# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

# CASE NO. 5050

Heard in Edmonton, June 11, 2024

Concerning

**CANADIAN NATIONAL RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

## DISPUTE:

Policy grievance on behalf of all Conductors, Trainpersons and Yardpersons of Winnipeg, MB, regarding the violation of the CEMR Interchange Understanding, and the rulings issued in CROA&DR 3719 and subsequent supplementary award.

## JOINT STATEMENT OF ISSUE:

Facts: On April 7, 2019, between 1330 and 1500, Central Manitoba Railway (CEMR) was instructed to build a transfer consisting of one hundred and fifty-two (152) cars in Transcona Yard. CEMR employees were instructed to pick up tracks TC12, TC13 and TC03. Once together, they departed for the Carmen Sub. The Union filed a Step II grievance that was declined by the Company stating that lifting from Transcona Yard does not take work away from the TCRC members.

The Union's Position:

As Transcona Yard is not a yard and/or Zone that CEMR employees are authorized to perform work, the Company chose to assign work that properly belonged to TCRC members in CROA 3719, the Arbitrator directed the Company to cease and desist actions directly related to the instant matter. Furthermore, the supplemental award to CROA 3719 served as a severe warning that continued failures to abide by the Arbitrators rulings may have serious consequences.

It is the Unions position the Company has knowingly violated the provisions of the Interchange Understanding, and the rulings frond in CROA 319 and the subsequent supplemental award. The Company has shown an unwillingness to ensure its operations comply with the provisions stipulated in the Interchange Agreement. The Company cannot be trusted, in good faith, to guarantee violations will not occur going forward. As such, deterrent(s) are required to ensure compliance with the direct orders of the Arbitrator.

For the indefensible violation of CROA 3719/Supplemental, the Union requests a declaration, with prejudice, that the Company has continued to violate the Arbitrators awards and has failed multiples times to remain compliant with the cease and desist as issued. The Union further seeks;

1. A declaration that the Company is contempt of CROA 3719,
2. Damages for the Company's violations of CROA 3719,
3. An order for costs,

4. A substantial monetary remedy for those adversely affected, that is applicable to grievances akin to the instant matter, and/or other violations of CROA 3719/supplemental.

The Company's Position:

It is the Company's position that, although the instant matter is a violation of CROA 3719, it firmly believes that the four remedies sought by the Union are excessively punitive and are above and beyond what is reasonable, as prescribed by the Arbitrator.

The Company has reviewed the outstanding grievances in this matter and they total (26) grievances between 2009 and 2020. It is important to note the CEMR Interchange takes place at least once per day. That would amount to twenty-six (26) occurrences in over four thousand (4000) opportunities, with no occurrences since 2020.

It is the Company's position that these occurrences were not egregious nor malicious in any way, but rather mistakes or oversights. As example, frequent changes in management are not uncommon and it would be reasonable to expect that infrequent errors are made by those who are yet familiar with the local operation in Winnipeg Symington Yard.

The Company is willing to provide a remedy to those employees who were affected, however, again, the remedies sought by the Union are excessive and unreasonable. Additionally, as evidenced by the absence of violations since 2020, the Company is fully committed to abiding by the agreement set forth regarding the CEMR interchange on an ongoing basis.

| **For the Union:** | **For the Company:** |
|---|---|
| **(SGD.) R. S. Donegan** | **(SGD.) L. Dodd** (for) **J. Girard** |
| General Chairperson, CTY-W | Sr. Vice President, Labour Relations |

There appeared on behalf of the Company:

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|---|---|
| L. Dodd | – Labour Relations Manager, Winnipeg |
| F. Daignault | – Director, Labour Relations, Montreal |
| A. Abdulle | – Superintendent, Winnipeg |
| J. Torchia | – Director, Labour Relations (retired), Edmonton |
| R. Singh | – Labour Relations Manager, Vancouver |

And on behalf of the Union:

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|---|---|
| K. Stuebing | – Counsel, Toronto |
| R. Donegan | – General Chairperson, Saskatoon |
| J. Thorbjornsen | – Vice General Chairperson, Saskatoon |
| M. Anderson | – Vice General Chairperson, Edmonton |
| A. Craig | – Local Chairperson, Winnipeg |

## AWARD OF THE ARBITRATOR

### *Background & Issue*

[1] This Grievance involves the Company's admitted breach of the CEMR Interchange Understanding for incidents which took place on April 7, 2019, at Transcona Yard, in Winnipeg, Manitoba.

[2] The JSI states that on that date, CEMR employees were instructed to build a transfer of 152 cars, in Transcona Yard, which involved picking up cars from tracks TC12, TC13 and

TC03. Transcona Yard is not a yard or a zone that CEMR employees are authorized to perform work under the CEMR Interchange Understanding. It was conceded by the Company in the JSI that the Company chose to assign work that "properly belonged to TCRC members".

[3] The issue in this Grievance is the appropriate remedy for that breach.

[4] It is relevant that in **CROA 3719**[1], Arbitrator Picher issued a "cease and desist" Order against the Company for breaches of the CEMR Interchange Understanding, including when CEMR employees handle or switch out CN cars**.**

[5] The Union has sought several remedies[2]:

a. "A declaration that the Company is in contempt of **CROA 3719**;
b. Damages for the Company's violations of **CROA 3719**;
c. An order for costs.
d. A substantial monetary remedy for those adversely affected, that is applicable to grievances akin to the instant matter, and/or other violations of **CROA 3719/Supplemental**."

***Analysis and Decision***

[6] While liability for this breach is conceded, some background information is necessary for important context to the positions of the parties and for determining the appropriate remedy.

*Background Facts & Relevant Provisions*

[7] In 1998, the Company arranged to sell the Pine Falls and Carman subdivisions to a third party independent operator of shortline railways. The new shortline railway that was created - known as the Central Manitoba Railway (the "CEMR") -was to have an agreement with the Company, to operate in the Company's terminal in Winnipeg.

[8] This triggered negotiations between the predecessor of the Union and the Company under the Material Change provisions of the various collective agreements then in place.

[1] Issued in 2009.
[2] Quoted from para. 7 of the Union's Submissions.

[9] On March 24, 1999, the Company confirmed to the Union[3] that the parties would meet and reach an understanding "of how interchange traffic is to be handled".[4] The parties further agreed that the matter could be referred up to the General Chairperson and the Sr. Vice-President Line Operations for resolution if no agreement was reached, and that any remaining dispute could be referred by either party to this Office.

[10] On April 5, 1999, the parties entered into the CEMR Interchange Understanding This is a two-page, detailed document. Due to its length and importance to this Grievance, it has been reproduced in full as Appendix "A" to this Award.

[11] As noted in that document (bold emphasis in original): "***The intent is that CEMR employees will NOT switch CN cars or CN customers".***

[12] Article 121.10 is also relevant to this dispute. It states:

> *When it is agreed between the Company and the General Chairperson of the Union that the reasonable intent of application of the Collective Agreement has been violated an agreed to remedy shall apply. The precise agreed to remedy, when applicable, will be agreed upon between the Company and the General Chairperson on a case-by-case basis. Cases will be considered if and only if the negotiated Collective Agreements do not provide for an existing penalty. In the event an agreement cannot be reached between the Company and the General Chairperson as to the reasonable intent of application of the Collective Agreement and/or the necessary remedy to be applied the matter may within 60 calendar days be referred to an Arbitrator as outlined in the Collective Agreements.*
>
> *NOTE: A remedy is a deterrent against Collective Agreement violations. The intent is that the Collective Agreement and the provisions as contained therein are reasonable and practicable and provide operating flexibility. An agreed to remedy is intended to ensure the continued correct application of the Collective Agreement.*

[13] On January 19, 2009, Arbitrator Picher issued **CROA 3719,** resolving a grievance brought by the Union alleging the Company was allowing CEMR employees to do work "which it maintains is reserved to employees of the Company from within its bargaining unit".

[14] In that case, the Union argued that there were repeated violations on an "ongoing basis, virtually up to the point of the hearing of this grievance". The Union provided specific

[3] Predecessor to the current Union
[4] Employer Tab 2.

examples where it alleged that CEMR employees had performed work reserved to Union members. The Union requested that Arbitrator to both issue a declaration of the entitlement of the employees to the work, and also a "cease and desist" order from requiring CEMR employees to do this work. It also asked that affected employees "be made whole".

[15] In **CROA 3719**, the Arbitrator found the Company had violated the CEMR Interchange Understanding with regard to certain actions, and that no violation had been established for other actions. Regarding the Company's actions in breach, the Arbitrator said:

> The documentary evidence tendered does, to the Arbitrator's satisfaction, demonstrate by a preponderance of evidence that ***CEMR employees have, on occasion, disregarded the zone restrictions contained in the IU [the "Interchange Understanding"], that they have handled CN cars contrary to that agreement and that, on at least one occasion, they have yarded their train in a zone prohibited to them, namely at Fort Rouge. In the Arbitrator's view these incidents are deserving the declaration which the Union seeks, and a cease and desist declaration for the future.***[5]

[16] This "*cease and desist*" Order is an important aspect of that Award. The Arbitrator's direction on that remedy was:

> The Arbitrator therefore directs the Company to ***cease and desist from the continuation of these practices, and that it abide by the terms of the IU, taking all reasonable efforts to ensure that the CEMR also respect the limitation of that agreement.***[6]

[17] As specifically noted, the Arbitrator in **CROA 3719** issued that Order to ensure ongoing compliance with the CEMR Interchange Understanding. His unstated - but obvious - assumption in doing so was his belief that the Company had within its power the ability to ensure that compliance.

[18] To establish some of the efforts which it took to abide by the CEMR Interchange Understanding both after that decision – and in response to the current Grievance - the Company filed an internal email chain from January 19, 2009[7].

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[5] At p. 3, emphasis added.
[6] At p. 4
[7] This and the other documents subsequently referred to (February email; Division Notice and Letter of March 5, 2009) are part of the Company's Tab 5.

[19] The first email was sent at 11:42, from "Kerry" [no last name] to Tom Brown, summarizing Arbitrator Picher's Award in **CROA 3719**:

> [first referring to where the Company was successful]…
>
> Picher did however issue "cease and desist" on matters such as setting off CN cars from CEMR train or setting off at Fort [sic] Rouge or picking up from various zones in the yard. ***These items we agree are in the interchange agreement and should not be violated.***
>
> ***Given fact we now have a "cease and desist" order, please inform officers in Symington accordingly, thanks.***[8]

[20] Three minutes later, Mr. Brown sent out an email to four other individuals, one of whom was Andrew Martin, who was the Company's General Superintendent in Winnipeg, which stated:

> Make sure the CEMR does NOT switch out misroutes. As per current instructions, they are grabbed by the hump. ***If we fail to comply with a cease and desist and the UTU [predecessor Union] goes back to Picher, we will end up paying $$$$ in penalties***[9]*.*

[21] A month later, on February 19, 2009, Mr. Martin sent an email to "John Pennock", the General Manager of the CEMR which said, in part:

> [*First referring to a meeting on February 10, 2009*]
>
> …A couple things I want to stress.
>
> ***Under No circumstances do we want the CEMR Crews switching in the yard.*** Please let Sean and your forces know that ***if we encounter an issue as such which cause you to switch out non CEMR traffic, please contact the Asst /Supt. or myself immediately or if known beforehand and we will personally handle the issue.***[10]

[22] The Company also filed an internal "Division Notice" from February 20, 2009, the next day, which stated, in part: "*CEMR traffic must be set properly. Under no circumstances are CEMR employees to switch out their own cars*."

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[8] Emphasis Added.
[9] Emphasis Added
[10] Emphasis Added

[23] On March 5, 2009, Mr. Martin sent a letter to Mr. Pennock and to Mr. Crick, the Manager, Train & Terminal Operations at CEMR that said:

> Effective immediately, ***CEMR crews will not be allow [sic] to do any switching nor blocking of cars pertaining to their train*** *(unless switching out a bad order) in Symington Yard.*
>
> Due to a recent arbitration award for CN crews in Symington Yard and another pending arbitration hearing later this month, ***this practice has to cease.***[11]

[24] Meanwhile, on March 11, 2009, Arbitrator Picher heard a second dispute where the Union alleged that the Company had failed to comply with the "*cease and desist" Order*. In **CROA 3719** - ***Supplemental Award*** [12] *(#1)*, the Arbitrator resolved this dispute. Without providing any details of the infractions at issue[13], he found the Company had "knowingly violated" **CROA 3719** on "at least" five occasions, since **CROA 3719** was issued two months earlier. He provided the following remedy:

> The Arbitrator directs that the Company compensate forthwith all employees adversely affected by these violations of the award and retains jurisdiction should the parties be unable to agree on the details of such compensation.
>
> The Arbitrator further directs that the Company post for a period of not less than thirty days, in prominent places in the Winnipeg Terminal, a copy of the award in **CROA&DR 3719** as well as a copy of this Supplementary Award[14].

[25] While the Arbitrator noted at the end of the Award that he retained jurisdiction for disputes regarding "interpretation and implementation" - a statement which is commonly seen at the end of arbitration awards - the Arbitrator ***also*** added this final sentence, on which the Union now relied: "*Any failure to honour the terms of these awards may result in serious consequences*".[15] I accept that by that statement, the Arbitrator was clearly telegraphing to the Company the importance of its ***ongoing*** compliance with the "cease and desist" Order, and also warning of *escalating* consequences, should breaches continue. That said, beyond the "make whole" Order and the posting requirement, no other

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[11] Emphasis Added
[12] As it turns out, this was the "first" Supplemental Award, so it will be referred to here as "#1", to distinguish it from the second Supplement Award, in July of 2009. That reference to #1 is not included in the original, however.
[13] And none were include in the *ex parte* Statement of issue, either, which is one sentence.
[14] At p. 2
[15] At p. 3

consequences were imposed by him on the Company for its five further breaches of his "cease and desist" Order, issued just two months earlier.

[26] In July of 2009, the Union filed four other grievances at this Office, alleging breach of the CEMR Interchange Understanding in March, April and May, 2009 (twice in May). In each of those four grievances, the Union claimed its costs associated with bringing the matter to arbitration, as well as a payment of $50,000 to the Union, "in an effort to ensure compliance with the arbitrator's decision". In response, Arbitrator Picher issued **CROA 3719 - *Supplemental Awards #2*, #3, #4 and #5.**

[27] While titled as "Awards", those documents are not actually "Awards" to resolve those disputes. Rather, each "Award" is the Union's *ex parte* Statement of Issue, with the following sentence on the bottom of the page:

> The matter was withdrawn by the Union during the arbitration hearing as it does not properly arise under this award. The parties are agreed that each dispute would be dealt with as a new grievance at Step III of the grievance procedure.

[28] This Arbitrator was not provided with any further information relating to the resolution of those grievances.

[29] The Company relied on an email filed by Mr. Zaleski. He is an employee of the Company who trains the Senior Transportation Officers ("STO's") who direct traffic. In his email, Mr. Zaleski states that he has been the Senior Transportation Officer for 8.5 years, and has been responsible for at least part of the training for 10 separate STO's *and all of the current active sitting STO's in Symington Yard*[16]*.*

[30] Mr. Zaleski stated that during the training, the "do's and don'ts with CEMR have been passed along *to every STO I have sat with in some fashion or another*". The nature of those "do's and don't's" are further noted in his email:

> There is no set "playbook" on how to do the job of STO, so no curriculum is available, however ***the general understanding that CEMR is not to deliver or depart from satellite terminals (Fort Rouge or Transcona) unless exceptional conditions arise such as a mainline disruption or severe congestion.*** [17]

[16] Emphasis Added.
[17] Emphasis Added.

[31] There were also oral representations from the Company, and evidence regarding the onboarding which takes place for new employees, which the Company represented includes discussion of the CEMR Interchange Understanding. There was no evidence of any ongoing discussions with the CEMR about this issue, such as the previous notices given in 2009.

[32] Against this background, this case stands to be considered.

*Facts*

[33] In the Grievance procedure, the Company responded to the Union's allegation of the breach of the CEMR Interchange Understanding with a one line statement that "CEMR lifting from Transcona does not take away from any TCRC work".

[34] Prior to this hearing, the Company changed its position and in the JSI it conceded there was a violation of the CEMR Interchange Understanding on April 7, 2019.

[35] The Company is to be commended for making this admission, so that the actual issue between the parties could be addressed at the hearing.

*Arguments*

[36] The Union has alleged the Company continues to violate the terms of the CEMR, in defiance of the "cease and desist" order in **CROA 3719**, and with disregard for the dictates of this Office".[18] The Union noted there are 22 grievances that have been filed since mid 2009.

[37] The Union filed a list of those grievances into this proceeding.[19] After 2009, the next grievance was filed in 2014, and the list continues until 2020. None of these disputes have been adjudicated.

[38] The Union argued the Company has been operating for its own convenience, and under an interpretation of the CEMR Interchange Understanding that cannot be supported, as

[18] Company Tab 9.
[19] Union Tab 7.

demonstrated by the email filed by the Company, from Mr. Zaleski, the trainer of the Company. It argued the Company is in breach of **CROA 3719,** and that it must be deterred from this continuing conduct by significant remedies.

[39] The Company argued the breaches were "not egregious nor malicious, but rather mistakes or oversights". It further argued that it would be reasonable to expect that "infrequent errors" would occur, given the frequent changes of management. It relied on Mr. Zaleski's email, as the individual who does the training for new employees regarding the CEMR work, that employees are appropriately trained. It also submitted evidence that as new transportation employees come into the role of directing traffic in Symington Yard, they are on-boarded, and educated on the CEMR Agreement as part of their training. The Company argued the Union's requested remedies are unwarranted and unduly punitive, and that the breaches were not "blatant and indefensible", so no remedy is warranted under Article 121.10. The Company also noted that the individuals directing traffic are unionized employees. The implication was that these employees could place the Company into conflict by their actions.

[40] There was no evidence this had occurred.

*Analysis and Decision*

[41] An issue of evidence must be resolved as a preliminary matter.

[42] In the JSI for this Grievance, the Company - for the first time - stated that the issue was no longer occurring and had been remedied, given the "*absence of violations since 2020*". It stated it was "fully committed to abiding by the agreement set forth regarding the CEMR Interchange on an ongoing basis."

[43] In response to that claim, the Union filed further grievances after the JSI was filed, alleging continuing breaches of the CEMR Interchange Understanding.

[44] The Company argued the Union could not rely on that late evidence.

[45] I am satisfied the Union was not aware - and could not have been aware given the Company's very brief Grievance response - that the Company's position was that breaches were *not* continuing after 2020, at least until the filing of the JSI. By its very brief

Grievance reply, the Company bore the risk that the Union would be given the opportunity to respond to its more fulsome position, once its position became clear in the JSI. The Grievances filed in 2024, after the JSI was agreed to, were made in that context - to demonstrate the Union does not agree that the issue has been resolved, and breaches are still occurring. The Union made the same allegation regarding the ongoing breaches "up to the date of the hearing", in **CROA 3719**.

[46] Those allegations are relevant and properly considered.

[47] At law, a "cease and desist" Order is a powerful and potent remedy. It has been described by an arbitrator in this industry as "extraordinary"[20]. Issuing such orders is part of the broad remedial discretion given to arbitrators under the *Canada Labour Code*[21]. Under section 66 of the *Code,* the Order of an arbitrator may be filed with the Court, and once so filed, it has the same force and effect as an Order of that Court. Therefore, contempt proceedings can be brought *in the Federal Court* when a "cease and desist" Order is breached[22].

[48] As an extraordinary remedy, "cease and desist" Orders are not issued lightly. However, when they are issued by this Office, the expectation is that the party against whom that Order is issued will recognize it as the serious and substantial remedy that it is.

[49] In **CROA 3719**, Arbitrator Picher issued the "cease and desist" Order which related to the CEMR Interchange Understanding. It is relevant to consider that this "cease and desist" order was issued in 2009. This was a *decade* <u>after</u> the CEMR Interchange Understanding was negotiated in 1999. Therefore, at the time of this "cease and desist" Order, it was not the case that these were new obligations that the Company – and its employees - had to adjust to, as can sometimes be the case.

[50] This current Grievance has arisen *25 years* after the CEMR Interchange Understanding was negotiated.

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[20] See for example this reference in **AH809**
[21] RSC 1984, C. L-2; see also the commentary in **AH809**, paras. 50-51
[22] Section 66 of the *Canada Labour Code,* the Order of an arbitrator may be filed with the Court, and once so filed, it has the same force and effect as an Order of that Court.

[51] It would of course be the case that there is a turnover in employees during the course of that significant time period. That turnover, however, does not provide an acceptable reason for a breach of that Understanding. Rather, it reinforces the necessity for the ongoing education of employees "down the line" regarding those obligations, to continue to comply with the "cease and desist" Order, which continues to act. The Company's efforts - or lack of efforts as the case may be – to carry out that task are relevant and key to what type of remedy should be attracted for this breach.

[52] The Company has argued this is a "mistake" and was an "oversight".

[53] The statement that CEMR employees are to "***NOT switch CN cars or CN customers"*** is bolded in the CEMR Interchange Agreement, demonstrating is importance for the parties. The emails from January to March 2009 were appropriate and necessary actions for the Company to take after **CROA 3719** was issued, to ensure compliance with that Award, "down the line" of its large organization.

[54] That said, there are no other similar *documentary* evidence filed by the Company after 2009, to communicate to - and educate - its employees or the CEMR, of the ongoing requirements of that Award. While the Company did file an email from Mr. Zaleski dated June 6, 2024, and gave evidence of its onboarding efforts, the email supports the Union's position more than it provides support for the Company.

[55] A review of the CEMR Interchange Understanding demonstrates that Mr. Zaleski is training employees that there is an "exception" to the CEMR Interchange Understanding in cases of "mainline congestion" or "severe congestion".

[56] However, there is no such "exception" in the CEMR Interchange Understanding.

[57] While at the hearing the Company sought to distance itself from Mr. Zaleski's understanding - describing it as his "own narrative" - It is difficult to rely on that distinction for the following three reasons.

[58] First, Mr. Zaleski refers to his understanding of these "exceptions" as a "general understanding" rather than his "own" understanding. A "general" understanding is one understood not just by him, but for which he feels there is support.

[59] Secondly, even if it could be said that Mr. Zaleski has a *false* understanding, - as the Company maintained - he is not a random Company employee. His "understanding" *as the trainer of the STO's* is obviously key to how the CEMR Interchange Understanding is administered by the Company. It is the Company's obligation to ensure that Mr. Zaleski - as the individual who trains the Company personnel who then make decisions around the CEMR Interchange Understanding - actually understands, *and then properly trains*, the obligations under that document. The Company must ensure that misinformation is not perpetuated, given Mr. Zaleski's role in training all the "current active STO's".

[60] Despite its able arguments, it is no answer for the Company to state that "errors" and "miscommunication" are inevitable and expected, when the evidence is that the very individual who is training the employees who control that work is telling them that there are "exceptions" to the CEMR Interchange Understanding, which do not exist.

[61] Thirdly, education is not an onerous task, as demonstrated by the evidence from early January, February and March 2009. Directives can be given, and the proper individuals informed that CEMR employees are not to perform CN work. If there is significant staff turnover - as the Company maintained - that makes it even more important for the Company to continually educate those new employees on its obligations.

[62] In this case, even if proper onboarding does occur upon hire, as the Company argued, and even if it could be said that Mr. Zaleski's false understanding is "his own", there is a lack of any documentary evidence of ongoing education *of the CEMR* and its continuing obligations. The Company is required to make 'reasonable efforts' to educate the CEMR. No efforts were demonstrated after 2009.

[63] The key point for the resolution of this Grievance is that the education of employees, the lower levels of supervisors and management, and the CEMR staff must be an ***ongoing*** task, if compliance is to occur.

[64] The Company made a comment regarding the involvement of Union employees in directing this work. However, there was no evidence filed to support any nefarious or even inappropriate actions of Union employees.

[65] The Company also argued there have been changes in the way the railway has operated since the CEMR Interchange Understanding was negotiated, including that trains are now longer. It argued this impacted its ability to fully comply at all times with that agreement.

[66] If the Company desires a change to the CEMR Interchange Understanding due to changes in railroad operations, it cannot create an exception for itself which does not appear in the CEMR Interchange Understanding, to gain that flexibility. The appropriate place to negotiate that change would be at the bargaining table.

[67] The Company also argued that 22 Grievances since 2009 was a "good record" which itself speaks to its ongoing efforts to achieve compliance, given the frequency of the CEMR activities in Symington Yard, which occur daily, with more than 5000 occurrences. It argued this record "speaks for itself".

[68] This is not a persuasive position. It is no defence to say an agreement is followed "most" of the time. There is no "acceptable tolerance level" for breaches of a collective agreement. If there is a breach - any breach - and if those breaches continue over time, then a consequence follows. That consequence appropriately escalates, if necessary, to deter that continuing conduct. This principle was clearly expressed in **CROA 3719** through the "cease and desist" Order from this Office, and the further warning from the Arbitrator of "serious consequences" if breaches continued in the first Supplementary Award.

[69] As noted in the Company's early education - and as the Union argued - if the CEMR Interchange Understanding is not complied with, then Arbitrator Picher envisioned "serious consequences". Mr. Brown described these consequences as the Company facing "$$$ in penalties".

[70] In **CROA 3719**, it was found that the "Company knew, or reasonably should have known that it was proceeding in direct violation of the Union's rights"[23]. The Arbitrator noted that "…repetitive violations of the collective agreement give rise to serious concerns on the part of the Union"[24].

[23] At p. 5.
[24] At p. 5.

[71] Article 121.10 of Agreement 4.3 refers to instances when the Company and Union *agree* that the "reasonable intent of application of the Collective Agreement has been violated"[25] and they then attempt to agree on a remedy on a "case-by-case" basis. The "Note" to the Article specifically references the concept of deterrence. It also specifically states that the parties have agreed that their Collective Agreement provides the required flexibility to the Company to operate its business, which also answers the Company's argument that it must have greater flexibility than provided in the CEMR Interchange Understanding, given the current length of trains.

[72] This Office has previously determined that provisions such as Article 121.1 provide for remedies which are appropriate where conduct is "blatant and indefensible": **CROA 3310.** While the Company argued this was not a "blatant and indefensible" violation, I am not drawn to the same conclusion, given the foregoing evidence. Like in **CROA 3310**, I am satisfied the Company has not provided any reasonable defence to its substantial violation of the collective agreement. Mr. Zaleski's evidence is compelling that the Company has created for itself an "exception" that does not appear in the CEMR Interchange Understanding. That evidence and understanding of the "trainer" of STO's, demonstrates these are not "one off" situations. It is difficult to conceive of a more "blatant and indefensible" violation than to "read in" an exception to an agreement that does not exist; and to do so in the face of an Order from this Office which has directed that the impugned conduct ***is*** in fact a breach, and which has further directed that violations of that Agreement are to "cease and desist".

[73] While Article 121.10 refers to situations where *the parties themselves agree* that the Collective Agreement is violated, I am persuaded by the Union's argument that this Article can also inform an Arbitrator's decision regarding remedy.

[74] I am convinced by the Union's arguments that continuing breaches must attract a significant - and increasingly serious - penalty. In particular, I find the Union's arguments regarding deterrence persuasive. Deterrence is an important principle for these parties. Remedies are to provide incentive for compliance and ensure a breach "doesn't pay" and

[25] As they have done in this JSI filed in this case.

so is not repeated. That requirement takes on greater significance when a previous "cease and desist" Order from this Office did not achieve that same end.

[75] As noted by Arbitrator Stout in ***AH829**, a "cease and* desist" Order is to "ensure that the Collective Agreement is not violated in the future".[26] This is the fourth time this Office has addressed this same issue. Not only has the issue been now adjudicated multiple times, but Arbitrator Picher felt he was controlling the possibility of future breaches by issuing a "cease and desist" Order - which was intended to have that effect.

[76] If the "cease and desist" Order of Arbitrator Picher did not have the desired effect to bring home that the CEMR Interchange Understanding must be complied with by the Company on an ***ongoing*** basis - and not just at a point in time in 2009 - then a different and escalated response is required from this Office. The Union's arguments are persuasive that an escalating and significant penalty is appropriate in this case, to ensure ongoing compliance by the Company with this 25 year old Agreement.

[77] The Union argued that the Company's actions have caused it to adjudicate this matter a number of times, at its own expense and it should be compensated for the need to do so on multiple occasions. The Company argued that parties are to each absorb their own cost for arbitration proceedings.

[78] I agree there has been an investment of time and energy by the Union to hold the Company to its negotiated obligations, on multiple occasions, for the same type of breach. Even though each party is held to its own costs under the *Canada Labour Code*, there is precedent in this industry for a lump sum award which reflects the expense a Union is put to, to litigate a breach that should not have occurred again[27].

[79] However, I prefer to consider a lump sum remedy from a "damages as deterrence" perspective[28]; and in consideration of the importance of work jurisdiction for the Union;[29] as well as to ensure future compliance with the "cease and desist" Orders both made by

[26] At para. 48
[27] See CROA 3310
[28] Recognized as important to the parties in Article 121.10
[29] Recognized as important to the parties in the CEMR Interchange Understanding

Arbitrator Picher in **CROA 3719**, and by this Arbitrator, (below); rather than from a "litigation costs" perspective.

[80] The Grievance is upheld. The following remedy is Awarded:

a. A declaration is issued that the Company is in breach of the CEMR Interchange Understanding when CEMR employees lifted cars on April 7, 2019 from the Transcona Yard;

b. The Company is to directed to pay two times the Basic Rate of pay to each individual affected, as partial damages for that breach;

c. The Company is also directed to pay to the Union a lump sum of $5,000 for this breach, as damages, to encourage appropriate ongoing training of its employees to achieve compliance, given this incident occurred in the shadow of a "cease and desist" order issued from this Office;

d. The Company is directed to post this Award in a conspicuous place at the Symington Yard for a period of 60 days;

e. The Company is further directed to provide a copy of this Award to management of the CEMR; and

f. The Company is directed to "cease and desist" the practice of CEMR employees handling CN cars in contravention of the CEMR Interchange Understanding, or risk further escalating monetary penalties.

I remain seized with jurisdiction to address any issues arising from the implementation of this Award; to correct any errors; and to address any omissions, to give it the intended effect.

**July 24, 2024**

**CHERYL YINGST BARTEL**
**ARBITRATOR**

# APPENDIX A

## Interchange Understanding between CCROU and La Verendrye District as directed by letter of intent, March 24, 1999, from Memorandum of Agreement between Canadian National Railways and the CCROU

For the purpose of this agreement, train of yard assignment numbers will not be used. Traffic and work will be identified by switching zone, train run, or customer specific.

A specific track cannot be designated for interchange, due to the varied traffic flows and operating requirements by CN, within the Greater Winnipeg Terminal. The locations defined below are relative to the CEMR customer base and CN operating requirements as it stands as present. **The intent is that CEMR employees will NOT switch CN cars or CN customers.**

The route segments or traffic flows are as follows:

1. Traffic to the Pine Falls Subdivision, beyond the industrial switching area, presently serviced by trains 535 and 534. The principal purpose of this traffic flow is to service Pine Falls proper, and the various line customers.

2. Transcona Industrial Zone, which presently consists of Griffin Wheel, Border Chemical and Imperial Oil.

3. The Carman Subdivision, beyond the Terminal Industrial Switching area.

4. Carman Subdivision Industrial Customers, which consists of Agrico and Wildwood Forest Products.

5. Train 770 is a coal train that arrives from the USA via Emerson. A CN crew will deliver the train to the CEMR crew at any specified change off point within the Greater Winnipeg Terminal. Train 771 will be delivered by the CEMR crew from East Selkirk to the Greater Winnipeg Terminal.

With respect to Items 1 and 2, traffic will be humped for each respective traffic flow into appropriate class tracks. The Pine Falls traffic will be in one track and the Transcona Industrial traffic will be in another track. A CN assignment will pull the two traffic flows to any departure track. When CEMR traffic is set to a departure track, it will not be coupled to CN cars.

The CEMR employees will lay over their private locomotive in the “old reefer shop lead”, between SSO4-SS08. The switch will have a private lock. Upon train make up, the CEMR employees will brake test their train and depart to the Pine Falls Subdivision.

With respect to items 3 and 4, the Carman Subdivision train (grain peddler/pickup) will be humped to an appropriate area within the class yard, and the outgoing train will be established in the “long” class tracks, or designated departure tracks. CEMR will move their engine to the designated departure track and complete the air test.

With respect to item 5, the CEMR crew will change off either “enroute” within the Greater Winnipeg Terminal, or take charge of the train and Symington. Train 770 will be delivered by the CEMR crew, with CN assigned locomotives, to East Selkirk. The CEMR crew will return the engines to the Symington lay over track, which may be at any location within the yard. The CEMR employees will not couple the power to any other train, except that when train771 is to utilize the inbound locomotives for the outbound route segment, CEMR may “run around” the train and “tie” the locomotives onto the appropriate end for layover. If a shop track test is to be performed on the outbound locomotives, CN Mechanical personnel will perform such test. The CEMR crew will take CN assigned locomotives from the designated layover location and run to East Selkirk, lift train 771 and return to Symington yard, or any location within the Greater Winnipeg terminal.

When the CEMR crew returns to Symington yard, with respect the return movements in items 1, 2, 3, or 4, they will deliver the train to the designated arrival track and if necessary double only the excess cars on their train into another track within the same zone. The CEMR engine will be delivered to the designated CEMR shop track by the CEMR Crew.

The Zones for the purpose of interchange will be “RT”, “ER”, “ED”, “WR”, “WD”, “LO1-LO12”, “CO15-CO20”, “CO29-CO31”, “SX32-36” and “CO65-CO68” and if necessary, “WC50-WC51”

**Dated the 5th day of April 1999 at Symington Yard.**

**For the Company:**

P.J. Marquis – Terminal Operations Manager

**For the CCROU**

G.A. Conrad – Local Chairperson CCROU (UTU)

V. Mask – Local Chairperson CCROU (UTU)

M. Ager – Local Chairperson CCROU (UTU)

T. Bozyk – Vice Local Chairperson CCROU (UTU)

B. Willows – Local Chairman CCROU (BLE)

B. Kramble – Vice Local Chairman CCROU (BLE)