CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5063

Heard in Montreal, July 16, 2024

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The alleged violation of Articles 51, 85, and 85.5, when Conductor Bowen was not off duty until 0210, some 35 minutes past the time his rest was due to commence.

JOINT STATEMENT OF ISSUE:

On February 14, 2016, Mr. Bowen was ordered on Train M39931 14 on duty at 1535. Mr. Bowen filed his rest message at 2128 with RTC JWB, his rest being due at 0135. Mr. Bowen booked off at 0210.

Union's Position

The Union contends that the Company was in violation of Articles 51, 85 and 85.5 of the 4.16. The Union further contends that the Company is in violation of arbitral jurisprudence, CIRB 315 and the May 5th, 2010 CIRB mediated settlement.

The Union seeks to have Conductor Bowen made whole for the violation of Article 51 as set out in the 4.16 Collective Agreement.

The Union has been to arbitration on numerous occasions and has been successful on this very same issue and therefore the Union is seeking a remedy for the blatant, indefensible and repeated violation of Articles 51 85, and 85.5 under Addendum 123 of the 4.16 Collective Agreement.

Company's Position

The Company disagrees with the Union's position. The Company is not in agreement that Addendum 123 is applicable.

For the Union:	**For the Company:**
(SGD.) J. Robbins	**(SGD.) V. Paquet**
(retired) General Chairperson	Labour Relations Manager

There appeared on behalf of the Company:

A. Borges	– Manager, Labour Relations, Toronto
F. Daignault	– Director, Labour Relations, Montreal
S. Matthews	– Senior Manager, Labour Relations, Montreal
A. Campbell	– Nurse Case Manager, OHS, Montreal

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, Hamilton
G. Gower	– Vice General Chairperson, Brockville
E. Jung	– Local Chairperson, Sarnia
J. Bedard	– Secretary Treasurer, Montreal
E. Page	– Vice General Chairperson, Hamilton
M. Kernaghan	– General Chairperson, Trenton

AWARD OF THE ARBITRATOR

Context and Issues

1. The Parties agree that Conductor Bowen properly requested rest under article 51 after his 10 hour shift. The Parties further agree that the grievor was not relieved of duty until after working more than 10 hours. They disagree as to how much additional time he worked, and what the appropriate remedy should be.

2. The issues are as follows:

A. How much additional time did the grievor work?

B. Does Addendum 123 apply here?

C. What is the appropriate remedy?

A. How much additional time did the grievor work?

Position of Parties

3. The Union submits that the grievor began work at 15:35 on February 14, 2016 and requested rest at 21:28, with his rest being due at 01:35. He booked off at 02:10, such that he worked an additional 35 minutes, before being taken by taxi from Port Huron back to Sarnia.

4. The Company submits that the Port Huron Yard is a yard within the Sarnia Terminal. It submits that the grievor was considered off-duty from the time his train crossed the outer switch at Port Huron, as it is a yard within Sarnia Terminal. His train passed the outer switch at Port Huron at 01:40, such that he was only 5 minutes late for his rest.

5. The Company further submits that there is a discrepancy between the taxi log which shows a pick up in Port Huron at 01:59 and the grievor's claim that he was off-duty only at 02:10.

6. The Union argues that the outer switch to which the Company refers is still some 3 miles from where the grievor parked his train and went off duty. They note that almost half the train was still in Canada when the engine passed the scanner on the US side of the tunnel.

7. The Union argues that the Company signed off the JSI which states: "Mr. Bowen booked off at 0210". It submits the Company cannot now argue the contrary. In addition, it submits that travel times are approximately 29 minutes between Port Huron and Sarnia, which concords with a pick up at 0210 and arrival at 0236, 26 minutes later.

Analysis and Decision

8. I find it difficult to accept the Company argument that the grievor is off duty, just because his engine has passed a scanner on the US side of the Windsor Tunnel. The grievor is responsible for a 10,000 foot train which still has another 3 miles to go before the grievor may detrain and hand the train off to a US crew.

9. The Company argues that as Port Huron is a yard within the Sarnia Terminal, their obligation under Article 51 is to get the grievor to his Home Terminal, not necessarily his home yard, by his requested rest period:

> "51.7
> a) When rest is booked en route, train service employees will, at the Company's option:
> i) be relieved of duty and provided with accommodations either in a Company facility or an available hotel or motel, or
> ii) be replaced and deadheaded immediately either to the point for which ordered or to the home terminal where they will be relieved of duty" (underlining added).

10. To state the obvious, rest provisions are to be invoked to deal with fatigue being experienced by crews. Travelling in a fatigued state is potentially dangerous to all

involved. This is why, in my view, article 51.7 speaks to employees being relieved of duty. The grievor was not relieved of duty when his engine passed the scanner; he still had 3 miles to go and was only relieved of duty later when they met the US crew.

11. As Arbitrator Picher noted in **AH 558**:

> "…where an employee has given proper notice of his or her desire to book rest in accordance with Article 51, the employee is entitled to be off on rest by the time rest booked is due to commence, except in circumstances beyond the Company's control or where the Company lawfully compels the employee to complete the yarding of his or her train…
> …The Arbitrator confirms, however, that where crews are held on duty yarding their trains for a substantial period of time beyond their booked rest time, in circumstances that were reasonably predictable at the time rest was booked, a violation of Article 51 of the collective agreement will be disclosed" (underlining added).

12. In my view, the grievor was held on duty for a substantial period in order to complete his run to Port Huron. He was required to continue to work as a conductor, transiting a busy yard, in conditions which are demanding. He worked at least until 0159 according to the Company or 0210 according to the grievor. This represents 24 minutes of additional on duty time according to the Company or 35 minutes according to the grievor.

13. I do not find compelling the argument that the Western Collective Agreement provides a rest exception for times below 30 minutes. No such agreement applies here. There are obvious benefits to such an agreement, but it must come through collective bargaining.

14. With respect to the discrepancy between the taxi log and the grievor's declared off duty time, I note that there is no evidence that the taxi log was synched to Company time. Railway rules compel their employees to have a watch set to Company time, with discipline possible for non-compliance. I have been provided no additional evidence to show that the grievor was mistaken, such as off duty times of other crew members which

match with the taxi log. On balance, I find the grievor's claim to be off duty at 0210 to be credible.

15. Accordingly, I find that the grievor worked 35 minutes past his booked off rest time of 0135.

B. Does Addendum 123 apply here?

Position of Parties

16. The Union takes the position that rest is both essential to its members and a right protected under article 51 of the Collective Agreement.

17. The grievor properly exercised his right to rest. The Union notes that none of the exceptions to article 51 apply.

18. The RTC nonetheless scheduled the grievor to take his train to Port Huron, despite passing through Sarnia Terminal, and knowing that the off duty time would likely exceed the rest time. The Union argues that the Company had multiple options in Sarnia, which would have enabled the grievor to be properly relieved.

19. The Union seeks an award under Addendum 123, because of the repeated violations to article 51 and the need to deter the Company from ignoring the rest provisions. It seeks damages of $38,000, being $1000 for each year since the new article 51 was added and $5000 to the grievor.

20. The Company argues that the actions taken were not blatant and indefensible, as when the request for rest was made, a good faith assessment was made that the grievor would make it to Port Huron in time. The Company cannot be held to a standard of perfection.

21. The Company further argues that there was no joint agreement that the Addendum should apply.

Analysis and Decision

22. Addendum 123 reads as follows:

> Ottawa, Ontario, December 13, 2001
> R. LeBel General Chairperson CCROU
> R. Long General Chairperson CCROU
> R. Beatty General Chairperson CCROU Gentlemen:
>
> During the current round of negotiations the Council expressed concern with respect to repetitive violations of the Collective Agreements. Although the Company does not entirely agree with the Council's position, the Company is prepared to deal with this matter as follows.
> 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 30 calendar days be referred to an Arbitrator as outlined in the applicable 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.
> Yours truly,
> **(Sgd) R. J. Dixon**
> Vice-President Labour Relations
> and Employment Legislation

23. The Union argues in paragraphs 44-63 of its Brief that there are repeated findings of breaches of Article 51. However, I note that the cases cited are all somewhat dated: **CROA 3280** (2002), **AH 558** (2004), **CROA 3408** (2004), **AH 559** (2004). The mediated settlement before the CIRB dates from 2010. The single recent case cited dealing with Article 51 did find a breach of the rest requirement, but also found that the breach did not amount to a breach of the Addendum: **AH 760** (2022).

24. The Union argues that Addendum 130 from 2019 is indicative of an on-going issue with respect to Article 51. That may be true, but Addendum 130 was signed three years after the present grievance, so it cannot be determinative of this issue.

25. It is therefore difficult to successfully argue that there are “repeated violations of the Collective Agreement”, which warrant an application of the Addendum to this fact situation in 2016. As I noted in **CROA 4895**:

> Whether one agrees with Arbitrator Picher about the need for repetitive violations as merely context rather than as a condition precedent or not, it would appear clear that repetitive findings of violations would make subsequent violations more “blatant and indefensible” and a lack of repetitive findings would make them less so.

26. Accordingly, I decline to award damages under Addendum 123 in these circumstances. Given these findings, I need not address the Company argument that a joint agreement is a pre-condition to the application of the Addendum.

C. What is the Appropriate Remedy?

27. Section 60 (1) of the Canada Labour Code gives arbitrators the discretion to fashion an appropriate remedy for breaches of the Collective Agreement.

28. Here, there are a number of factors which militate in favour of a significant deterrent penalty.

29. Firstly, there has been a clear breach of article 51 of the Collective Agreement. Even based on the Company’s time calculations to the outer switch in Port Huron, the Company failed to meet the rest requirements.

30. Secondly, there has been a finding of fact that the grievor was not off duty for 35 additional minutes, having to traverse a busy yard for some 3 miles with a large train, while already over his rest requirement.

31. Thirdly, while all breaches of the Collective Agreement are problematic, breaches of safety related articles are especially troubling. There is no doubt that a tired employee is one that is more likely to make mistakes, where such mistakes can have grave consequences to the individual, his colleagues and to the public.

32. Fourthly, I find it difficult to accept that the obligation of the Company to respect the rest requirement was met when the initial assessment by the RTC had the grievor getting into Port Huron with minutes to spare. Even the Company admits that crossing an international border is subject to multiple variables, all of which can delay the arrival of the train. The initial decision which did not build in sufficient time for contingencies is contrary to Company Policy. As the Company Director of Labour Relations noted in 1986: "In other words, the fact that trainmen are required to clear trains is not a license to require them to run their train as far as possible, up to the time that rest booked is due to commence and, thereafter, require them to remain on duty to put away their train" (see Tab 6, Union documents). The jurisprudence confirms that the goal is to have employees off duty in time for their booked rest, absent circumstances beyond the Company's control, and not to run trains until the last moment (see **AH 558, AH 559**).

33. Fifthly, I also find it difficult to accept that it is enough for the Company to make a good faith assessment only at the time of the request for rest. The situation is necessarily somewhat fluid. The RTC will be aware of the progress of the train and the likelihood of the train reaching its destination while respecting the rest requirements. If the reality is that the train is likely to be somewhat delayed, then the RTC will have to take reasonable steps to meet that new reality. Here, the train was somewhat delayed getting to Sarnia and the RTC had to know about the inherent issues of getting into Port Huron. The Company has not offered any evidence that steps were taken before or in Sarnia to explore alternatives which would have made the respect of the rest requirements possible, or alternatively, that the exploration was done and no alternatives were possible. Had that been done, it is possible that one of the exceptions to article 51 would have applied.

34. Accordingly, I find that damages are due to both the grievor and the Union for the Company's failure to respect Article 51. In my view, the breach of a rest provision, given its importance for safety, merits not just compensation but deterrence.

35. In **AH 760**, Arbitrator Stout gave damages to the grievor for breach of Article 51, involving on duty time of 2 hours and 5 minutes over the rest requirement. He noted: "I accept that the company acted in good faith when they assessed the situation and they believed that they would be able to provide transportation for relief. However, they did not act within a reasonable period of time, and they did not make reasonable efforts to have the appropriate resources in place to ensure that Conductor Ferns was provided with the rest that he is entitled to under Article 51". The arbitrator remitted the issue of damages to the parties.

36. In **CROA 5013**, I gave damages of $1500 to the grievor and $1500 to the road crew for repeated breaches of Articles 11.7 and 41. It is noteworthy that this matter dealt with restrictions on "Conductor Only" trains, which are important to work jurisdiction concerns, but do not relate to the imperatives of safety.

37. Here I find that damages of $3000 to the grievor for the non-respect of his request for rest, and $5000 to the Union for the breach of Article 51 are appropriate, given the need to ensure the observance of such a safety critical provision.

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

September 16, 2024

JAMES CAMERON
ARBITRATOR