CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5064 -and- 5065

Heard in Montreal, July 16, 2024

Concerning

ALSTOM TRANSPORT CANADA INC.

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

5064: The assessment of a 30-day suspension to Mr. N. Spinelli.

5065: The assessment of a 60-day suspension to Mr. N. Spinelli.

5064: JOINT STATEMENT OF ISSUE:

Mr. Spinelli receives a 30-day suspension as shown in his discipline letter as follows;

« Cette lettre est en référence à l'enquête tenue le 22 Décembre 2021 concernant le déraillement du train 810 au mi. 51.3 subdivisions St-Hyacinthe en date du 15 Décembre 2021.

Cette enquête a révélé que vous et votre coéquipier êtes pleinement et équitablement responsable du manquement en vertu de la règle 564 du REFC qui a mené au déraillement de la locomotive AMT 1359, le déraillement a causé des dommages considérables a la voie, a l'équipement, en plus d'affecter la logistique opérationnelle des chemins de fer partenaire en obstruant la voie Nord de la subdivision St-Hyacinthe au mi. 51.3.

Pour ces motifs, nous avons décidé de vous imposer une suspension de 30 jours sans solde qui sera purgée du 16 Décembre 2021 au 14 Janvier 2022 inclusivement (excluant la journée de l'investigation formelle du 22 Décembre 2021 pour lequel vous êtes rémunérés selon la convention en vigueur).

Cette mesure disciplinaire demeurera inscrite a votre dossier pour une période de 730 jours de calendrier, suivant la signature de cet avis.

Soyez avisé qu'au prochain manquement, en fonction de son degré, des mesures disciplinaires supplémentaires pourraient être imposées. »

UNION'S POSITION:

For all the reasons and submissions set forth in the Union's grievance which are herein adopted, the Union believes the Company has excessive discipline to Mr. Spinelli.

The purpose of an investigation is to gather all the facts, and then look to see through education that the incident can be avoided in the future.

It is clear from reading the facts by both employees that a better briefing needed to be done so all understood what the requirements were, and the sequence to follow to achieve what was required.

Mr. Spinelli further provided the mistakes the crew made and also his remorse and positive approach moving forward. These are the things that should come out of an investigation process, not punitive penalty. Mr. Spinelli is than after his suspension is over, required to talk to his fellow workers about his mistakes, the Union is all for education, but this should have been what took place and not a suspension, the employee explain their mistakes and educate those around them.

The Union request that the 30-day suspension assessed be reduced and Mr. Spinelli be compensated all loss wages from the reduction. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY'S POSITION:

The Company disagrees and denies the Union's request. The Company considers the disciplinary measure is reasonable given the severity of the circumstances.

As mentioned in our Step 2 grievance response, the investigation did demonstrate that M. Spinelli did not comply with CROR Rule 564 and therefore resulted in significant damage to the equipment, the infrastructures of the rail and created a major disturbance and inconvenience not only for our customers but also for the other railway companies operating on the St-Hyacinthe subdivision since all tracks were closed due to the derailment.

CROA - 5065 : The assessment of a 60-day suspension to Mr. N. Spinelli.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Mr. Spinelli received a 60-day suspension as shown in his discipline letter as follows;

"This letter is in reference to the investigation held on September 15, 2023 concerning the derailment of train 814 in the Thériault marshalling yard on June 27, 2023.

This investigation highlighted your violation of rule 104 of the REFC which led to the derailment of locomotive AMT 1359 in the Thériault marshalling yard. The derailment caused considerable damage to the track and the locomotive, and also caused a major service disruption.

For these reasons, and taking into account the history of your disciplinary measures in your file, we have decided to impose a suspension of sixty (60) days without pay which will be served from September 4 to November 3, 2023 inclusive. Your return to work will be November 4, 2023. Upon your return, you will be given five (5) days of familiarization, i.e. one day on each EXO train line. This disciplinary measure will remain on your file for a period of 730 calendar days, following the signing of this notice.

Please be advised that the next time you fail, more severe disciplinary measures may be taken against you, up to and including dismissal."

Union's Position:

For all the reasons and submissions set forth in the Union's grievances which are herein adopted, the Union's position is that the 60-day suspension assessed to Mr. Nicola Spinelli is excessive in all circumstances and does not follow the principles of progressive discipline.

Mr. Spinelli from the get-go took responsibility for what happened and provided exactly what happened. There is no doubt he obviously made a mistake and threw the switch before the engine had cleared it, there is no argument on that aspect that he in fact violated Rule 104 (c) which is what he was assessed disciplined for.

The Company will base their 60-days of excessive discipline on an incident from December 2021 where Mr. Spinelli was excessively disciplined with 30-days of unpaid suspension (under grievance). Progressive discipline is not whatever you got last time we will automatically double it up this time. It is a process to enable an employee to learn from any mistakes and have any disciplinary action (if required) suited to the incident. The Union at no time looks at this as being something minor that took place, but the purpose of an investigation

is to gather all the facts, and then look to see through education that the incident can be avoided in the future. The sole purpose of an investigation should not be to assess how much punitive discipline can be assessed, which the Union believes has taken place in this circumstance.

Within the investigation process it is noted that the movement never stopped yet the Engineer was never investigated. Mr. Spinelli was not disciplined for this but had the movement been stopped prior to his detraining this most likely would have prevented him rushing in the manner he did. This is part of the fact finding and educational process that both employees should have been part of, instead the investigation process is handled in a discriminatory manner, Mr. Spinelli did not receive a fair and impartial process violating Article 34.10 rendering any discipline void.

The Company did not respond to the Union's Step 2 grievance. After the Union submitted its' Step 3 grievance and received the Company response was the first time the Company brought forward their new position that the grievance was filed late. Simply put, the Company was/is not prejudiced by the filing of the grievance when it did at the Division level. The Company had every opportunity to respond to that grievance but chose to not respond and provide any position. Only after the Union submitted its Step 3 did the Company object and declined the grievance based on a violation of Article 33.13 wherein the Local Chair did not submit his grievance within the time frames thus 33.03 allows the grievance to be denied by the Company.

The Union asserts that this Board has the authority to exercise its discretion to extend the timelines for filing and hear the grievance, and respectfully asks that it do so. The Company only took its' fresh steps after the Union had submitted its second grievance. The Union request that the 60-day suspension assessed be expunged and Mr. Nicola Spinelli be compensated all loss wages with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Mr. Spinelli received a 60-day suspension as shown in his discipline letter.

The Company considers the disciplinary measure is reasonable given the severity of the circumstances. The Company relies on the discipline letter and all relevant circumstances.

As mentioned in our Step 3 grievance response, the Union representative, M. Côté did not submit the Step 2 grievance as per Article 33.13 of the collective agreement. The Company denied the grievance due to the fact that the Step 2 was submitted out of the time limits. Article 33.03 clearly states that if an employee or the Union does not respect the time limits specified in this Article, the grievance will be denied by the Company.

Further, during a recent formal investigation (May 10, 2024), M. Côté admitted that he filed the grievance late and knew he was late. M. Côté also admitted that he informed Mr. Wayne Apsey that the grievance was filed late, when transferring him the step 2 grievance. The Company will rely on the formal investigation that M. Côté was subject to (May 10 and 30, 2024), including the transcriptions, the relevant exhibits and the ensuing disciplinary measure.

For the Union:	**For the Company:**
(SGD.) W. Apsey	**(SGD.) A. Ignas**
General Chairperson	Industrial Relations Lead

There appeared on behalf of the Company:

C. Trudeau	– Counsel, Fasken Martineau DuMoulin, Montreal
A. Ignas	– Industrial Relations Lead, Toronto
J. F. Brault	– Assistant GM, CPS, Montreal

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto

W. Apsey – General Chairperson, CTY-E, Smiths Falls
M. Tremblay – Local Chair, Div. 760, Montreal

AWARD OF THE ARBITRATOR

Context

1. The grievor received a 30 day suspension after contravening CROR Rule 564 by going through three switches before his train derailed.

2. At the time of the incident, the grievor had some four years of experience as a conductor with a completely clean disciplinary record.

Position of Parties

3. The Company submits that the penalty is appropriate, as the grievor as the grievor was negligent in performing his duties. He did not know the number and location of the switches, it was dark and the weather was bad, and yet he permitted the train to blindly proceed.

4. The derailment caused damage to equipment and caused the line to be obstructed.

5. The jurisprudence indicates that a 30 day suspension is reasonable.

6. The Union submits that the penalty is excessive and that discipline is intended to be corrective rather than punitive. It notes that there are multiple mitigating factors, including seniority, a clean disciplinary record, acceptance of responsibility, the rule violation was an isolated one, the substantial financial penalty and the low likelihood of a reoffence.

Analysis and Decision

7. Rule 564 CROR provides as follows:

> 564. Authority to Pass Stop Signal

> a) A train or transfer must have authority to pass a block signal indicating Stop.
>
> b) The RTC may authorize the train or transfer to pass the signal but before doing so must:
>
> (i) ensure that there are no conflicting trains or transfers within, or authorized to enter, the controlled block affected (other than one authorized by Rule 567, 567.3 or 577); and
>
> (ii) provide protection against all opposing trains or transfers.
>
> d) The train or transfer so authorized need not stop at the signal but must positively identify the signal by number; operate at RESTRICTED speed to the next signal or Block End sign, and must be governed by Rule 104.1 at spring switches, Rule 104.2 at dual control switches, Rule 104.3 at power-operated switches and Rule 611 at automatic interlockings.

8. Rule 104.2 CROR provides detailed instructions concerning the use of dual control switches (see para. 41, Company Brief).

9. The grievor admits that he infringed Rule 564 and Rule 104.2 CROR by failing to identify the signals and dual control switches and failing to properly manually adjust the switches:

> Q049: Knowing that the weather was bad, that you and your crew mate had no specific ideas as of where the switches to take were located and therefor not knowing where to stop to take manually the switches, do you feel that you proceeded safely with your movement?
> A049: No, I think we could have done things very differently. We focused on the wrong things instead of focusing on what we should have been.
>
> Q050: What could have been done differently?
> A050: Could have focused on taking the switches before contacting the yard. That would have saved us.

10. The issue between the Parties is whether the 30 day suspension is appropriate in the circumstances.

11. A violation of Rule 104 has rightly been viewed by the jurisprudence as extremely serious. As Arbitrator Picher noted in **CROA 3097**:

> The seriousness of the grievor's actions, including violations of a number of aspects of CROR rule 104, which governs the lining of

> switches on main tracks, can scarcely be understated. In the circumstances I am satisfied that the assessment of forty-five demerits to Mr. McNay was appropriate, as was the removal of Mr. Busby from the locomotive engineer training program. While initially the discipline assessed against Mr. McAndrew was both thirty demerits and sixty day suspension, at the hearing the Corporation confirmed that the thirty demerits, which would constitute a double penalty, are to be removed from his record. In the circumstances, I am satisfied that the remaining assessment of a sixty day suspension is within the appropriate range of discipline for a cardinal rule violation of this kind.

12. Arbitrator Picher in **AH 491** reviewed the disciplinary measures imposed by arbitrators for Rule 104 violations:

> Significantly, the jurisprudence reveals that employers in the railway industry do not assess discharge as a normal response to a Rule 104 violation, although the assessment of demerits in that circumstance has sometimes led to discharge by reason of the accumulation of demerits. (See, e.g. CROA 1583, 2487, 2659). Thirty demerits has commonly been an employer response to a Rule 104 violation (CROA 1583, 2487, 2659) although one case reveals the assessment of 45 demerits, sustained at arbitration (CROA 3097) and 50 demerits reduced to 25 by the employer (CROA 353). On occasion demotion has been resorted to (CROA 1332) as well as suspensions of 30 days (CROA 2487), 60 days (CROA 3097) and 10 days, in adhoc award No. 305, a decision of Arbitrator LaCharité, involving BC Rail and the United Transportation Union Locals 1778 and 1923. In that case the penalty was reduced by the board of arbitration to a five day suspension.
>
> What the Arbitrator's review discloses is that employers themselves have imposed discharge in only two recorded cases within the thirty-five year jurisprudence of the CROA. In both of those awards the Rule 104 violation resulted in a collision, one of which involved fatalities. In no instance of a Rule 104 violation involving main line operations where no collision resulted has discharge been resorted to, other than in a case of demerit accumulation. On that basis the Arbitrator is compelled to agree with the Union's representative in his submission that the discharge of Assistant Conductor Zuefelt, in the circumstances disclosed, is unprecedented. That is particularly so having regard to the grievor's exemplary prior record. Discharges have, of course, been imposed where the accumulation of demerits placed the employee in a dismissable position. More typically, however, the penalty for such a violation has been the assessment of demerits in the range of 30 to 45, or a suspension generally in the range of 30 to 60 days.

13. The Union cites cases where discipline of between 15 and 30 demerits was imposed for switching errors under Rule 564 (see **CROA 2952, CROA 993, CROA 353**

and **CROA 4215**). It relies on the decision of Arbitrator Hodges in **SHP 720** for the importance of the principle of progressive discipline.

14. The William Scott matter directs arbitrators to consider mitigating and aggravating factors in assessing whether the discipline imposed was reasonable in the circumstances.

15. The grievor was not a long service employee, but he had a perfect discipline record. There were no other previous instances of switch violations. He was direct and frank in admitting his errors during the investigation.

16. However, he committed a seriously negligent error in permitting the train to advance when he was unclear as to the number and location of the switches. He failed to either visually confirm their location from the locomotive, or to detrain and walk next to the tracks. This was not the case of a missed signal through a momentary distraction, but rather a decision to proceed blindly despite not knowing where the switches might be. It shows a lack of judgment and care which is troubling. Even the grievor admits that he should have proceeded differently.

17. In my view, some form of serious discipline is appropriate in the circumstances. As Arbitrator Picher noted in **AH 491**: “the penalty for such a violation has been the assessment of demerits in the range of 30-45, or a suspension generally in the range of 30-60 days”. Weighing the aggravating and mitigating circumstances set out above, I do not find the decision of the Company to impose a suspension of 30 days in the circumstances to be unreasonable.

18. Accordingly, the grievance is dismissed.

19. I retain jurisdiction with respect to any questions of interpretation or implementation of this Award.

CROA 5065 – The 60 Day Suspension

Context

20. Some twenty months after the incident described in **CROA 5064**, the grievor was assessed a 60 day suspension by the Company. He admits that he turned a switch while the train was over the switch, resulting in a derailment. He admits having violated CROR Rule 104.

21. The grievor at the time of the incident had six years of seniority and the only discipline on his record was that of a 30 day suspension, upheld by the decision in **CROA 5064.**

Position of Parties

22. The Company makes a preliminary objection that the grievance should be dismissed as untimely.

23. In the alternative, it submits that the discipline was appropriate, given the serious nature of a Rule 104 violation and the derailment caused by the actions of the grievor. It notes that this is the second switching violation in 20 months and that progressive discipline is necessary.

24. The Union submits that the collective agreement provisions concerning the filing of grievances should not be interpreted to mean that a failure to file a grievance in a timely manner should result in the dismissal of the grievance, especially if the Company has suffered no prejudice as a result of the delay.

25. The Union makes a preliminary objection as well, with respect to certain facts and arguments advanced in the Company Brief concerning the reasons for the untimely filing of the grievance. It also contests the late filing of the Company Ex Parte statement.

26. On the merits of the present matter, the Union argues that the discipline imposed is much too severe, and that a penalty of a small number of demerits or a short suspension would be appropriate.

Analysis and Decision

Preliminary Objections

27. An initial issue to be decided is the Union objection to allegations contained in paragraphs 68-76 of the Company's Brief. These allegations address exchanges between the Parties concerning the late filing of the grievance, together with a hearing before the Administrative Labour Board.

28. As the Union does not contest that the grievance was filed late, and does not rely on these exchanges to justify the late filing, I agree that the circumstances surrounding the filing are not relevant to my decision, as set out below.

29. The second issue to be decided is the Company's objection to the late filing of the grievance.

30. The relevant provisions of Article 33 of the Collective Agreement read as follows:

> 33.0 GRIEVANCE AND ARBITRATION PROCEDURE
> 33.01 Wage Claims and/or Alleged Violations of the Collective Agreement
> 33.02 A grievance shall be defined as a complaint regarding the interpretation, application or alleged violation of this Agreement.
> 33.03 Any step of the grievance procedure may be waived or have the time limits extended by mutual agreement in writing between the Company and the Union.
> Note: It should be understood that if an employee or the Union does not respect the time limits specified in this article, the grievance shall be denied by the Company.
>
> 33.13 Step 2 - Appeal to the Designated Company Officer
> Within thirty (30) calendar days from the date the employee is notified of discipline assessed the employee and/or Local Chairperson may appeal the discipline in writing to the designated Company Officer. The appeal shall contention as to why the discipline should be reduced or removed. A decision will be rendered in writing within thirty (30) calendar days of the date of the appeal.
>
> Step 3 - Appeal to Manager, Human Resources

> Within sixty (60) calendar days from the date decision was rendered under Step 2, the General Chairperson may appeal the decision in writing to the Manager, Human Resources or designate, whose decision will be rendered in writing within sixty (60) calendar days of the date of the appeal.
>
> 33.19 If final settlement of the grievance is not reached, then the grievance may be referred in writing by either party to arbitration as provided in this agreement, at any time within sixty(60) calendar days after the final decision. If no such written request for arbitration is received within the time limits then the grievance shall be deemed to have been abandoned. The parties may, by mutual agreement, extend these time limits.
>
> Note: All grievances to be held in abeyance while cases wait to be scheduled at CROA, AdHoc arbitration or resolve.
>
> 33.20 A grievance as defined in the Grievance Procedure which has been properly carried through all the requisite steps of the Grievance procedure outlined in this agreement and which has not been settled, abandoned or withdrawn, may be referred to the Canadian Railway Office of Arbitration and Dispute Resolution for final and binding settlement without stoppage of work.
>
> 33.22 The Union and the Company will be governed by the Canadian Railway Office of Arbitration and Dispute Resolution Agreement in effect.

31. The 60 day suspension was imposed on September 22, 2023, with the 60 day suspension commencing September 4 and ending November 4, 2023 (see Tab 7, Company documents). The grievance was filed on November 8, 2023, although incorrectly dated. The grievance was therefore filed some seventeen days later than the thirty day delay foreseen by article 33.13 of the collective agreement.

32. At issue is whether the delay set out in article 33.13 is peremptory and whether any provision in the Quebec labour legislation permits the arbitrator to relieve against missing the time set out in the article.

33. Article 33.03 notes that “Any step of the grievance procedure may be waived or have the time limits extended by mutual agreement in writing between the Company and the Union”. A plain reading of this article indicates that the time lines are not permissive, but <u>may</u> be extended by mutual agreement in writing. Here there is no such agreement.

34. The article further contains an explanatory note: "**Note**: It should be understood that if an employee or the Union does not respect the time limits specified in this article, the grievance shall be denied by the Company". The Company argues that this underlines the imperative nature of the time lines. The Union argues that the note uses the term "denied by the Company", rather than "dismissed", which does not result in the automatic dismissal of the grievance.

35. In my view, it is difficult to imagine how the Parties could have drafted the note to the article to include an application to the initial filing of the grievance. How could the Company deny a grievance of which it is unaware and indeed, may never be filed? It seems more likely to apply to subsequent stages of the grievance process, when the initial grievance has been filed, the Company is aware of the dispute, and time lines apply to the Union and Company to advance the grievance.

36. The Union notes that nothing in article 33.13 and following which stipulates that the time lines indicated are peremptory. It notes that there is nothing equivalent to article 33.19, which notes: "If no such written request for arbitration is received within the time limits then the grievance shall be deemed to have been abandoned. The parties may, by mutual agreement, extend these time limits".

37. I agree that articles 33.13 and following are silent with respect to the non-respect of the time lines set out therein. I further agree that there is no equivalent provision to article 33.19 indicating that the grievance shall be deemed abandoned.

38. We are therefore left with the bare time lines set out in articles 33.13 and following and article 33.03, which sets out that time lines may be extended by mutual, written agreement.

39. Arbitrator Brault dealt with similar provisions of a collective agreement in **Portes et Fenetres Chanteclerc Inc. v Union Internationale des Opérateurs-Ingénieurs,**

Section Locale 772, No 2010-4437, in which he considered both doctrine and the significance of a possible mutual agreement:

> [43] Voici ce qu'écrivent au sujet de la distinction Morin et Blouin dans leur ouvrage Droit de l'arbitrage de grief, [précité] : [paragraphes V-45 et ss]
>
> > V.45 une disposition conventionnelle serait impérative s'il ressort de son libellé qu'elle doit être respectée, qu'elle est de rigueur. Une procédure impérative n'est cependant pas toujours de déchéance. En certaines circonstances, les vices de fond sont en effet qualifiés comme irrégularités réfragables, c'est-à-dire que l'on peut éventuellement corriger, par opposition aux vices irréfragables (de déchéance), c'est-à-dire que l'on ne peut pas bonifier. Pour qu'il y ait perte de droit en cas de défaut du respect de la procédure, on exige que la convention collective précise clairement cet effet.
> >
> > [...]
> >
> > V.46 Lorsqu'il appert que la procédure n'est pas de déchéance, que l'irrégularité n'a pas été soulevée à la première occasion et qu'il ne résulterait aucun préjudice majeur à faire corriger le manquement, l'arbitre doit alors adopter une approche qui atteste que le fond l'emporte sur la forme.
>
> [44] Ainsi, la présence dans le texte d'une sanction punissant le défaut de respecter un délai donné est un indice de la nature fatale du défaut de se plier au délai en question.
>
> [45] Or, en l'espèce il n'y en a pas de telle sanction explicite et directe. La procédure ne stipule en effet pas de sanction formelle applicable à l'éventualité où les délais ne sont pas respectés. En fait, elle ne dit pas explicitement que le défaut d'un grief de respecter les délais peut emporter déchéance, i.e. son rejet pur et simple.
>
> [46] Toutefois, ce silence apparent ne règle pas la question vu la présence de la clause 11.10 dont il n'a pas encore été question. En effet, les parties y conviennent que les périodes de temps mentionnées aux articles 11.01, 11.02 et 11.03 peuvent être extensionées [sic] pour une période de temps définie avec un accord écrit entre les deux parties. [Caractères gras ajoutés] Autrement dit, il peut y avoir prolongation mais sur accord écrit des parties.
>
> [47] Avec égards, pareille stipulation indique qu'on veut que les délais ne puissent pas être prolongés sauf sur un tel accord écrit. Il en résulte que ces délais sont non seulement de rigueur mais impératifs et de déchéance à défaut d'être prolongés de consentement par écrit. En somme, que leur non-respect emporte le rejet du recours.
>
> [48] En effet, si de passer outre aux délais prévus à la convention collective n'emportait pas déchéance et que ces délais n'étaient qu'indicatifs, on pourrait s'interroger sur l'utilité de la clause 11.10 de la convention collective. Pourquoi en effet les parties auraient-elles exigé un accord écrit pour les prolonger et encore, seulement pour une période de temps définie, si elles ne voulaient pas que le non-respect de ces délais soit fatal? Comment, sans ignorer le texte de la convention collective ou y ajouter, l'arbitre pourrait-il interpréter cette disposition comme l'autorisant à étendre d'office pareils délais en l'absence d'accord écrit des parties?

> [49] Pour ces raisons, il y a lieu de conclure que les délais prévus à la procédure de grief sont impératifs et qu'à moins d'entente écrite entre les parties pour les prolonger, leur non-respect emporte déchéance. Il n'y a pas eu de telle entente ici.
>
> [54] Ces refus sont les évènements qui *donnent naissance* aux griefs et tous se sont produits à des moments bien précis, soit les 2 et 27 avril ainsi que le 12 mai 2009. Or, les griefs sont du 30 septembre 2009 et donc tardifs. Vu la nature du délai stipulé à la clause 11, le Tribunal n'a d'autre choix que de conclure au rejet de ces griefs faute d'avoir été présentés en temps et vu l'absence d'un accord écrit des parties prolongeant le délai pour les présenter. (underlining added)

40. In a more recent decision, Arbitrator Faucher in **Syndicat des cols bleus regroupés de Montréal, SCFP-301 v. Ville de Mont-Royal**, 2021 QCTA 496 comes to the same interpretation, stating that the jurisprudence is in agreement, and citing the decision of Arbitrator Brault:

> [19] Le délai de prescription pour déposer un grief est de trente (30) jours ouvrables de la connaissance de l'événement qui a donné naissance au grief, comme le prévoit la clause 21.04 de la convention collective :
>
> 21.04 PREMIÈRE ÉTAPE
> Le grief que le Syndicat ou l'Employeur juge à propos de formuler est soumis, par écrit, au Directeur des ressources humaines ou au Président du Syndicat, selon le cas, en deux (2) copies, dans les trente (30) jours ouvrables de la connaissance de l'événement qui a donné naissance au
> grief.
>
> Aux fins de la présente convention collective, « grief » signifie et comprend :
>
> a) Tout désaccord relatif à l'interprétation ou à l'application de la convention collective ;
>
> b) Toute mesure prise par l'Employeur et ayant pour conséquence la rétrogradation, la suspension ou le congédiement d'un employé.
> (…)
>
> [20] Se pose alors la question si un tel délai est ou non impératif.
>
> [21] La clause 21.05 de la convention collective prévoit que le délai de prescription prévu à la clause 21.01 peut être prolongé après une entente écrite entre les parties.

> [22] Il est généralement reconnu en jurisprudence[1] qu'une clause libellée de la sorte est à caractère impératif et de rigueur. La soussignée souscrit d'ailleurs à cette interprétation. (underlining added)

41. I find compelling the reasoning of Arbitrators Brault and Faucher. There would be no reason for article 33.03 if the time lines set out in article 33.13 were not both mandatory and peremptory ("de déchéance").

42. Accordingly, I find that the initial grievance was filed outside the mandatory and peremptory time lines and the grievance, according to the language of the collective agreement, must therefore be dismissed.

43. A further issue arises, however, to determine whether the collective agreement language can be overcome by the provisions of the Quebec Labour Code. Following the initial hearing, I sought additional submissions from the Parties on this issue. For the reasons that follow, I find that it cannot.

44. The Parties agree that their labour relations are governed by the Quebec Labour Code. The Code provides certain powers to arbitrators and obliges decisions to be made according to certain requirements:

> **Code du travail**
>
> 83. The arbitrator has all the powers of a judge of the Superior Court for the conduct of arbitration sittings; but he cannot order imprisonment.
>
> 100. Every grievance shall be submitted to arbitration in the manner provided in the collective agreement if it so provides and the certified association and the employer abide by it; otherwise it shall be referred to an arbitrator chosen by the parties or, failing agreement, appointed by the Minister.
> The arbitrator appointed by the Minister is selected from the list contemplated in section 77.

[1] Voir notamment: *Travailleurs et travailleuses unis de l'alimentation et du commerce (TUAC), section locale 500 et 5 Saisons, une division de Metro inc.*, 2016 QCTA 712, SOQUIJ AZ-51325794 2016EXPT-1927, D.T.E. 2016T-807 ; *Portes et fenêtres Chanteclerc inc. et Union internationale des opérateurs-ingénieurs, section locale* 772, SOQUIJ AZ-50678744, 2010EXPT-2523, D.T.E. 2010T- 768; *Syndicat des cols bleus regroupés de Montréal*, SCFP-301 et Ville de Mont-Royal, 2019 QCTA 269.

> Except where provided to the contrary, the provisions of this division prevail over the provisions of any collective agreement in case of incompatibility.
>
> 100.2.1 No grievance may be rejected because of a defect of form or irregularity in the procedure.

45. It is clear that mandatory time requirements set out in the collective agreement can be relieved against if there are good reasons to do so. It is also clear that substance must prevail over questions of form, particularly where a right to grieve might otherwise be lost (see **Ambulance Ste-Catherine-J.C.Inc. c Rassemblement des employés techniciens ambulanciers du Québec métropolitain** 1996 JQ no. 3977; **Québec (Ville) c Alliance de professionnelles et professionels de la Ville de Québec** 1998 JQ no. 2501).

46. However, it is also clear that the parties, by the effect of the words and the interplay of the provisions of the collective agreement, can make a delay not only mandatory, but also peremptory, entailing the loss of rights based on the passage of time. In that case, the provisions of article 100.2.1 will not override the provisions of article 100, which require the respect of the parties' intentions, as set out in the collective agreement.

47. Arbitrator Massicotte, in **Le syndicat des employés municipaux des iles-CSN c La Municipalité des Isles de la Madeleine** 2017 Canlii 3646 dealt directly with the non-applicability of article 100.2.1 of the Code in the face of clear collective agreement language, who cites multiple other arbitrators to this effect:

> [50] Le défaut d'avoir respecté le délai dont ont convenu les parties à l'article 9.02 est un vice irréfragable, puisque les parties en ont prévu de manière explicite la sanction, à savoir, que le grief est réputé retiré. Elles ont donc décidé que le délai imposant l'amorce des procédures de nomination d'un arbitre était une condition de fond et, conséquemment, l'article 100.2.1 C.t. plaidé en renfort par le syndicat, dans ces circonstances, n'est d'aucun secours. Et, l'article 8.02, relativement au fait qu'un grief constitue une demande d'arbitrage, n'a, dans ce contexte, aucune incidence sur les conséquences choisies par les parties à 9.02 en cas de non-respect de celui-ci. D'autant, faut-il le préciser, que la

demande d'arbitrage se distingue des procédures de nomination d'un arbitre.

[51] C'est également à cette conclusion qu'en arrivait Me Huguette April dans la décision qu'elle rendait dans Syndicat des employés de Sico Inc. (CSN) (Bureau de Longueuil) et Sico Inc., 2010 CanLII 34240 CQ (SAT). Me April abonde dans le même sens que d'autres arbitres à ce sujet : [65] Selon l'article 100 du Code du travail, tout grief doit être soumis à l'arbitrage selon la manière prévue dans la convention collective. Ainsi, les parties peuvent 2017 CanLII 3646 (QC SAT) 2014-15 PAGE : 12 aménager un processus de nomination des arbitres et convenir de toutes les conditions qu'elles croient utiles pour répondre à leurs besoins, incluant l'ajout d'un délai pour désigner un arbitre, et ce, alors même que le Code du travail ou autre loi n'impose pas un tel délai. En l'espèce, les parties ont convenu d'un délai assorti d'une conséquence en cas de non-respect. L'arbitre ne peut ignorer ce choix des parties. [66] La nature du délai indiqué à l'article 11.01de la convention collective fait en sorte qu'il ne s'agit pas d'une condition de forme dont le non-respect peut être couvert, mais bien d'une condition de fond et dès lors, l'article 100.2.1 du Code du travail ne peut être invoqué en l'espèce comme le souligne l'arbitre Hamelin dans l'affaire Montupet Ltée inc. «Il faut également apporter des conclusions similaires à l'égard de l'article 100.2.1 du Code du travail qui prévoit qu'un grief ne doit pas être rejeté pour vice de forme. Cela n'inclut certainement pas les délais de rigueur dont les parties à la convention ont pu convenir, d'autant plus que le législateur a expressément prévu au code que les griefs doivent être soumis à la manière prévue à ladite convention.» L'arbitre Claude Fabien abonde dans ce sens lorsqu'il écrit au sujet de l'article 100.2.1 du Code du travail : «L'apparition de cette disposition n'a pas changé la manière dont la jurisprudence traite généralement les dérogations aux délais de la procédure de griefs et d'arbitrage. Elle persiste à qualifier ces délais comme des règles de fond sanctionnées par la prescription ou la péremption du grief lorsqu'ils sont outrepassés». [Références et notes omises]

[52] Dans cette affaire, l'arbitre Huguette April était saisie d'une objection préliminaire soulevée par l'employeur à l'effet que le délai prévu à la convention collective pour la nomination d'un arbitre n'avait pas été respecté. L'arbitre, ayant conclu qu'il n'avait pas été respecté, a déterminé que ce vice emportait le rejet du grief considérant le libellé de la clause en litige qui prévoyait que le grief était censé être réglé ou abandonné si, dans les six mois de la date du grief, un arbitre n'avait pas été choisi de consentement par les parties ou si une demande de nomination au ministre n'avait pas été faite. (underlining added).

48. Arbitrator Rivest in **Teamsters Section local 973 c Québec Linge Inc**. 2020 Canlii 73656 is also clearly in agreement that the flexibility given to the arbitrator to deal with "vices de forme" does not extend to flexibility with "vices de fond":

> [2] Préliminairement, l'employeur soulève que le grief a été déposé tardivement et qu'il doit, sur cette seule constatation, être rejeté. Pour sa part, le syndicat considère que le défaut de respecter le délai prévu à la convention collective n'est pas fatal compte tenu des circonstances et du libellé des dispositions prévues au processus d'arbitrage. En la matière, le décideur est limité grandement à ce qui a été convenu par les parties. Ici, la Convention prévoit des modalités d'application impératives et strictes. Le défaut de les respecter fait en sorte d'invalider le recours. Pour les motifs qui seront plus amplement discutés, le Tribunal confirme que le délai est dépassé et il doit, par conséquent, rejeter le grief. L'analyse Les délais sont qualifiés en fonction du cadre légal et conventionnel.
>
> [3] Le Code du travail prévoit, de façon générale, que le rigorisme des procédures doit être assoupli en relation du travail : « aucun grief ne peut être rejeté pour vice de forme ou irrégularité de procédure ». Toutefois, la jurisprudence et la doctrine reconnaissent que cette souplesse suggérée par le législateur doit céder le pas à la volonté des parties exprimée par la convention collective les liant.
>
> [4] Ainsi, une irrégularité pourra être qualifiée comme un vice de fond, notamment en matière de délai, lorsque les parties auront précisé la nature du processus d'arbitrage en ce sens. Il revient alors au Tribunal de déterminer si de tels délais sont impératifs et emporte la déchéance du recours à la lumière des clauses pertinentes et de la preuve présentée (Underlining added).

49. It is noteworthy that in the two cases cited by the Union concerning the Code (see paragraph 45 above), both deal with "vices de forme", rather than "vices de fond". In **Ambulance Ste Catherine**, the Court found that the arbitrator had not taken this distinction into account: "Il est possible qu'il n'ait pas cru nécessaire d'étudier la distinction entre le mécanisme procédurale entourant l'application d'une mesure disciplinaire et les moyens de forme par lesquels la procédure peut s'executer" (para 32). In **Ville de Québec**, the Court found that an error in the member of management to whom the grievance was sent, although mandatory, was not peremptory: "la procedure d'acheminement du grief n'est pas de déchéance" (para 7). Thus both of

these cases apply to mandatory language in a collective agreement, to which the Code can relieve from procedural error. They do not deal with collective agreement language where the language is peremptory ("de déchéance") and where the error is a "vice de fond".

50. Given my earlier finding that the language of the Collective Agreement is both mandatory and peremptory, I find that article 100.2.1 of the Quebec Labour Code does not permit me to modify the delays set out by the parties in their Agreement. I am bound by the terms of the Agreement reached between the Parties, as set out in article 100 of the Code and the CROA Rules. If further flexibility is required, the Collective Agreement can be modified through collective negotiations to permit the application of this provision of the Code. Accordingly, the preliminary objection of the Company is granted.

51. With respect to the references made by the Company to inappropriate detraining, I agree with the Union submission that these do not form part of the reasons for discipline and consequently must be disregarded.

52. With respect to the Union objection to the late filing of the Company Ex Parte, I have already dealt with this problem in **CROA 5062**. Such practices are not in keeping with the intent of the CROA process and the Parties are now on notice that it will result in matters not proceeding. However, in this instance, the Union was well aware of the Company position from its grievance response (see Tabs 10 and 12, Company documents). It has added nothing new from the investigation or discipline letter and the Union has therefore not been prejudiced by the late filing of the Ex Parte. Accordingly, this preliminary objection is dismissed.

Decision re Merits of Case

53. Had the grievance been filed in a timely manner, I nonetheless would not have intervened to change the discipline imposed.

54. The grievor admits that he violated Rule 104 (c), which reads as follows:

> *"*A switch must not be turned while any part of a car or engine is between the switch points and the fouling point of the track to be used, except when making a running switch or in the application of the exception to Rule 114*"*

55. This violation caused the derailment of a locomotive. There can be no doubt that discipline was appropriate.

56. The only remaining issue is whether discipline of a 60 day suspension was appropriate in the circumstances and if not, what discipline is appropriate.

57. The approach set out in the William Scott matter is therefore necessary, with a weighing of the various mitigating and aggravating factors.

58. The grievor now has some six years of seniority, which still does not make him a long service employee. He was forthright in accepting responsibility for the Rule violation. He has no further discipline after that upheld in **CROA 5064**, but his record is no longer pristine, as he has had a previous 30 day suspension. The most compelling factor is that the present incident is a further switching issue, albeit with a different Rule violation.

59. I have again considered the jurisprudence cited by both Parties, which is the same as that cited in **CROA 5064.** Each case is necessarily unique, depending on the facts of the matter and the history of the grievor.

60. Here when I consider all of the mitigating and aggravating factors, it is noteworthy that a relatively short service employee has been involved in two different switching violations within 20 months, both of which resulted in derailments. Progressive discipline calls for a more severe sanction for a second switching violation in such a short time. While arguments can be made that the penalty should be greater than 30 days but not as high as 60 days, I note that Arbitrator Picher in **AH 491** found that discipline in the 30-60 day range had been imposed by CROA arbitrators for a <u>first</u> such infraction. I do

not find that the Company decision to impose a 60 day suspension for a second infraction to be unreasonable in the circumstances.

61. For these reasons, I would have dismissed the grievance on the merits, had I not already found that the grievance was dismissed, being filed in an untimely manner.

62. I retain jurisdiction for any questions of interpretation or application of this Award.

September 16, 2024

JAMES CAMERON
ARBITRATOR