CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5007

Heard in Edmonton, February 15, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union disputes the Company's ability to use a Locomotive Engineer (Sean Lackey) from one pool to another pool within the same terminal, for an ad hoc trip based on arguments relating to Seniority Districts.

On March 5th, 2023, at 11:45, Mr. Lackey was called by CMA to work train 132-03 as an Engineer on the Winchester Subdivision.

Employees at Smiths Falls terminal operate freight trains between Montreal and Toronto. The Smiths Falls Terminal has two pools: the Belleville Pool (which operates trains between Smiths Falls and Toronto) and the Winchester Pool (which operates trains between Smiths Falls and Montreal).

On March 5, 2023, S. Lackey occupied a Locomotive Engineer's turn in the Belleville Pool at Smiths Falls. When the Winchester Pool was depleted, he was called to operate a train to Montreal as a Locomotive Engineer.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

The Company Disagrees and denies the Union's request.

Preliminary Objection:

The Company objects to the submission of this grievance based on the untimeliness of the grievance submission. The Collective Agreement is clear that it requires a grievance to be filed within 60 calendar days from the date of the cause of grievance. On this basis alone, the Company maintains the grievance is not valid.

Notwithstanding this and without prejudice to the Company's preliminary objection above, the Company maintains its position that in 2018, the Collective Agreement Articles regarding Directional Pools were agreed to by the parties and that any attempts to change the negotiated language of the collective agreement is inappropriate and contrary to CROA&DR rules.

Merits

The Union alleges that the Company has failed to respond to the grievance. Article 40.04 is clear that the remedy for not responding is escalation to the next step. Based on the Union's submission in the final step (JSI) and its progression of the grievance to the next step, it is also clear that the Union acknowledges Article 40.04 and has progressed to the next step of the grievance and arbitration process.

Directional Pool language does not contain any restrictions on the very normal calling protocol of cross pooling at a given terminal. The Company maintains its position that although

Belleville pool Engineers are called for trains on the Belleville pool first and Winchester pool Engineers are called for trains on the Winchester pool first, these Engineers do not have exclusivity to work within these unassigned pools nor are these Engineers excluded from working in the opposite pool within the same Smiths Falls Terminal. The Union has not identified any language that explicitly states an exclusivity to work these two pools within the Smiths Falls Terminal. Further, the Union has not identified any language that explicitly restricts the Company from cross-pooling employees within Smiths Falls. The Company maintains that there is no impact to an employee's seniority given that they bid onto a pool and are then called for trains in that respective pool first. Once a pool has been depleted, the Company then calls an employee from the other pool to work.

Arbitral jurisprudence on Common Pools has determined that Directional Pools were not enshrined in the collective agreement but were in the realm of Local Rules and as such, can be abolished. Given this, the Company maintains that Directional Pools at Smiths Falls (Belleville and Winchester) can be merged into a common pool without any collective agreement restriction further proving that cross-pooling, when more than one directional pool exists at any given terminal, is perfectly valid. The Company further maintains that cross-pooling is a calling procedure, not a change to seniority. As a calling procedure, unless there is explicit an Agreement to the contrary, cross-pooling is within the scope of Management Rights. The Collective Agreement further requires employees to maintain familiarity on all terminals on all subdivisions at their Terminal, further evidence of the propriety of cross-pooling.

Further and as an issue of estoppel and detrimental reliance, the Union has made a clear and unequivocal representation through its actions and acquiescence in the years prior to the filing of this grievance that the Company relied upon to its detriment that it has had a long-standing practise of cross-pooling employees at Smiths Falls. Company calling records and the Standardized Calling Procedures clearly establish this longstanding practice. The Union now seeks to exploit the grievance process in an attempt to gain that which it failed to negotiate or achieve in previous arbitral decisions.

The Union alleges the Company has violated Article 56; however, has failed to demonstrate how it has violated the article. The Union further argues a violation of Article 56.03. The Company maintains that Mr. Lackey was not forced to a separate Home Terminal; Smiths Falls has remained his Home Terminal, so no violation has occurred.

The Union also alleges the Company has violated Article 60 and again has failed to demonstrate how. The Union claims that the Company also violated Article 60.17; however, the language makes no reference to cross-pooling within a terminal, nor restricts the Company's ability to have Locomotive Engineers work the opposite pool within their Home Terminal.

As such, the Company maintains its ability to cross-pool. This ability exists within all terminals across Canada that have unassigned pool employees and more than one pool. Smiths Falls is one terminal and is no different in that regard.

By claiming there is a prohibition against cross-pooling, the Union makes a glaring contradiction against its own position on the use of Management Crews where it has long held that a Manager must never be used when a unionized employee is qualified, rested, and available.

The Company maintains there has been no violation of the Collective Agreement nor any other historical agreements or otherwise, as referenced by the Union. The Union's request for an Abeyance Code at this stage of the grievance process is moot. As per Article 40.06, the Company cannot agree that an abeyance code would be appropriate under the circumstances.

The Company continues to maintain that the Union's request for a "cease and desist" is inappropriate as there are no provisions in the Collective Agreement for submission of a grievance encompassing this. The MOS establishing CROA&DR clearly indicates that a dispute must be progressed through the grievance process. This request for remedy is a further attempt to seek relief for an allegation of multiple disputes without progressing each issue through the grievance process.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Dispute: S. Lackey employee who was called from the Belleville Run Through Pool, Southern Ontario District, to work as engineer in the Quebec District, at Smiths Falls Ontario. On January 05th, 2023 at 03:30 Mr. Lackey was called by cma to work train 112-31 as an Engineer on the Winchester Subdivision.

Union Position:

- January 5th, 2023 at 03:30 Mr. Lackey was called by cma to work train 112-31
- January 6th, 2023 at 00:15 Mr. Lackey was called by cma to work train 529-797 back to Smiths Falls
- January 16th, 2023 the local Union files a step two grievance.
- 60 days pass and the Company could not even take the time to answer Step two grievance filed by the local.
- On April 4th, 2023 the General Committee filed a Step three grievance.
- May 26th the Company responded to the Step three.

The Union reserves its right on its positions made throughout correspondence and grievances. The Union will not duplicate all arguments presented in grievances and correspondence but relies on them. The Union stands by all of its positions put forth. The Union reserves its rights to object and respond to any new positions presented by the Company.

In regards to the step three response, the union contends this matter is unresolved and has not gone through the grievance procedure in full. Therefore union objects to any preliminary hearing being used to impede the merits of this on going issue.

The Company has violated articles 56, 56.03, 60, 60.17, Local Rules on behalf of the Locomotive Engineers employed on the Ontario District, Appendix A Memorandum Relating to Engineer's work on the Ontario Seniority District, and District Local Rules for Farnham Seniority District, Ottawa Seniority District, Quebec Seniority District, & Winchester Seniority District.

Smiths Falls terminal is unique in that it is the only terminal in Canada where two seniority districts meet in the terminal. Equally, the two districts only apply to Locomotive Engineers.

The Union contends that the Company does not have the ability to force a Locomotive Engineer off their district and the Company's actions in doing so are contrary to the parties' practice and various provisions of the Collective Agreement.

Entitlements to assignments are determined by seniority within the terminal and district in which an employee is set up as follows: 1) prior rights if any (district seniority); 2) regional seniority; and 3) national seniority.

The Belleville Pool on the Ontario District operates with Locomotive Engineers on the Ontario Seniority District and have the jurisdiction of this work.

The Winchester Pool on the Quebec District operates with Locomotive Engineers on the Quebec Seniority District and have the jurisdiction of this work.

The boundaries of this work are in the CCA article 56.

Mr. Lackey was in the Belleville Pool on the Ontario Seniority District when forced by the Company off of her district to do work of the Quebec district.

Seniority is a fundamental core right of Unionized employees and any alteration must be specifically provided within the CCA.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) E. Mogus	**(SGD.) F. Billings**
General Chairperson LE-E	Assistant Director

There appeared on behalf of the Company:

D. Zurbuchen – Manager, Labour Relations, Calgary
J. Bairaktaris – Director, Labour Relations, Calgary

D. Guerin – Managing Director, Labour Relations, Calgary
A. Harrison – Manager, Labour Relations, Calgary

And on behalf of the Union:
K. Stuebing – Counsel, Caley Wray, Toronto
E. Mogus – General Chairperson, LE-E, Toronto
S. Orr – Vice General Chairperson, LE-E, Oakville
S. Lackey – Grievor, Smiths Falls (via Zoom)

AWARD OF THE ARBITRATOR

Background, Issues and Summary

[1] The Smiths Falls Terminal is one of the main home terminals for Locomotive Engineers in Eastern Canada. It is also the only terminal in the country where there are two different seniority districts are based out of one terminal.

[2] Those two districts are the Southern Ontario Seniority District; and the Quebec Seniority District.

[3] The Grievor is employed as a Locomotive Engineer based at Smiths Falls. On January 5, 2023, the Grievor was called by the Crew Management Centre (CMC) from the Belleville Run through Pool, Southern Ontario District, to work as engineer on train 112-31 in the Winchester Pool, Quebec Seniority District. This assignment was given to the Grievor, because there were no Locomotive Engineers available in the Quebec Seniority District who could take that assignment due to manpower shortages.

[4] The Union grieved that this action forced the Grievor "off-District", since the Grievor's Seniority District is the Southern Ontario District and not the Quebec Seniority District. It alleged a breach of Articles 56 and 60. The Company also raised a preliminary objection based on estoppel and timeliness.

[5] The Issues to be determined are:

a. Is the Union estopped from raising this issue?
b. Is the Grievance timely?; and
c. Can the Company force the Grievor to work this *ad hoc* assignment off his own Seniority District?

[6] For the reasons which follow:

a. The Union is not estopped from bringing this Grievance as it has not demonstrated acquiescence to the Company's requirement that employees work off-District for *ad hoc* assignments;

b. The Grievance is timely, having been filed shortly after the alleged breach occurred; and

c. The Grievance is allowed. The Company cannot require the Grievor to work a different Seniority District except in case of emergency and then only when there are unqualified Locomotive Engineers who can be trained. It is the Company's burden to establish these preconditions were met. That burden has not been satisifed.

Collective Agreement Provisions

Article 11

Note: From 2018 MOS

11.01

The parties recognize and agree the operation of Directional Pools in unassigned service requires employee availability and, on that basis, requires the calling rules to draw on employees to work in either pool when the supply of employees in a particular pool and/or spareboard is insufficient to operate all of the trains.

11.02

Directional pools will be implemented in the following locations.

[there follows a list of 11 locations, which does not include Smiths Falls]

Directional pools currently in place will remain as is. The parties agree that further locations be identified they will be implemented by mutual agreement.

11.03

In the establishment of Directional Pools, the parties agree the joint development of the standardized calling rules for that Terminal and their mutual agreement is required prior to implementation of Directional Pools at that location.

11.04

All road employees must maintain their familiarity on all subdivisions at their terminal. To ensure that familiarity is maintained, the Parties will jointly develop a system that at each change of card operating employees can validate their familiarity for each pool, so they are considered familiar and qualified to be called for work in any of the pools in that Terminal. **Operating employees who do not validate their familiarity at each change of card will be required to make at least one working trip in order to validate their familiarity with runs in each pool**. Local Agreements to manage familiarization trips will be in writing and filed with the General Chairman, General Manager, and AVP Labour Relations for their approval and validation.

11.05

In the event of a major line outage, **the Company may exercise the right to temporarily collapse and combine the directional pools at that Terminal to maintain sufficient**

crew availability during the outage. The Company will notify the Local Chairman when this will occur, along with the expected duration [emphasis added]

11.06

At locations where the Company has established directional pools and any train identified on the current lineup is not protected by rested and available employees, who do not accept a call to work to ensure cross pool protection obligations, the following will apply:

(1) In the event train delays are attributable to the existence of directional pools at a terminal, the General Manager, or delegate; and the Local Chairman at that Terminal will review any delay. Any further train delays referred to herein will be elevated to the Senior Vice President Operations and the applicable General Chairman for their review and recommendation.

(2) In the unfortunate circumstance that train delays attributed to cross pool operations continue to take place, despite the best efforts of the Company and the Union, the parties agree that pools may be restructured at that terminal.

11.07

The intent between the parties is that directional pools/cross pool protection will enhance customer service, employee availability, and provide a more regular employee work routine; and the above provisions will rarely, if ever, have to be invoked.

Article 56 Seniority

…

56.01 (6)

A Locomotive Engineer from outside a Locomotive Engineer Seniority District shall not be allowed to work a Locomotive Engineer's job if there are Locomotive Engineers on the Seniority District List who could be trained, except in emergency. In these cases the Company must immediately start training unqualified Locomotive Engineers from that Locomotive Engineer Seniority District to fill the vacant positions.

56.02

Unless otherwise provided for, by Eastern District Rules and as provided for in Article 60 TCRC Locomotive Engineer's West, employees may move within districts at General Advertisement of Assignments, Pool to Pool or when displaced from holding a locomotive engineer's position. Locomotive Engineers may not reduce themselves.

…

56.03

Unless otherwise provided for by District Rules, should there be no available Locomotive Engineers, the senior qualified Locomotive Engineer not set up as such, shall be used. A Locomotive Engineer having to move under this rule will be permitted to return to their home terminal when they stand for work on the Locomotive Engineers list at that terminal. **Locomotive Engineers cannot be forced off their district.** [emphasis added]

…

Belleville Run Through Agreement[1]

Section 2

Engineers with home terminals at Smiths Falls and Toronto will run through freight trains between Smiths Falls and Toronto under schedule rates and conditions except as otherwise provided hereunder [emphasis added].

….

Section 4

Run-through trains will be manned in accordance with the provisions of Appendix "A" attached hereto. This Appendix "A" is subject to change by mutual agreement.

Appendix "A"

Section 1

Two pool boards will be maintained at each home terminal, one for the home terminal pool engineers and one for the "away-from-home" pool engineer.

Section 2

[standing of home terminal engineers and away-from-home terminal engineers; list of specific trains for home terminal engineers]

NOTE: In the event no home terminal engineers or qualified engineers are available to man the above trains, away-from-home engineers may be called.

September 7, 2005 Modification

Section 3

The rules regarding relief work and the present requirement to utilize certain crews for this work **beyond the dividing line at Trenton, will be modified and will permit the Company to utilize Smiths Falls or Toronto crews for this work**, based on operational requirements and a deemed crew shortage (i.e. no availability in the pool or road spareboard) at either terminal. Should crews be utilized beyond the dividing line at Trenton, as per the circumstances identified herein, they shall not be called in turn service out of the away from home terminal.

Local Rules on behalf of the Locomotive Engineers employed on the Ontario District

Revised & reprinted effective May 1, 1975 (Rules 7 and 13 revised as of March 1, 1981)

…

[1] Memorandum of Agreement Between the Canadian Pacific Railway Company and the Brotherhood of Locomotive Engineers Governing the Manning of Through Freight Trains in Run-Through Services Between Toronto, Ontario and Smiths Falls, Ontario, as amended September 7, 2005 by Memorandum of Agreement Between Canadian Pacific Railway and the TCRC – Trainspersons and Locomotive Engineers of Divisions 295, 658, 381 of Toronto, Ontario and Smiths Falls, Ontario Governing Train Operations on the Belleville Subdivision and Superseding Certain Terms and Conditions Identified in the Belleville Run Through Agreement.

Rule 8

The **Ontario District will extend from Smiths Falls west to Windsor**, MacTier….including all branches insofar as promotion of Engineers is concerned [emphasis added].

Rule 9

Main terminals are London, Toronto Terminals and Smiths Falls

…

Rule 13

An Engineer in any class of service at main terminals who between changes of time may desire to take pool service or spare board work, or any engineer desiring to change from one subdivision to another for pool service, will make application in writing…

…

Rule 18

Local Chairman in conjunction with Divisional Officers may set up pool rules and assignment suitable for the manning of each subdivision mileage in accordance with Article 33 [emphasis added].

…

Rule 21

Except as provided in Rules 14 [deleted] and 20 and at Smiths Falls where no spare Engineer is maintained the following will govern temporary vacancies in all classes of service…

(d) At Smiths Falls, the senior Engineer applying may fill a temporary vacancy from the first day;

…

Rule 28

With reference to Clause 33.06, should there be no available pool Engineers to fill pool vacancies, spare or available Engineers to fill necessary vacancies the senior available demoted Engineer or senior available qualified fireman (helper) will be used.

…

Rule 30

The signatories may request an immediate revision of these rules during the 90-day period following their implementation after which they may be cancelled or revised upon 60 days written notice from either party.

Facts

[7] As the Union tabled two additional authorities on the morning of the hearing, in the interests of fairness, the Arbitrator provided to the Company an opportunity to file short written submissions after the hearing, to distinguish these authorities. The Company took that opportunity. However, I agree with the Union's concern that the

Company's additional submissions went beyond distinguishing the Union's authorities and presented a further example of cross-pooling, which did not involve distinguishing authorities. That information therefore has not been considered in resolving this dispute.

[8] The Grievor occupied and held a turn in the Belleville Run through Pool as a Locomotive Engineer (also referred to in this Award as an "LE"), assigned to the Belleville Subdivision, on the Ontario Seniority District.

[9] In addition to the undisputed facts already noted, the following historical information is relevant as surrounding circumstances, being uncontroversial facts and jurisprudence, which provide context to the negotiation of Article 11.

a. In 1969, the parties negotiated the Belleville Run Through Agreement, which was amended in September, 2005.

b. While the parties discussed developing local rules shortly after, it is not clear from the evidence whether the parties ultimately reached "local rules" at that time specific to Belleville, but there is evidence of "local rules" which apply to the Ontario Seniority District, as reproduced above.

c. "Local Rules" are specific to Seniority Districts.

d. On July 21, 2014, Arbitrator Picher issued his decision in *CP Railway v. TCRC (Replacement of Directional Pools and the Establishment of Common Pools at Various Terminals)*. At issue in that case was the validity of the Company's decision to eliminate directional pools at various terminals and replace them with common pools. It was understood the decision would effect "all running trades employees at all locations within the Company's system"[2].

e. The Arbitrator found that directional pools were regulated by "local rules" rather than by terms in the various collective agreements; and that the Union did not "seek to protect directional pool running within the terms [sic] the collective agreements[3]. The Arbitrator agreed with the Company and found there was no language which would "expressly or impliedly prevent the Company from adjusting or abolishing directional pools at any

[2] At p. 3
[3] At p. 8

location…."[4], although he also noted it would be open to the Union to negotiate such language.

f. He also determined the circumstances under which local rules could be cancelled, which are not relevant to this dispute. He held that such negotiation regarding pooling would be a matter for bargaining.

g. In the 2018 round of collective bargaining, the parties agreed to Article 11: Directional Pools.

h. The parties developed "FAQ's" for the MOS, which the Union then used in its Town Halls for its members.

i. **AH708** was decided in June of 2020. While the Company argued Arbitrator Moreau ruled on the issue of whether an LE can be "forced off district", I agree with the Union that Arbitrator Moreau did not consider the merits of the Union's arguments which are now before this Arbitrator, as he found that the parties had not agreed between themselves to bring that issue before him for resolution.

j. There is a backlog of grievances to be resolved between the parties, with the result that the hearing of grievances by this Office can be subject to a delay. Disputed practices can continue unabated until that resolution is reached.

The Preliminary Objection

Arguments

[10] The Company objected to the Grievance on the basis that the Union was both estopped from bringing the Grievance and that the Grievance was not timely. It argued the Union had known of the Company's practice for at least eight years, and pointed out that a former Local Chairman had himself worked *ad hoc* assignments on the Quebec Seniority District many years previously. It provided five examples of where that work had occurred, between 2015 and 2018. It also argued there were no limits to cross-pooling in Article 11, negotiated in 2018.

[11] The Union argued issue estoppel as argued by the Company was not established, as the issue had not been adjudicated between the parties. It also argued it had never acquiesced to the Company's position, nor had the Company demonstrated any detrimental reliance on the Union's position, so the elements of promissory

[4] At p. 6

estoppel could not be established. It argued that the attempt to have this matter adjudicated by Arbitrator Moreau in **AH708** demonstrated it was a live issue from its perspective, and that any estoppel would have been lifted by that notice. It argued the Company bore the burden of proof that the elements of estoppel had been met, and was unable to satisfy that burden.

[12] In addition to the filing of multiple grievances awaiting adjudication by this Office, the Union argued this particular Grievance *was* timely, as it had filed the Grievance shortly after the incident in question had occurred in January of 2023.

Analysis and Decision

[13] Issue estoppel requires that the same issue between the same parties must already have been decided.

[14] I am satisfied that "issue estoppel" does not apply, as the same issue has not already been adjudicated. Arbitrator Moreau **in AH708** did not adjudicate the issue because he found the parties had not agreed to place it before him in that *ad hoc* process. He did not adjudicate on the merits of that issue.

[15] I am also satisfied the arguments of the Company raise *promissory* estoppel. That is an equitable doctrine. The Company must demonstrate that by words or conduct, the Union has acquiesced to the Company requiring LE's based in Smiths Falls to work on the Quebec Seniority District; that it relied on that acquiescence to its detriment, and therefore it is inequitable for the Union to now rely on a strict adherence to the Agreement.

[16] It must be emphasized that this preliminary objection is not to establish the Company's past practice regarding forcing employees off district, as an aid to interpret the Agreement to determine if it has that right. That past practice would only be relevantly considered if I find the words of the Agreement to be ambiguous.

[17] Rather, the actions which must be established for this preliminary objection to succeed are actions relating to the acquiescence o*f the Union,* and *reliance* by the Company. Whether acquiescence and reliance are established are matters of fact. While the argument of estoppel allows an arbitrator to consider the past practice of

the parties, the words and/or conduct relied on must be unequivocal in establishing acquiescence.

[18] The evidence of acquiescence must also be timely to the issue. I note the evidence filed by the Company as examples was from before the Directional Pool language was negotiated in 2018. In this Grievance, the Company is arguing, at least in part, that it is the language of Article 11 that now provides it the ability to 'cross-pool' in the Smiths Falls terminal, and the Union arguing that Article does not have that reach. The language prior to that Article would not have relevance to that argument.

[19] I am satisfied there is a distinction between a Union *acquiescing* to a particular type of conduct, and it choosing a fact pattern to grieve a course of conduct that it feels highlights the issue most appropriately and provides it the greatest chance of success. The evidence demonstrated that the Company has taken the position that the Union cannot combine its grievances for multiple individuals into one grievance, but that it must advance each case on its own facts. That requirement works both ways. To acquiesce, the actions must be clear and unequivocal. If the Union is required to grieve each instance, it does not lose the ability to do so because of a "global" view by the Company that there was an earlier contravention it did not grieve.

[20] There are various reasons why a Union may not pursue every contravention of an Agreement through a grievance. Perhaps the fact pattern is imperfect; or the Grievor is not credible. I do not find that choice to grieve one instance but not another creates clear and unequivocal acquiescence by the Union to a particular practice, unless the Union *never* grieves that practice. In this case, the Union has argued it has filed 150 grievances against the Company's practice. It was not clear whether all of those Grievances related to the practices at Smiths Falls, or to the practices of forcing individuals off-district at other terminals as well, but the filing of grievances against the Company's practices militates against a finding of acquiescence.

[21] It is also an undisputed and well known circumstance to both parties in this industry, that given the large number of grievances filed before this Office, there can be delay in having a particular issue heard, and that a practice can continue unabated –

sometimes for several years – while a grievance works its way to this office to resolve the issue. In this case, that Grievance took more than a year to reach this hearing.

[22] I am satisfied it is an uncontroversial background fact that after Arbitrator Picher's decision in 2014, the parties negotiated Article 11 in 2018. Article 11.05 limited the right of the Company to collapse directional pools:

> In the event of a major line outage, **the Company may exercise the right to temporarily collapse and combine the directional pools at that Terminal to maintain sufficient crew availability during the outage.** The Company will notify the Local Chairman when this will occur, along with the expected duration [emphasis added]

[23] I therefore cannot agree that the Union "sat on its hands" after Arbitrator Picher's award, which found the Company could collapse Directional Pools into Common Pools, since that was not subject to the collective agreement. Rather, the Union and the Company negotiated the wording of Article 11 into the Agreement.

[24] In 2020, the Union also took the position before Arbitrator Moreau that the issue of being forced off district should be adjudicated. Had it been acquiescing to the Company's practices as was argued by the Company, that position would have been inconsistent with that acquiescence. Instead, it is clear the Union desired to have this issue adjudicated as late as 2020 - to the Company's knowledge. While the Union was not successful in bringing that issue before the Arbitrator, that was because the Arbitrator found the parties had not agreed to have that issue adjudicated, which agreement was necessary given the *ad hoc* process the parties chose to use.

[25] Neither has the Company satisfied me that it relied on the Union's actions to its detriment, or changed its position. The Company had the opportunity to bargain both Articles 11 and 56 in response to the Union's position after 2020, which did not occur. It cannot be said the Company was lulled into a false sense of security that the Union was not intending to take issue with its practice of forcing employees off district, in view of the Union's actions in seeking to have that issue addressed by the Arbitrator in **AH708,** or that the equities now demand that the Union cannot raise this issue.

[26] I am further satisfied that when the parties added Article 11 in 2018, the parties did not also amend Article 56. The Company could have negotiated changes to that Article at that time.

[27] Even if the Union was estopped prior to 2020, I agree with the Union that its desire to have that issue adjudicated in 2020 would have provided notice to the Company that any acquiescence was then at an end. The Company had the opportunity to negotiate changes to Articles 11, 56 or 60 in the next bargaining round. Those changes were not negotiated. It is not therefore inequitable to now allow this issue to proceed to adjudication.

[28] I am also not able to agree the Grievance is not otherwise timely. I cannot agree with the Company that the Grievance relating to this Grievor arose "years earlier". In this case, a factual circumstance occurred which the Union chose to grieve and advance to this Office. As it was not estopped from doing so by its acquiescence to the Company's practices – and as it filed that Grievance well within the time period for taking that Step after this action occurred – as outlined in Article 40 of the Agreement – I cannot agree the Grievance is not timely.

[29] To summarize, I am persuaded by the Union's argument that the elements of promissory estoppel have not been established on the evidence in this case. I am not satisfied the Union's words or conduct provided clear and unequivocal acquiescence to the Company's ability to require employees in Smiths Falls to work on both Seniority Districts because they shared a terminal.

[30] Neither can I find detrimental reliance by the Company, even if acquiescence could be established.

[31] Therefore, estoppel is not established and it is not inequitable to allow the Union to proceed.

[32] The preliminary objection is over-ruled. The matter can be heard on the merits, which are addressed below.

The Merits

Arguments

[33] The Union argued the issue is whether the Company can unilaterally force an employee to work an assignment on another Seniority District, and even if so, whether the Company has discharged the conditions precedent for that to occur. It argued the answer to both questions is "no". The Union argued that Article 11 did not apply, as there was no agreement made between the parties to establish Directional Pools at Smiths Falls. In the alternative, it argued that Article 11 must be read in context with the balance of the Agreement, which includes Articles 59 and 60. It argued these Articles contained important limitations on the ability of the Company to require the Grievor perform that work, relating to seniority and that Article 11 cannot be interpreted in a manner which places these provisions into conflict. It pointed out that Article 11 must be read in context with Article 56.01(6) which sets outs the conditions under which an LE can work on another Seniority District. It argued there must be an emergency; and there must not be unqualified engineers that could be trained. Even if those conditions are met, the Company must then "immediately start training unqualified Locomotive Engineers" from that Locomotive Engineer Seniority District…". It argued a manpower shortage did not constitute an emergency.

[34] It noted that in Smiths Falls, there are "two" Seniority Districts and not just one Seniority District with two directional pools. It argued that LE's from one Seniority District have priority over LE's from another on their own district. It was the Union's position that a wholistic view of the Agreement demonstrated the Company has fettered its rights to direct the Grievor onto the Quebec Seniority District by Articles 56 and 60. The Union argued that to read the Agreement as urged by the Company would be to render those Articles meaningless. It urged it is a principle of interpretation that such an interpretation should not be preferred. It also argued that Article 60.17 related to the Grievor, as he worked in the East, which was different than what applied to the West. It noted the parties had agreed that an LE working in the East would "not be run off the subdivision to which they are assigned, except in case of emergency", which had not occurred in this case. It also argued that Article

56.03 stated that a LE would not be “forced off their district”. It further argued that as Articles 56 and 60 deal with seniority rights, they must be strictly construed against any interpretation that would reduce their impact or protections.

[35] For its part, the Company argued it has the right to cross-pool; that it has been doing so for many years out of terminals in Canada; that Smiths Falls is no different; and that cross-pooling is a normal calling procedure. It argued there was no language in the Agreement which prohibited it from cross-pooling between Seniority Districts when they shared a terminal. The Company argued that crew resources are critical to the operation of a railway, and are a limited resource at any given location, at any given time and that all employees are not rested, available and qualified for any given *ad hoc* vacancy. It noted that Arbitrator Picher’s 2014 Award confirmed that the Company had the right to call employees in any direction, out of any terminal, by virtue of its management rights. While the Company relied on bargaining history to support its interpretation, it also argued the Agreement was unambiguous, plainly written, easily understood and abundantly clear.

[36] The Company also relied on Article 11.01. It argued that Smiths Falls was “one terminal” for the purposes of Article 11; that it had retained its management rights to direct an employee to cross-pool out of the same terminal under Article 11.01, and that no exception is made in that Article for Smiths Falls as a terminal where there are two Seniority Districts. The Company maintained it had the ability to cross-pool within all terminals across the country. It also argued that to require engineers to work on different seniority districts was a well-established practice, stating engineers from the Alberta Seniority District worked on the Saskatchewan Seniority District. Its position was that standing on a particular seniority district does not inhibit the Company’s ability to call that employee on an *ad hoc* basis to cross pool and work a train from another pool. It argued that nothing in either Article 11 or 56 prevents this and argued the Grievor’s seniority was unaffected. It argued no seniority rights were impacted as there were no available Locomotive Engineers in the Quebec Seniority District to work the assignment worked by the Grievor, so no seniority rights in that District were affected. It also argued the seniority of the Grievor was not impacted by its choice and that the argument of the impact on Articles 56 and

60 by the Union was a 'red herring'. It also argued that the Grievor enjoyed 'prior rights' to the Quebec Seniority District, which allowed him priority to bid and select on new jobs before others.

[37] While the Union disagreed with that fact in its grievance documentation, nothing turns on whether the Grievor held prior rights and it is not necessary to resolve this issue for the purposes of this Award.

Analysis and Decision

[38] The issue in this Grievance is not whether the Company is allowed to "cross-pool" amongst directional pools which work out of the same terminal. Rather, the issue raised by this Grievance is whether the Company is entitled to force the Grievor to work on a different Seniority District, by an application of Article 11 or otherwise.

[39] I do not find either Article 11, 56 or 60 to be ambiguous. I am satisfied the mutual objection intention of the parties can be determined by considering the plain and ordinary meaning, of the words the parties chose to use, considered within the factual context.

[40] It must be emphasized that there is very little use that can be made of evidence surrounding bargaining negotiations, which evidence was filed by the Company to support its interpretation. This is so regardless of whether the Articles are found to be ambiguous, allowing certain extrinsic evidence to be considered. The Alberta Court of Appeal has recently clarified that direct or indirect evidence of the parties' subjective intentions is *never* admissible, as it is *always* irrelevant[5]. Prior jurisprudence that does not address this clarification in the law must be read with caution.

[41] Much of the evidence which surrounds bargaining history – and much of that relied on by the Company – is often of a parties' subjective intentions, as it includes evidence of why a particular clause was proposed by a party, or what problem that clause was intended to solve, or what the clause was intended to mean. This is

[5] *AUPE v. AHS* 2020 ABCA 4

evidence of subjective intentions.[6] Further, I have significant difficulty with the proposition that negotiating history from the current bargaining round is appropriately filed at an arbitration as extrinsic evidence, when that bargaining round has not even concluded.

[42] The modern principle of contract interpretation requires that words must be given their "plain and ordinary" meaning. This must be determined by considering the external factual context or "surrounding circumstances" which existed at the time the contract was made, as well as the other provisions of the Agreement. I consider this principle relates to both consideration of the "micro" context – how the disputed Article itself works together; and the "macro" context – how that Article interplays with the other Articles in an Agreement, to create a cohesive whole.

[43] It is also a "canon of construction" that an interpretation that results in the Articles of an Agreement being placed into conflict is to be avoided. It is assumed that the parties objectively intended that all Articles they negotiated would work together harmoniously. There is a further canon of construction that when the Agreement has a specific provision relating to a particular issue, that takes precedence over a more general clause.

[44] As a general principle, the management rights of an employer allow it to direct its workforce where that effort is needed. However, it is also an accepted principle that a party is free to fetter any right which it has when it negotiates a collective agreement, including on how its workforce is to be directed.

[45] It is also trite to state that an arbitrator does not have jurisdiction to amend, alter or modify a collective agreement to make a different deal for the parties than one they have negotiated for themselves.

[46] In this case, I recognize the parties have a mature collective bargaining relationship and are sophisticated and well-versed in the art of collective bargaining.

[47] For convenience, Article 11.01 states:

[6] See **CROA 4884** for a discussion of the modern principle of contract interpretation; the recent jurisprudence and what qualifies as evidence of "subjective intentions".

> The parties recognize and agree the operation of Directional Pools in unassigned service requires employee availability and, on that basis, requires the calling rules to draw on employees to work together in either pool when the supply of employees in a particular pool and/or spareboard is insufficient to operate all the trains".

[48] The Company has argued this Article applies equally to pools which are within and without a particular Seniority District, so long as they are both at the same "terminal". According to the Company's argument, the key is that both Districts share a "terminal".

[49] As has been noted, Smiths Falls is the only terminal in the country where one 'direction' is on one Seniority District, and the other 'direction' is on another Seniority District. This was known to the parties at the time Article 11 was negotiated.

[50] Upon careful review of all of the evidence, jurisprudence and submissions, I find I cannot agree with the Company's interpretation. I am satisfied when considering this Agreement as a whole that there are differences between the terms "Seniority District" and "Terminal" and that Article 11 does not serve to ignore those differences when it refers to the ability to cross-pool from a "terminal". I am satisfied that Article 11 – added to the Agreement in 2018 – must be read in a manner which allows it to work harmoniously with the other existing Articles of this Agreement.

[51] I am drawn to the conclusion that to interpret Article 11 as the Company argues – giving a right to cross-pool *between* Seniority Districts so long as the "terminal" is the same - would place Article 11 into conflict with other existing provisions of this Agreement, that were not amended when it was included; would ignore that familiarization rules are developed *by Seniority District* and would ignore provisions in the Belleville Run Through Agreement regarding what work is properly directed.

[52] Turning first to Article 56, it is a seniority provision. It is well-established in arbitral jurisprudence that seniority provisions must be strictly construed against an interpretation which would lessen the protections those provisions provide.

[53] Article 56 specifically addresses the issue of when an LE can work on a different Seniority District. It was formerly Article 21 of the LE West and East collective agreement, before Consolidation of the collective agreements.[7]

[54] I am further satisfied the clause is not ambiguous. Article 56.01(6) prevents an LE who is from "outside a Locomotive Engineer Seniority District" from working an LE's job on a different Seniority District "if there are Locomotive Engineers on the Seniority District List who could be trained, "**except in emergency"**.

[55] I am satisfied the parties turned their collective mind to the ability to 'cross-pool' between Seniority Districts – as opposed to between "terminals" – when they negotiated Article 56.01(6). I am satisfied it specifically addresses the ability of an LE from one Seniority District to work on another Seniority District. I am further satisfied the parties agreed to limit the circumstances where that could occur, which are as noted in Article 56.01(6).

[56] I am satisfied that Article 56 is specific to that ability, while Article 11 is not.

[57] I am satisfied from a plain and ordinary reading of Article 56.01(6), that one circumstance is contemplated which would allow cross-pooling to occur, as between Seniority Districts:

> a. An emergency has occurred and there are LE's on the Seniority District list who could be trained, in which case an LE from another Seniority District <u>can</u> work that assignment, but the Company must then "immediately start training unqualified LE's.

[58] An underlying requirement is that there must be an "emergency".

[59] I do not find any specialized meaning to be given to the word 'emergency' in the Agreement. Giving the word "emergency" a "plain and ordinary meaning", I am satisfied that it refers to those situations that cannot be foreseen by the Company and so planned for. A manpower shortage – from not having enough LE's to service a particular Seniority District – is a situation that has an element of foreseeability and control and in my view does not qualify as an "emergency". It can be addressed by hiring more employees.

[7] Which was ordered by Arbitrator Adams in 2015.

[60] However, even if that shortage *did* qualify as an 'emergency', Article 56.01(6) then requires the Company to "immediately start training unqualified Locomotive Engineers from that Locomotive Engineer Seniority District to fill the vacant positions".

[61] While the Company argued there was a manpower shortage on the Quebec Seniority District and that there were no personnel rested and available to work this assignment, they have not established that this was an 'emergency' and further that there were no unqualified LE's on that Seniority District who could have been trained, to meet the requirements of Article 56. Even if it could be considered as an "emergency", the Company did not establish that it took the steps required under that Article to allow that work to occur.

[62] I am satisfied that an interpretation that would allow Article 11 to work harmoniously with Article 56 is one that recognizes that the Directional Pools to which Article 11 refers must be located not just in the same terminal, but on the same Seniority District, as are the pools in the terminals which are listed in Article 11, which were to be established by the Company.

[63] That is the only interpretation that allows the two Articles to be read together harmoniously.

[64] To reach the interpretation urged by the Company would place Article 11 into conflict with Article 56. It would allow the Company to ignore the requirements of Article 56 – which require it to train unqualified LE's to service a Seniority District – and instead allow it to choose to continue to meet its manpower shortages through *ad hoc* assignments pulling LE's off other Seniority Districts.

[65] I am satisfied that was not the parties' mutual objective intention when they added Article 11 to the Agreement in 2018, but did not change Article 56.

[66] I am reinforced in this interpretation by a review of Article 56.03. That Article provides for the movement of LE's between terminals, but does not allow the "forcing" of an LE off of their own district. While I cannot agree with the Union this prevents an *ad hoc* assignment to a different Seniority District where there is an

'emergency' – which is contemplated under Article 56.01(6) – it *does* recognize that there is an important distinction between "terminals" and "districts" that must be respected.

[67] I am further supported in my interpretation by a review of the TCRC T&E Employee FAQ's to the MOS reached in 2018 which added Article 11 to the Agreement. Question 1 under "Directional Pools (MOS- Quality of Life/Fatigue Management) considered the following question and answer:

> Are employees expected to keep themselves qualified or is the Company required to give them familiarization runs?
>
> - Employees are responsible to keep themselves familiarized on all subdivisions at their terminal. The parties will develop local rules to keep everyone familiarized.

[68] This was a question which arose from Article 11.04. This leads into an exploration of "local rules" to keep employees familiarized "on all subdivisions in their terminal". As was evident from the evidence filed before me, there are different local rules <u>for each Seniority District</u>. Local Rules are *not* developed on a "terminal" basis. In his 2014 Award, Arbitrator Picher noted that the concept of directional pool was "left to be regulated by local rules".[8]

[69] That Directional Pools are subject to "local rules" – which are Seniority District specific – supports an interpretation that "cross-pooling" between them must be done *within one* Seniority District and not *between* Seniority Districts. I am satisfied it was the parties' mutual and objective intention to require employees to be familiarized on all subdivisions *within their own Seniority District* under the provisions of Article 11, and not all subdivisions *within their home terminal* where that terminal was the home terminal for more than one Seniority District. The familiarization for those subdivisions – within those different Seniority Districts - would then be subject to "local rules".

[70] However, section 56.01(6) does not speak to the situation where an emergency occurs and there are no unqualified LE's who could be trained to do that work. I am satisfied the Belleville Run Through Agreement applies to that situation to limit the

[8] At p. 8

Company's ability to assign an employee to whom the Belleville Run through Agreement applies, to do work on the Quebec Seniority District. Section 2 states:

> **Engineers with home terminals at Smiths Falls and Toronto will run through freight trains between Smiths Falls and Toronto** under schedule rates and conditions except as otherwise provided hereunder [emphasis added].

[71] That Agreement does not allow those LE's to be used on the Quebec Seniority District.

[72] While there was a modification in 2005 regarding coverage "beyond the dividing line at Trenton", for "relief work", there was no similar modification to allow LE's to work on the Quebec Seniority District for the same reason.

[73] I am further satisfied this supports an interpretation that the parties did not mutually and objectively intend – and neither Article 56 nor the Belleville Run Through Agreement allow – "cross-pooling" of LE's as between Seniority Districts out of the Smiths Falls terminal, except in cases of emergency and then only with certain conditions attached.

[74] The Company argued it has required engineers to work off their own Seniority District, such as those between Alberta and Saskatchewan. What occurs for LE's in Alberta and Saskatchewan is not directly before me; neither is evidence of whether the Company's practices in those provinces have been grieved. However, I note there was no evidence provided of what conditions surrounded those decisions and it is difficult to address that argument without specifics.

[75] It may well be those situations will turn on the lack of the protection given by Article 60.17, which only applies to Eastern employees, but I make no determination of that issue. Article 60.17 states that "Engineer will not be run off the subdivision to which they are assigned except in case of emergency…", which is consistent with the requirement of an 'emergency' as noted in Article 56 and an interpretation of Article 11 which respects the distinction between "Seniority Districts" and "Terminals"

Conclusion

[76] The Grievance is allowed.

[77] I find and declare the Company breached the Agreement when it required the Grievor to work on the Winchester subdivision in the Quebec Seniority District, when no emergency existed.

[78] I find and declare that “cross-pooling” as between pools in different Seniority Districts in the Smiths Falls terminal is not supported by Article 11.

[79] Due to the importance of this issue to both parties and its potential reach to resolve other grievances, this Award is more detailed that those which typically issue from this Office and took considerably more time to draft.

[80] I therefore encourage the parties to review the approximately 150 outstanding grievances relating to this issue to determine which can be resolved, given the findings in this Award.

[81] That said, I do not consider this to be an appropriate case for a cease and desist order to issue. None of the outstanding grievances noted by the Union have been adjudicated and I am not aware of the details of those grievances. The Company is entitled to an opportunity to comply with this finding and make efforts to settle any outstanding disputes to which it reasonably relates.

[82] The Grievor is entitled to any lost wages and entitlements. I submit that issue back to the parties for their resolution. I retain jurisdiction to resolve that amount, should they be unable to agree.

I retain jurisdiction to address any questions relating to the application or implementation of this Award and to correct any errors or omissions to give it the intended effect.

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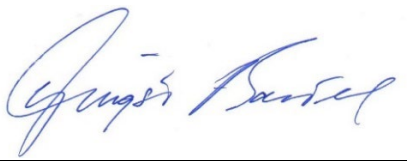

CHERYL YINGST BARTEL
ARBITRATOR