CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5051

Heard in Edmonton, June 11, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Policy and Remedy Grievance on behalf of CN Conductors, Assistant Conductors and Yard Service Employees of Western Canada, specifically in Saskatoon, SK regarding the Company's violation of Article 44 of the 4.3 Agreement.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On October 1, 2014, Local Chair D. Bayda submitted his recommendations for the number of employees to be placed on the Saskatoon Joint Spareboard (B1) to the Board Adjustment Desk and Local Company Officers. Based on the reports LC Bayda received from the Board Adjustment Desk and from reports on CATS computer system, he recommended 12 employees be placed on the Saskatoon Joint Spareboard (B1) for the board change 03 October to 10 October 2014.

The Company unilaterally placed sixteen employees on the Saskatoon Joint Spareboard (B1) for the board change 03 October to 10 October despite LC Bayda's protests.

It is the Union's position that the Company failed to adjust the Saskatoon Joint Spareboard (B1) in a manner that ensures employees on the Saskatoon Joint Spareboard could make 1078 miles for the week and therefore maximize their earnings as required by Article 44 of the 4.3 Agreement.

The Company is required to obtain concurrence from the Local Chairperson if an exception is required to the 1078 miles for a spareboard to cover local requirements. In this case the Company did not obtain concurrence from the Local Chair to put 33% more employees on the board than the numbers called for.

The unilateral placement of an arbitrary number of employees on the Saskatoon Joint Spareboard so that they are unable to maximize their earnings is a blatant and indefensible violation Article 44 of the 4.3 agreement and the Arbitrators ruling in CROA 3822. Arbitrator Picher ordered the Company to cease and desist flooding the Saskatoon Joint Spareboard in his CROA 3822 award.

Based on the above facts and other pertinent information that may be brought forth at Joint Conference, it is the Union's position that given the violations of the Collective Agreement, that a Remedy is applicable consistent with paragraph 121.10, Article 121 of the 4.3 Agreement

The Company has not responded at any steps of the grievance procedure.

For the Union:
(SGD.) R. S. Donegan
General Chairperson, CTY-W

There appeared on behalf of the Company:

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

And on behalf of the Union:

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 & Summary

[1] This Grievance is a Policy Grievance alleging the Company's failure to accept the Union's recommendations for numbers for the Saskatoon Joint Spareboard, resulting in alleged overstaffing and reduction of earnings for Union members. The Union filed an *ex parte* Statement of Issue. The Company did not file a Statement of Issue.

[2] The issue raised by the Union is whether the Company appropriately applied the formula in Article 44.12 and whether it improperly failed to seek the Union's agreement when it set a different number of employees on the Saskatoon spareboard than what that formula called for.

[3] For the reasons which follow, the Grievance is upheld. The Company failed to seek the Union's agreement under Article 44.13 to the exception it applied to the formula as established in Article 44.12.

Collective Agreement Provisions

[4] The following provisions of the Agreement 4.3 are relevant:

> 44.12 The following mileage figures are to be used when adjusting road and joint spare boards or pools on a 7-day basis
>
> (a) Unassigned and assigned pools - 1125 miles
>
> (b) all road or joint spare boards - 1178 miles
>
> 44.13 In the application of the foregoing exceptions may be made to cover local requirements where mutually agreed to between the appropriate officer of the Company and the Local Chairperson.
>
> 44.14 Should it be demonstrated that inequities exist in the adjustment of spareboards, e.g. there are insufficient employees on the spareboard to protect the service or insufficient work is available to allow employees on road or joint spareboards to earn the average of 4300 miles per mileage month, the Local Chairperson and the appropriate officer of the Company will adjust these spare boards to protect the situation. Should they be unable to agree, the General Chairperson and the Vice-President or his delegate will meet on a timely basis to resolve the matter.
>
> 121.10 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 to ensure the continued correct application of the Collective Agreement.
>
> …
>
> 44.8 No part of this article shall be used against the Company in any manner whatsoever, either directly, or indirectly, as a basis for a grievance or time claim by or on behalf of any employee.

> 14. The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions, which may be arbitrated, to such issues, conditions or questions.[1]

Facts

[5] Saskatoon Terminal has two spareboards which I am satisfied qualify as "road or joint spareboards" under Article 44.12(b): the Branch Joint Spareboard (B1) and the Mainline Spareboard (B2). Employees on B1 are also required to protect work normally allocated to B2, which leads to a certain amount of overlap of work.

[6] In Article 44.12, these parties have agreed to a formula to determine the number of employees required for a given pool or spareboard, as set out above. I am satisfied from a review of the history of this provision provided by the parties that this agreed upon calculation is to ensure both that the Company can adequately service its needs, *and* that Union members do not suffer reductions in their earnings due to inflated or "flooded" spareboards.

[7] To calculate the required adjustment numbers required by Article 44.12(b) for October 3 to 10, 2014, Local Chairman Bayda accessed the Company's "CATS" computer system on September 29, 2014 to obtain the Spareboard mileage report for September 22, to 28, 2014.

[8] That Report noted the mileage was 11,519.61. Mr. Bayda manually adjusted that number to reflect Branch trips worked by the Mainline Spareboard, and vice versa. He arrived at 12,807.67. Dividing that mileage by 1078 as provided by Article 44.12(b), Mr. Bayda arrived at 11.88 employees, which he rounded up to 12 employees. The number he arrived at for the Branch Pool was 4.

[9] On October 1, 2014, Mr. Bayda emailed this result to the appropriate Company officers, both locally and at the Company's Board Adjustment Desk.

[1] CROA Memorandum of Agreement, 2023.

[10] He was not contacted by the Company after that date to discuss any desired exceptions to that number.

[11] On October 2, 2014, there were two internal emails sent by Mr. Kyle Blair, Board Change Manager, to Mr. Gerald Guest, Superintendent, at Saskatoon, which are relevant to this dispute.

[12] The first email was sent at 2:48 p.m. It began with Mr. Blair stating that Saskatoon was going to be nine employees short to cover the following week's volumes, as seven account employees were on scheduled vacation and leaves, and two additional employees were 'set up' as Locomotive Engineers. A question was asked about trimming "… a bit from the pools to spread the lack of manpower across the board", and a concern that the spareboard not take all the impact.

[13] The next email is also from Mr. Blair to Mr. Guest, sent approximately 90 minutes later. In that email, Mr. Blair stated: "I've shown the following for numbers, told Chris we need 9 guys inbound". At the end of that email, there is a chart titled "Saskatoon TCRC-CTY Board Adjustment". For the B1 spareboard, the "final adj" number is shown as "12", which is the same number determined by the Union. There is then a reference to "2 listed above on 6 day rules" and "7 more guys, adjust the B2 board to make 7 guys come inbound (24 was my guess after the adjustment).

[14] The next day, the Company issued the Board Adjustment report for the upcoming week, which showed a total of sixteen employees, which was four more than required by the formula in Article 44.12 (or 1/3 more employees).

[15] The Company did not consult with the Union or obtain Mr. Bayda's agreement before adjusting the Spareboard to sixteen employees.

[16] The Union grieved the Company had violated Article 44.13 of the Collective Agreement.

[17] In its submission, the Company stated its CATS system indicated a requirement of 15 employees to meet demands, given the use of B2 employees to cover B1 work and vice versa, in the previous week; and that it is also applied other factors which were unknown to the Union to determine the appropriate number. It also noted that while the Union made manual adjustments, the CATS system did not.

Analysis and Decision

[18] This is a contract interpretation Grievance. The modern principle of contract interpretation requires that an arbitrator determine the "plain and ordinary meaning" of the words the parties have used to record their agreement. Certain "canons of construction" or principles are applied by arbitrators to determine that meaning, such that an interpretation should not be preferred if it leads to an absurd result; and that "all words are assumed to have meaning".[2] A further principle relevant to the interpretation exercise in this case is that an interpretation should not be preferred for a provision if it renders another meaningless.

[19] It is a further and well-accepted principle, reflected also in the CROA Agreement[3], that an arbitrator has no jurisdiction to change the parties' deal[4]. Changes to that agreement must be gained through bargaining and not imposed by this Office.

[20] This Office has already outlined much of the background information regarding the regulation of Spareboards in **CROA 3822**, decided in 2009. In that case - as in this case - it was alleged that the input and advice of the Local Chairman was being ignored, and that the Company was "unilaterally and arbitrarily establishing the number of people assigned to these boards over the objections of the Local Chairmen". **CROA 3822** also addressed an issue of workload allocation, which is not relevant to this dispute.

[21] **CROA 3822** provided the following background information:

> The background to the dispute is instructive to understand the issues and the positions of the parties. In 1992 the Company and the Union agreed to the introduction of Conductor Only operations. **With the advent of that development the Company had concern to maintain pools and spareboards in such a manner to adequately service its needs while the Union naturally wanted to avoid the excessive or inflated adjustment of boards in such a way as to reduce the potential earnings of employees, whether on spareboards or in pools.** To that end, an agreement was executed on February 10, 1992 which provided as follows:

[2] See **CROA 4884** for discussion of these principles.
[3] The Memorandum of Agreement Establishing the CROA&DR, as amended.
[4] On general arbitral principles, and as set out by these parties in the CROA Memorandum of Agreement, as amended. See also **AH809.**

> During the discussions which culminated in the Memorandum of Agreement dated January 15,1992, the Union expressed concern with respect to board adjustments and the local practices which have developed over a period of time at various terminal governed by Agreement 4.3. In particular, the Union express concern that the company could arbitrarily adjust boards thereby adversely affecting the earnings of employees on spareboards or unassigned pools. The Company expressed a concern that there may not be sufficient employees available to meet the requirements of the service.
>
> Therefore, **the parties agreed that the following mileage figures are to be used when adjusting road and joint spareboards or pools on a 7 day basis**:
>
> (a) Unassigned and assigned pools - 1125 miles
>
> (b) All road or Joint spareboards - 1078 miles
>
> The number of employees on the yard spareboard will be regulated between the Local Chairperson and the appropriate officer of the Company each Friday afternoon (or other day as mutually agreed to) to take effect at 0001 hours so that the average earnings of a Yardman will not be less than the equivalent of 5 shifts per 7 day period in the following manner:
>
> Add the total number of spare Yardmen used during the previous 7 days and divide by 5, that is for example:
>
> 100 spare yard shifts for the 7 day period divided by 5 equals 20 employees on the yard spareboard.
>
> The above two principles were incorporated as Addendum 31D to the collective agreement and subsequently became paragraphs 44.12 for road employees and 90.3 for yard employees within the terms of the collective agreement.[5]

[22] While **CROA 3822** referred to various provisions in Article 44, it did not interpret either Article 44.12 or Article 44.13 of Agreement 4.3, other than to outline the background to those provisions.

[23] The Arbitrator in **CROA 3822** considered several terminals, including Kamloops and Edmonton, which are extended run terminals, and so governed by Article 44.15. Also at

[5] Emphasis Added.

issue was the regulation of the Saskatoon Spareboard. The Union had argued that the Company was setting the Spareboard in Saskatoon at 30% more than the numbers would dictate since December of 2007, resulting in a 30% pay cut to the spareboard employees.

[24] In **CROA 3822**, the Arbitrator found that "…the Company has not administered the provisions of Article 44 in a way consistent with its obligation to enable employees to earn the maximum miles",[6] referring to the Kamloops board and to extended run provisions (and not single subdivision provisions). It was found that 17.2 employees were required for April 25, 2008 in Kamloops, but the Company had placed 42 employees on the Spareboard.

[25] Saskatoon is not and extended run terminal. It is therefore governed by Article 44.12 and 44.13 and not 44.15. The Arbitrator's reasoning relating to the Spareboards at Saskatoon is very brief. While the Arbitrator found the "same facts" to be disclosed for the Edmonton and Saskatoon spareboards, there are no extended runs for the Saskatoon terminal, so the "maximum miles" guarantee which the Arbitrator referred to was not applicable to Saskatoon.

[26] A "cease and desist" Order was granted by the Arbitrator and the matter of further remedy was remitted to the parties for the violations found in the Award.

[27] The Union has filed into evidence its Brief from **CROA 3822**, which outlines its arguments to the arbitrator in **CROA 3822** in greater detail. The Arbitrator did not disclose in his Award which of the Union's arguments he found persuasive relating to Saskatoon, which is a limiting point of the Award, not cured by the Union's Brief.

[28] The Company stated that the Board Change Manager does <u>not</u> review or date the numbers on a "terminal by terminal" basis, but rather as a "whole" and determines the numbers by reviewing various factors, including "…anticipated traffic volumes, anticipated disruptions, crew availability changes…and others".[7] It further stated the Board Change Manager was privy to information the Union was not, he or she "…uses their discretion in setting the boards from an overall terminal/network perspective, rather than just singularly

[6] At p. 9.
[7] Company Submissions, para. 13

on one board at one terminal".[8] It argued the Board Change Manager had this discretion to "make the necessary adjustment to the board", so there was no violation of Agreement 4.3, given that mileage regulations for Saskatoon terminal required 101 employees and the Company added 99, considering the terminal "as a whole". The Company's position was that - on this perspective - "Saskatoon as a whole overall, was set below what had been called for" at 99 employees instead of 100, so there was no breach. It noted it acted in good faith if it made an error in doing so. It also noted there are new measures and processes in place since this Grievance was filed in 2014, to ensure a more streamlined process.

[29] In its Rebuttal submissions, the Company argued that the Company added four more employees to "recall them home from shortages they were protecting in the Western Region", since employees returning home needed to be recalled to the working board. It also noted that 12 employees were in "training status" and had "significant training objectives" in the coming weeks, and that the "…Company's decision to recall the employees was imperative to support and backfill the known deficiency that would stem from employees being unavailable while in advanced training programs".[9] The Company also argued in its submissions that certain employees were not available for work and that as a result, only 12 employees were in effect assigned to the Saskatoon B1 Spareboard.

[30] The difficulty for the Company with its perspective is that the Company has not retained to itself the discretion to unilaterally take these "other" considerations and factors into account for setting spareboard numbers at a *different* figure than the mileage referred to in Article 44.12 would dictate. Rather, it has bargained with the Union that it will <u>not</u> make exceptions for "local requirements" - regardless of what information it does or does not have regarding those requirements - without the mutual agreement of the Union: Article 44.13. It is not disputed that agreement was not sought.

[31] A further difficulty for the Company's "broad-based mileage" approach is that the email chain between Mr. Blair and Mr. Guest specifically refers *to the number obtained by the*

[8] Company Submissions, para. 20.
[9] Company Rebuttal, para. 32

Union being 12, for the spareboard number for Saskatoon, and issues relating *to Saskatoon,* and not to any other numbers which are based on some other, broader-based, systemic figure.

[32] I am satisfied that accounting for the overlaps between the spareboards to arrive at 12 employees was a reasonable action on Mr. Bayda's part. It is notable that nowhere in the internal email between Mr. Blair and Mr. Guest is it suggested that type of accounting was an error. I am also drawn to the conclusion that by assigning 16 employees, the Company applied an exception to the number that was required by the formula the parties agreed upon in Article 44.12, *for the Saskatoon spareboards*, which number was known to the Company and in fact was referenced in the email chain between Mr. Blair and Mr. Guest.

[33] While the parties anticipated that exceptions may need to be made based on "local requirements", they specifically and clearly agreed that the Union would need to "agree" to any such changes.

[34] The truth of the statements argued by the Company for its actions regarding the local requirements in Saskatoon does not change the Company's obligation to seek the Union's agreement *before* it made any changes to the number determined by the formula in Article 44.12. It may well have been that had the Company sought that agreement, the Union may have agreed to the assignment of 16 employees. The point is that the agreement of the Union was *not* sought, as required.

[35] The result is the Company denied the Union its bargained right to reach an agreement with the Company, when it unilaterally applied an exception to the figure determined by the formula in Article 44.12. This action breached Article 44.13.

[36] I am further satisfied the Company knew - or reasonably ought to have known - of its requirement to seek the Union's agreement, which has been clearly set out in Article 44.13. It was also aware of the number obtained from the application of the formula in Article 44.12 was "12", as this was noted in the chart which was in the internal email chain between Mr. Blair and Mr. Guest. While the Company argued this was an "error", there was no explanation provided for why that error was made. Therefore, without any explanation, the actions were blatant and indefensible, given the clear requirement of Article 44.13.

[37] The Union has argued the issue of improperly inflated - or "flooded" - boards is a systemic issue. While that may or may not be the case, I am not convinced the Company was trying to artificially "inflate" the board adjustment as argued by the Union, given the particular facts in *this* case, or that punitive damages are appropriate. I am satisfied that blatant and indefensible failures by the Company to abide by the Collective Agreement are, however, serious. When the agreement of the Union is required but not sought, that conduct can have the impact of reducing the perceived effectiveness of the Union in the eyes of its membership.

[38] The Company raised a jurisdictional issue that this arbitrator cannot order compensation for affected employees, based on Article 44.8. The Union argued in its Rebuttal that the Company did not respond to the Union's grievance at Step 2, nor at Step 3, and did not respond to the Union's proposal for a Joint Statement of Issue. Not having raised that issue earlier, it argued the Company cannot do so before this Arbitrator on the eve of the hearing. It also presented arguments in the alternative.

[39] Under the expedited CROA regime, multiple cases are heard in one day. Parties are limited in time for how long they are given to not only present their own case, but to rebut the case of the opposite party. Parties must be efficient and well-prepared to meet the demands of this regime.

[40] Article 14 of the CROA Agreement limits this Arbitrator's jurisdiction to resolving only those issues which are raised by the parties in either their Joint Statement of Issue - or *ex parte* Statement of Issue - as the case may be. In **AH809-M**, the arbitrator noted the importance of parties outlining what issues are brought to this Office in a particular case. In that case, the TCRC sought to first raise an argument in its Brief that was not raised in either the grievance process or the Joint Statement of Issue. The arbitrator commented on the importance of the requirement to raise issues at an early stage, according with the CROA Agreement. He stated:

> The arbitrator appreciates the challenges for both parties in identifying the legal issues early in the process. ***But that identification is at the heart of this arbitration regime since the late addition of issues can prevent an arbitrator from running a procedurally fair hearing****. It is for that reason that the railway model has, for decades, imposed harsh*

> *consequences for actions, however innocent, which prejudice the process*.[10]

[41] The Company did not file its own *ex parte* Statement of Issue. While I am not convinced this is a grievance to which Article 44.8 would apply in any event, it is not necessary to determine that issue, as I am persuaded by the Union's argument. A contractual limitation to the otherwise broad jurisdiction of an arbitrator to award damages for breach of a contract is a substantial and significant issue which should have been - but was not - raised by the Company in a Statement of Issue to properly place it before this Arbitrator. Not having done so, the Company cannot do so now, at this late stage, as that action prejudices the Union, who was not given the appropriate time and opportunity to consider and respond to that issue.

[42] The Union has argued that damages are an appropriate remedy for this breach.

[43] Article 121.10 of the Collective Agreement is applicable where the parties *agree* a violation of the Collective Agreement has occurred. However, I am satisfied that Article 121.10 can also inform the exercise of an Arbitrator's jurisdiction to craft a remedy, even where the parties have not agreed there is a violation but an arbitrator has found a blatant and indefensible breach has occurred.

[44] The Company's failure to address its responsibilities under Article 44.13 without a reasonable explanation qualifies as a blatant and indefensible error which is appropriately addressed by an award of damages.

[45] The Union requested that the amount of damages be remitted to the parties for their discussion, with jurisdiction reserved for this arbitrator to address that issue if they cannot agree. Given the stipulations in Article 121.10 for that type of conversation, this is a reasonable and appropriate request.

[46] The Grievance is upheld and the following remedies will flow:

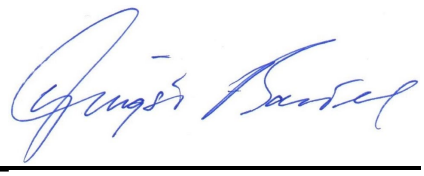
a. It is declared that the Company has breached Article 44 in assigning 16 employees to the spareboard instead of 12 as required by the formula in Article 44.12;

[10] At para. 41, emphasis added.

b. The Company is hereby ordered to “make whole” any affected employees; and
c. Damages pursuant to Article 121.10 for this breach are to be remitted to the parties for their discussion and potential agreement.

I remain seized with jurisdiction to address the issue of the amount of damages owing under Article 121.10, should the parties be unable to agree. If no agreement is reached, either party can request that this matter be placed on the docket as a stand-alone issue, before a session over which this Arbitrator resides.

I also remain seized with jurisdiction to address any questions regarding the implementation of this Award; and to correct any errors and to address any omissions, to give this Award its intended effect.



July 24, 2024

CHERYL YINGST BARTEL
ARBITRATOR