CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5128

Heard in Calgary, January 14, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

UNITED STEELWORKERS LOCAL 1976

DISPUTE:

Application of meal and break periods at the Weston Shop.

JOINT STATEMENT OF ISSUE:

On June 24, 2020, a notice was posted advising Weston employees that, effective July 1, 2020, a new break time structure would take effect.

The new structure, as per bulletin, would be as follows: one 10-minute break at the commencement of the third hour of an employee's shift and one twenty-minute meal period at the commencement of the fifth hour of an employee's shift.

Prior to this change, Weston shop employees had a second 10-minute break at 1400. The Union filed grievances at each step of the procedure, the Company denied the Union's request.

Union Position:

Without discussing it with the Union and while a bargained Collective Agreement was in effect, the Company decided to change its practice and violated Article 10 of the Collective Agreement. Since each employee saw their break time reduced by 10 minutes, the Union claims that each employee should be paid at time and one half for that period that they now must work, since the implementation of the new policy.

The Union believes that since the two breaks practice has been in effects for many years, the Company is estopped from changing the working conditions.

The Union also requests that the afternoon ten-minute break be reinstated.

Company Position:

The Company maintains that there has been no violation of Article 10. The notification of the twenty (20) minute meal period within the fifth hour is in line with the language provided within the Collective Agreement. The Company submits that the Union has not adequately demonstrated that past practice included two ten (10) minute breaks in addition to the twenty (20) minute meal break provided for in the Collective Agreement. Nor does the Company agree it is obliged to maintain two ten (10) minute breaks in addition to the twenty (20) minute meal break provided for within the Collective Agreement

The Company cannot agree any payment would be appropriate resolution to this matter. The Company respectfully requests that the arbitrator be drawn to the same conclusion.

For the Union:
(SGD.) N. Lapointe
Area Coordinator, USW

For the Company:
(SGD.) S. Scott
Manager, Labour Relations

There appeared on behalf of the Company:

S. Scott	– Manager Labour Relations, Calgary
T. Gain	– Legal Counsel, CPKCR, Calgary
R. Botelho	– Superintendent Locomotive Maintenance, Winnipeg
A. Harrison	– Manager, Labour Relations, Calgary

And on behalf of the Union:

N. Lapointe	– Area Coordinator, Montreal
J. Howell	– President Board of Trustees, Winnipeg
N. Lapointe	– President Local 1976, Montreal
S. Rybuck	– Witness, Winnipeg

AWARD OF THE ARBITRATOR

[1] On June 24, 2020, a notice was posted in the Weston Shop (the "Notice"). The Weston Shop is located in Winnipeg, Manitoba. That Notice advised employees that – effective July 1, 2020 - the break structure would consist of one 10-minute break and a 20-minute meal period. The Company noted that this Notice "*eliminated a ten (10) minute break during the second half of the shift*", which it described as an "*afternoon break*" (at para. 1 of its submissions).

[2] The elimination of this Afternoon Break is at the heart of this dispute.

[3] For the following reasons, the Grievance is dismissed.

Relevant Provisions

> Article 10.1 When a meal period is allowed, it shall be after the fourth hour and before the sixth hour after starting work unless otherwise locally agreed.
>
> …
>
> Article 10.6 A twenty-minute meal period without deduction in pay shall be allowed Stores Department employees and shop clerks employed at Weston and Ogden Shops.

Facts

[4] While the Company also offered evidence of Job Bulletins advertising for this job - it is unnecessary to consider this evidence, given the finding in this case.

[5] The Notice was filed into evidence by the Company. It was dated June 24, 2020 and was directed to "All Weston Production Facility Employees". That Notice stated:

> Please be advised that effective July 1, 2020 in accordance with the collective agreement the following break time structure during a regular eight (8) our shift will take effect:
>
> - A ten (10) minute break at the commencement of the third (3) hour of an employees shift.
> - A meal period lasting twenty (20) minutes at the commencement of the fifth (5) hour of an employees shift.
>
> For questions and clarification, please see your respective Manager.

[6] This Notice was given by Rui Botelho, the Director, Weston Production Facility. The Company offered a "Will Say" statement of that Director, who is now the Superintendent Locomotive Maintenance for the Company's Central Region.

[7] It is not clear from the name if this individual is a male or female. That individual occupied the position as Director of the Company's Weston Production Facility between 2017 and 2023. He or she would therefore have been the Director for approximately three years at the time the Notice was given.

[8] His/her evidence was that "[p]rior to July 1, 2020, Union members working at the Weston Shop were provided with two ten (10) minute breaks and one twenty (20) minute meal period during each eight (8) hour shift; and that "[*e]ffective July 1, 2020, the practice was changed such that employees would be provided with one ten (10) minute break and one twenty (20) minute meal period per shift*."

[9] It was noted that the Director was "*directly involved in implementing this change*". It was also the Director's evidence that the change was made after he (or she) "*discovered*" both that the CA "*only requires one twenty (20) minute meal period per shift; and (ii) that "…Union members (including USW members) at all other locomotive shops in Canada were only receiving one ten (10) minute break and one twenty (20-minute meal*

period per shift". He/she also noted that the "*intent behind this change as to align break practices at the Weston Shop with all other locomotive shops, such that all Union members would be treated consistently*".

[10] The Union argued that the Company had violated Article 10.1 of the Agreement, which set out when the meal period was to begin, as the Company changed the commencement of lunch to the "fifth" hour of the employees shift, and also cancelled the Afternoon Break, which had occurred at 14:00. It argued the extra Afternoon Break was considered part of the contract and that the Company was not entitled to "change the rules" regarding the lunch period and Afternoon Break outside of bargaining. It argued that the way that lunch breaks had been observed constituted a past practice, accepted by both workers and management. The Union argued the practice was not properly denounced by the Company as it was noted done at the appropriate time. It argued that the past practice of giving a 10-minute break in the afternoon should be restored and it sought payment of the 10 minutes lost at overtime rates. It pointed out that no issue had ever been raised with that practice during that time period and therefore the Union did not try to bargain the practice into the contract, as it considered it was part of the agreement between the Union and the Company. It argued it relied on the representation made by the Company to its detriment by not doing so, and that the Company is estopped from removing the break unilaterally. It argued that **CROA 5052** of this Arbitrator was the same situation and should be applied. It also relied on **CROA 3458**; *DMW Electrical Instrumentation Inc. v. IBEW, Local 530* 2012 CarswellOnt 17510.

[11] The Company argued that Union bore the burden to establish both the practice and that the Agreement had been violated, and it had failed to meet that burden in both cases. It argued that the "*practice*" alleged under Article 10 differed from location to location, so there could not be said to be a "*clear and unequivocal"* evidence of a practice under Article 10. It argued its Notice simply clarified the expectation. It also argued no detrimental reliance by the Union, given the parties had not negotiated language regarding breaks through many rounds of bargaining. The Company argued its Notice was consistent with the requirements of the Collective Agreement which does not set out any entitlement to breaks or consolidate the meal break to any Afternoon Break, as argued by the Union. It also denied it changed the 20-minute meal period, as argued by

the Union. It argued it therefore had the ability to direct scheduling as it wished. It argued its right to do so was a "management right", meaning the Company has the ability to provide – and amend – breaks. It argued the breaks were provided to the employees on a "gratuitous" basis, given that the Agreement was "silent" and that it was entitled to cease that practice. It relied on **AH569**; **CROA 2638; CROA 2284;** *Durham District School Board v. Ontario Secondary School Teachers' Federation District 13* (unreported 2000) and the Alberta Court of Appeal's decision in *USW v. Smoky River Coal Limited,* which it argued was determinative.

[12] Both parties also relied on *Brown & Beatty* excerpts.

Analysis & Decision

[13] I am satisfied that Article 10 of the Collective Agreement is "silent" regarding breaks other than a meal period break. It is not part of the "meal break" or in any manner 'consolidated' with the meal break, as was argued by the Union, or tied in some manner to that break. It is a "distinct" type of break which is not related to the terms and conditions of employment on which the parties are agreed.

[14] Neither can I agree with the Union that **CROA 5052** is therefore applicable to these facts. In that case, the Company engaged in a clear deviation from what was its right under the Collective Agreement and then chose to later revert to its strict rights on that same issue. In that case, the practice at issue was "*directly related*" to a right under the Collective Agreement, as has been argued by the Company.

[15] This is not that same type of case. **CROA 5052** is distinguishable from the facts in this case. While I am satisfied there was a practice of the Company in providing an Afternoon Break for many years, I am satisfied that practice was "gratuitous".

[16] Turning to the evidence, I am satisfied that as a Director for three years, the Directo knew – or should have known – of the requirements of the Collective Agreement regarding one meal break and should have had that knowledge well before June 24, 2020. I therefore do not find convincing the "will say" evidence that this individual "discovered" in the Spring of 2020 that the Collective Agreement only required one 20-minute meal period

per shift. Rather, I am satisfied from the evidence that it is the *second* aspect as noted in the "Will Say" statement which captured the Company's concern, which was that the breaks at Weston Shops were *different* than at other locomotive shops across Canada, and the Company sought consistency.

[17] I am further satisfied from a review of the evidence – including the wording of this Notice and that of the Director – that the Company was not only well aware of the practice the employees taking two breaks in addition to a meal period - but that this Notice was issued to "*change*" that practice and to "*eliminate*" one of those breaks, implementing a "*new*" practice that was to "*take effect*" as of a certain date.

[18] For a practice to "*take effect*" as of a certain date implies that something *else* had been in place before that point. I am satisfied the employees at the Weston Shop had enjoyed the practice of an Afternoon Break for at least 20 years; that the Company was aware that was occurring and was not just "clarifying" its expectation in the Notice. I am satisfied the Company's actions were taken in June of 2020 to "*eliminate*" that what had been occurring.

[19] While I agree with the Union that the Company cannot unilaterally change the meal period time, I am not satisfied they have done so in this case.

[20] Article 10.1 provides that the meal period is to be taken after the fourth hour and before the sixth. The Notice does not offend that requirement.

[21] While the Union's membership is concerned to have one break removed – and that concern can be understood after it has been enjoyed for a lengthy period of time - the facts in this case cannot be distinguished substantively from the situation considered by the Alberta Court of Appeal in *U.S.W. v. Smoky River Coal Limited*. That case is binding on this Arbitrator and is determinative.

[22] That case involved a long-standing practice that did not arise form a particular provision in the Agreement but was gratuitous. In that case, the employer had – for approximately 15 years – followed a practice of "*paying underground maintenance personnel half an hour overtime per day to those who reported prior to the commencement of the shift and after the completion of the shift to discuss maintenance*

and make reports" (at para. 2). The practice was never recorded in the Agreement. The Union argued estoppel.

[23] While the arbitrator agreed and found promissory estoppel, finding that the practice had "*modified the terms and conditions of employment and in effect became part of the collective agreemen*t", and imposed a "*positive obligation on the employer to continue the practice, notwithstanding the absence of an agreement to that effect*" (at para. 6), the Courts did not agree and quashed that decision.

[24] The Court of Appeal found the practice arose from a "*unilateral decision of the employer*" and not from the Agreement. It argued the arbitrator could not – from the existence of that long-standing practice – impose a *positive obligation* on the employer to continue that practice. It found that "*the creation of positive obligations is not the office of promissory estoppel*". The Court found that *"[a]t root, this is a bald attempt to turn a policy or practice into a term of a contract when the parties never bargained that it be such*" (at para. 11). It also stated that "*Every practice in the workplace is not automatically to be elevated to a term of the collective agreement…(*at para. 13).

[25] That case is binding on this Arbitrator and has been widely followed. In fact, Arbitrator Picher came to the same conclusion in **CROA 2284** in this industry, in an Award issued seven years later.

[26] That case involved the change in practice of providing boarding cars for some employees, which were then removed. While the Arbitrator did not reference *Smoky River Coal*, he arrived at the same conclusion as the Alberta Court of Appeal. He found that the "*availability of boarding car accommodation was an incidental privilege utilized by a small minority of employees and not a condition which was extended to all of them*" (at p. 4). He continued:

> *The fact that the privilege was extended, for a substantial number of years, does not however, elevate it to a collective agreement right which the employer is without power to withdraw for a valid business purpose…it was open to the parties to negotiate boarding car accommodation for employees at West Toronto into the terms of the collective agreement, if they so desired. They did not do so*….in the absence of any such provision, the grievance must be dismissed (at p. 5, emphasis added).

[27] The Company has persuaded this Arbitrator that whether or not a break beyond the meal break is provided to employees is a function of the Company's management rights, and/or its exercise of a gratuitous offer, on the facts of this case.

[28] The Union has not met its burden to establish the elements of estoppel are met, or that the Agreement has been breached.

[29] The Grievance is dismissed.

I retain jurisdiction for any questions relating to the implementation of this Award; to correct any errors; and to address any omissions, to give this Award its intended effect.

April 9, 2025

CHERYL YINGST BARTEL
ARBITRATOR