appeal shall be accompanied by the Union's contention and all relevant information concerning the grievance and shall:

(2) if agreed between the General Chairman and the Vice-President or their respective delegates, be examined at a joint meeting within 60 calendar days of the date of the appeal. The Vice-President shall render his decision in writing within 30 calendar days of the date on which the meeting took place; or

(c) Should the General Chairman or the Vice-President consider that a meeting on a particular grievance is not required he will so advise the other accordingly. In the event a meeting is not agreed to the Vice-President shall render his decision in writing within 60 days of the date of the appeal.

NOTE: The Company must respond to the Union's grievance particulars at each Step of the Grievance Procedure.

NOTE 2: A grievance processed against Company practices and procedures that affect multiple members will be initiated at Step 3 of the Grievance Procedure (Item 19- Nov 2019 MOA).[5]

[*these two "Notes" are not reproduced in the June 2022 Agreement, but there is also no specific agreement to remove them from Agreement 4.16*]

Article 84.3

> A grievance which is not settled at the Vice-President's Step of the grievance procedure may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work.

[4] Memorandum of Agreement Establishing the CROA&DR; as most recently amended in November of 2023 (item 23).

[5] Emphasis at the end of 84.2(c) appears in the original

Article 84.4:

A request for arbitration shall be made within 60 calendar days from the date decision is rendered in writing by the Vice-President by filing written notice thereof with the other party to the grievance.

NOTE: In the application of this paragraph upon receipt of a request for arbitration, the Company will meet with the General Chairman, within 30 calendar days from receipt of such request, to finalize the required Joint Statement of Issue. Failure to comply with the provisions of this paragraph will permit either party to the dispute to *progress the dispute to the Canadian Railway Office of Arbitration on an "ex parte" basis* **pursuant to the provisions of the Memorandum of Agreement governing the Canadian Railway Office of Arbitration.**[6]

CROA Agreement

Item 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 one or more of its employees represented by a bargaining agent, being a signatory hereto, of:

(A) Disputes respect 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 discipline or discharged; and

(B) …..

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.

Item 7:

A request for arbitration of a dispute shall be made by filing notice thereof with the Office of Arbitration not later than the first day of the month preceding that in which the hearing is to take place and on the same date a copy of such filed notice shall be transmitted to the other party to the grievance.

A request for arbitration respecting a dispute of the nature set forth in section (A) of clause 6 shall contain or shall be accompanied by a "Joint Statement of Issue"…

Item 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

[6] Emphasis added.

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.

…[reference to section (B) disputes]

Item 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…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 party **may apply to the Office of Arbitration for permission to submit a separate statement and proceed to a hearing. The scheduled arbitrato**r shall have the sole authority to grant or refuse such an application.[7]

Item 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 decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.

Arguments

[13] The Company argued the language of the "Note" to Article 84.4 allows it to proceed on an *ex parte* basis, and that the Company can thereby "speed up" the process to arbitration. It argued it engaged in good faith negotiations to reach a JSI with the Union, as on three separate occasions it provided and/or followed up with the Union to collaborate on the JSI: November 24, 27 and December 15, 2023. It argued it met the requirements of the June 2022 Agreement, which it argued removed the requirement for the Company to respond to the Union's grievance at each Step. It also briefly argued the merits of this case, including that a probationary release is not disciplinary in nature and does not constitute a discharge.

[14] The Union argued the Company's interpretation of the CROA Agreement is erroneous. It argued the CROA rules form part of Agreement 4.16 and the Company failed to engage in "good faith" efforts to reach a JSI and to follow the timelines and

[7] Underlined emphasis in original; bold emphasis added.

processes set up in the Grievance Procedure. It also objected to the prioritization of this dispute. It argued this is a contract interpretation dispute, which is straightforward: The Union filed its grievance under Article 84.2(c); the Company responded; if the parties cannot settle, either party can refer it to CROA: Article 84.3 and "notifies" the other party under the June 2022 Agreement in the GTS. The parties then meet and finalize a JSI. If that does not occur, either party can proceed to arbitration.

[15] The Union does not take issue with the Company's ability to proceed to arbitration unilaterally, but with it advancing a grievance to arbitration prematurely, which precludes cooperation in the settlement of disputes. It argues its interpretation prevents the Company from taking advantage of its own intentional breach of Article 84.4 to drive-up the number of grievances proceeding to arbitration.

Analysis and Decision

[16] This Arbitrator canvassed the principles of contract interpretation in **CROA 4884**, based on the Supreme Court of Canada's requirements in applying the modern principle of contract interpretation. Those principles are adopted here – but not reproduced.

[17] I accept the parties must comply with both the Agreement and the CROA Agreement to have a case heard by this Office. Agreement 4.16 anticipates that a grievance will be advanced to CROA: Article 84.3, 84.4 and "Note" to Article 84.4.

[18] I cannot agree with the Company that the "Note" allows it to "progress the dispute on an *ex parte* basis to this Office. If this matter is to be heard by this Office – as Agreement 4.16 contemplates – it must satisfy the requirements of not just Agreement 4.16, but of the CROA Agreement as well.

[19] While the Company argued it gave 48 hours *to the Union* for a "Notice to Arbitrate", Item 10 does not give a Company the ability to pursue a grievance *directly to arbitration* on an *ex parte* basis. I am satisfied the "Note" to Article 84.4 mirrors the requirement of Item 10 of the CROA Agreement, which is that *either* party can bring

an application to have the matter heard on an *ex parte* basis, however either party is not given a "right" to have the matter heard on an *ex parte* basis.

[20] Item 10 of the CROA Agreement requires the parties to make "good faith" efforts to reach a JSI.

[21] If the parties are ***not*** able to reach a JSI, then "either party" may apply ***to CROA*** *"upon 48 hours, (48) hours notice in* writing to the other party"… **for permission "to proceed *on an ex parte basis*"**.

[22] The Company did not make that pre-requisite application to this Arbitrator. This application is a *pre-requisite* for the scheduling of a hearing by this Office, when a JSI cannot be reached and a party seeks to proceed *ex parte*.

[23] As this Arbitrator noted at the hearing of this issue, the requirement to apply for permission to proceed with an ExSI appears to be observed by these parties in its breach, rather than with compliance, as it is often the case that each party files their own ExSI and no objection is taken to proceeding on that basis.

[24] However, in this case, the Union raised an objection. Had the Company made an application to the Arbitrator, the Union could have made the arguments it did in this case, regarding lack of "good faith" efforts to seek its agreement to a JSI. This Arbitrator could then have imposed a schedule for those negotiations to occur, thereby freeing up a place in the CROA calendar for another case to be advanced to hearing, in the February session.

[25] Resolving this objection, the Company took approximately 60 days to decline this Grievance. It then provided a proposed JSI and expected a response from the Union within *three* days, failing which it sought to schedule this hearing.

[26] I am satisfied that this tight timeline given by the Company for a response from the Union to its proposed JSI – after taking a full 60 days to decline the Grievance – does not demonstrate "good faith" efforts by the Company to reach a JSI, as required under the CROA Agreement.

[27] The preliminary objection is sustained.

[28] The parties are directed to engage in “good faith” efforts to reach a JSI over the next 30 days from the date of this Award.

[29] Should a JSI not be reached, either party can approach this Arbitrator on 48 hours notice to the other party, ***for permission*** from this Arbitrator to proceed on an *ex parte* basis. That party will be expected to establish in that application that it made “good faith” efforts to reach a JSI.

I remain seized to address any application by either party to proceed to a hearing of the merits, on an *ex parte* basis.

I also remain seized to address any issues with the implementation or application of this Award and to make any corrections necessary to give it the intended effect.

March 22, 2024

CHERYL YINGST BARTEL
ARBITRATOR