Ad Hoc 660

IN THE MATTER OF A DISPUTE

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS SYSTEM COUNCIL NO. 11 ("IBEW")

And

CANADIAN NATIONAL RAILWAY COMPANY ("CN")

#CN-IBEW 2014-00037-OVERTIME-SERGE MORIN

ARBITRATOR: Graham J. Clarke

Appearing for IBEW:

R. Church – Legal Counsel
S. Martin – Senior General Chairman
L. Couture – International Representative
Claude Menard – Regional Chairman East
Pierre Tardif – S&C Maintainer – Witness

Appearing for CN:

Francois Daignault – Manager, Labour Relations
Sylvie Grou – Senior Manager, Labour Relations
Serge Lauzon – Senior Manager, Signals and Communications

A hearing was held in Montreal on November 16, 2017.

Award

Nature of the Dispute

1. On separate days, Signals and Communications (S&C) Maintainer Serge Morin drove either to or from mandatory “fall protection” training. The parties’ dispute concerns whether any hours exceeding 8 for the two days in question should be remunerated at the regular or overtime rate.

2. The IBEW maintains that in Mr. Morin’s situation all hours exceeding 8 constituted overtime. In its view, collective agreement article 12, entitled “Training”, did not take precedence over the overtime calculations governed by articles 5 and 6.

3. CN argued that article 12 governs training for any of its employees. In its view, the parties agreed in article 12.29 that up to 10 hours of time spent travelling for training purposes would be paid at an employee’s regular rate.

4. For the reasons which follow, the arbitrator concludes that article 12, which is not ambiguous, is not limited solely to “Trainees”, as they are defined in that article. While a significant portion of article 12 deals with Trainees, the wording the parties negotiated demonstrates that the article also applies to other employees.

5. The arbitrator also did not find any of the required elements for an estoppel. Both parties were able to point to occasional events in support of their interpretation, but there was no representation by CN that overtime would be paid for travel to or from training and no resulting reliance to its detriment by the IBEW.

Facts

6. The grievor, Mr. Morin, works as an S&C Maintainer, a safety-sensitive position at CN. Article 2.5 of the collective agreement defines an S&C Maintainer as:

> An employee qualified and assigned to construct, install, maintain, repair or renew any apparatus, or to perform electrical and other work pertaining to, or under the jurisdiction of the S&C Department.

7. Mr. Morin, who lives in Chambord, Quebec, attended “fall protection” training in Candiac, Quebec from April 29 to May 1, 2014. He worked part of his shift on April 28, before driving his CN vehicle to Candiac. The drive takes roughly 4 hours and 45 minutes. Mr. Morin arrived in Candiac at 16:00. His daily shift ends each day at 15:00.

8. After completing his training on May 1, Mr. Morin drove home to Candiac.

9. Mr. Morin claimed 1-hour overtime for April 28 and 5.5 hours overtime for his drive home on May 1. CN has already paid him regular time for those hours. The only issue in dispute is whether the 6.5 hours ought to have been paid as overtime.

10. Employees code their time directly into CN’s pay system. Mr. Morin used the overtime code for the 6.5 hours in question. The system accepts employees’ entries, but audits may subsequently take place.

11. On June 6, 2014, Mr. Morin’s supervisor advised him to use the regular rate code on the basis that overtime was not payable for his travel time.

12. Mr. Morin complied. The IBEW filed a grievance contesting CN's interpretation of the collective agreement.

13. At article 13 of their collective agreement, the parties have adopted generally the expedited arbitration process applied by the Canadian Railway Office of Arbitration and Dispute Resolution (CROA). Their written submissions referred to CROA jurisprudence.

14. The parties were unable to agree on a Joint Statement of Issue (JSI). The arbitrator heard contradictory information at the hearing about whether any type of past practice existed. For example, CN's brief suggested Mr. Morin had been paid straight time on certain occasions for training travel time going back to 2005.

15. However, the IBEW had three individuals present at the hearing who said they had traditionally been paid overtime when required to travel for training.

16. This evidence would have only become relevant if the arbitrator had determined that article 12 was ambiguous, which, as noted above, was not the case.

Collective Agreement Provisions

17. Article 5.1 of the collective agreement states that 8 consecutive hours, excluding the meal period, constitute a day's work:

> 5.1 Except as otherwise provided herein, eight consecutive hours, exclusive of meal period, shall constitute a day's work.

18. Article 6.1 of the collective agreement deals with overtime:

> 6.1 Except as otherwise provided, time worked in excess of eight hours, exclusive of meal period, shall be considered overtime and paid on the actual minute basis at the rate of time and one-half.

19. Article 12 is entitled “Training”. Article 12.1 refers to a “Training Program” and designates employees into categories:

> 12.1 Employees taking training under the Training Program shall, for the purposes of this Agreement, be designated as follows:
>
> (a) Compulsory Trainee: An employee who is enrolled into the S&C Apprentice Training Program.
>
> (b) Selected Trainee: An employee that the Company has designated to take job-related training.
>
> (c) Technician Trainee: An employee who has been selected to take training for promotion as an S&C Technician.

20. Articles 12.2 to 12.25 then go into considerable detail about these three types of “Trainees”.

21. The parties differ about the interpretation of the articles after 12.25. The key provision in dispute, article 12.29, found under the heading “Expenses and Travel Time”, deals with an employee whose training location makes him/her unable to return home each day:

> 12.29 An employee who is required to take training away from his working area who is unable to leave and return to his place of residence on a daily basis will be allowed actual reasonable expenses necessarily incurred. Such employee will be paid travel time at pro-rata to a maximum of 10 hours per day for time travelling outside of regular hours of duty, except that travel time will not be allowed between 21:00 and 07:00 hours when sleeping accommodation is available.

22. Does article 12.29 of the parties' collective agreement apply to all CN employees who receive training or only to "Trainees" attending a "Training Program"?

Parties' Arguments

IBEW

23. For the IBEW, article 12 of the collective agreement applies solely to the "Training Program", as that capitalized term is used in article 12.1. Moreover, they note that Mr. Morin was never assigned to one of the three designations found at article 12.1: a) Compulsory Trainee; b) Selected Trainee or c) Technician Trainee.

24. The IBEW argued that the parties' later use of the word "employee" in article 12 simply captured those assigned to the three designations. In other words, the use of the term "employee" does not mean that article 12 applies to all other CN bargaining unit employees who receive training. The IBEW emphasized that article 12.1 itself states how "employees" will be designated: "Employees taking training under the Training Program shall, for the purpose of this Agreement, be designated as follows…".

25. The IBEW further argued that the headings the parties used in article 12 applied only to the three designations created in article 12.1. In its view, article 12 was originally designed to cover formal longer-term training programs at CN's training schools. These schools have more recently been consolidated in Winnipeg (WTC).

CN

26. CN argued there is nothing in the collective agreement to support the union's claim that articles 5 and 6, rather than article 12, apply to employees who go for training. Instead, CN maintains that the parties negotiated article 12 expressly to cover

issues related to employee training. CN indicated it had always applied article 12 to training, both for Trainees and for other employees.

27. As noted above, the IBEW's evidence on past practice differed.

28. CN argued that article 12.29 is a standalone provision which on its face is not limited to Trainees, but instead applies to any bargaining unit employee's training. All employees receive ongoing training at CN, whether they are classified as Trainees or not.

29. CN referred to article 1.1, which deals with the collective agreement's scope, to demonstrate the meaning of the word "employee":

> 1.1 By S&C Coordinators, S&C Testmen, S&C Technicians, S&C Leading Maintainers, S&C Maintainers, S&C Leading Mechanics, S&C Mechanics, S&C Assistants, S&C Linemen, S&C Apprentices and S&C Helpers is meant employees for whom rates of pay are provided for in this Agreement, who have been in the service for six months in the preceding twelve months.

Analysis and Decision

Past Practice

30. An arbitrator interprets the parties' negotiated language. The parties make it clear in article 13.23 of their collective agreement that the arbitrator has "no power to add to or to subtract from, or modify any of the terms of this Agreement".

31. An arbitrator may refer to extrinsic evidence, such as past practice, but only if an ambiguity exists. As examined in more detail below, the arbitrator did not find ambiguity

in article 12. Moreover, even if an ambiguity had existed, any evidence of past practice at the hearing was contradictory.

New issues cannot be introduced at the expedited arbitration hearing

32. This case is not about an employee who, without authorization or in defiance of clear instructions, drives to and from training and thereby exceeds the 8 consecutive hours in a day's work (article 5.1). CN alluded to this potential situation for the first time in its written brief. That position was never previously raised either during the grievance procedure or in CN's ex parte statement.

33. CROA jurisprudence is clear that parties cannot raise new issues only at the expedited arbitration hearing, as noted in CROA&DR 3488:

> The jurisdiction of the Arbitrator under of the memorandum of agreement establishing the Canadian Railway Office of Arbitration & Dispute Resolution expressly limits the Arbitrator's jurisdiction to those matters contained within a joint statement of issue. As is clear from the text of that document in the case at hand, the alleged acts of harassment contained within the letter of April 26, 2005 prepared by the grievor fall entirely outside the issues identified within the joint statement of issue and cannot be properly said to fall within the jurisdiction of this Office in respect of the grievance at hand (sic).

34. A party may also object if an ex parte statement raises a new issue too close to the date of the expedited arbitration hearing: CROA&DR 4548.

35. Article 13.19 of the parties' collective agreement, modelled on article 10 of CROA's governing Memorandum of Agreement (MOA), presupposes the parties will draft a JSI to identify the relevant facts and collective agreement provisions so that argument at the hearing will focus on specific legal issues. Exceptionally, ex parte

statements may be used, provided they are filed 30 days in advance of the hearing. The parties may agree to waive the 30-day requirement.

36. Similarly, at the hearing, the parties may introduce some clarifying evidence, but this differs from new evidence or issues which take the other party by surprise.

37. The arbitrator agrees with the IBEW that Mr. Morin's supervisor's alleged comments constituted an entirely new issue. Those allegations fall outside the scope of this matter.

Referencing the precise collective agreement articles

38. CN raised a further argument at the hearing.

39. As the arbitrator understood the argument, CN suggested that since the IBEW had not referred explicitly to article 6 (overtime) then the arbitrator could not find a violation of it. The arbitrator does not agree, though the issue is somewhat academic given the conclusion mentioned above.

40. The parties' JSI is supposed to refer to "the specific provision or provisions of the Collective Agreement allegedly violated" (article 13.19). The parties were unable to negotiate a JSI. Nonetheless, it is clear from the grievance procedure, and the ex parte statements, that the issue dividing the parties concerned whether Mr. Morin had an entitlement to overtime.

41. Moreover, the parties' dispute concerned whether article 12 excluded overtime for certain travel time related to mandatory training. Unless article 12 applied, then it did

not appear disputed that article 6 would mandate overtime payments for the time worked exceeding 8 hours in a day (article 5.1).

42. The arbitrator dismisses the argument that the IBEW, in arguing about overtime but without expressly mentioning article 6 in its ex parte, somehow lost its entitlement to pursue this grievance.

Article 12 is not limited to Trainees

43. The arbitrator agrees with the IBEW that a lot of article 12 focuses on the specific situation of designated "Trainees". Article 12 has existed for a long time. CN has centralized a lot of its training at the WTC, rather than doing it regionally.

44. Article 12 is entitled "Training". Article 12.1 then categorizes employees into one of three designations for the purposes of the "Training Program": i) Compulsory Trainee; ii) Selected Trainee or iii) Technician Trainee. The expression "Training Program", despite the use of capitals, remains undefined.

45. The arbitrator notes that the title of article 12 is simply "Training". The parties did not use "Training Program" for the main title, but instead referred to it only in article 12.1[1].

46. Article 12 spends considerable time dealing with the three types of designated employees: Compulsory Trainee (articles 12.2-12.11), Selected Trainee (articles 12.12-12.15) and Technician Trainee (articles12.16-12.25, and Appendix Q). Neither party suggested Mr. Morin had been designated as one of these types of Trainee.

[1] A subtitle "(See Appendix K)" does refer to a 1988 Memorandum of Agreement regarding training for one of the Trainee designations "Technician Employees".

47. The heading “General” appears following article 12.25 and has two articles under it:

> General
>
> 12.26 The Company shall provide each employee taking training with books, literature and other material to permit him through study to prepare for examinations. All S&C employees will assist Trainees to acquire knowledge and practical experience essential for their development and proficiency in servicing S&C equipment and systems.
>
> 12.27 A Trainee who fails any training-related test twice and claims he did not have a proper test may appeal the decision under the provisions of the Grievance Procedure commencing at Step 2.

48. Articles 12.26 and 12.27 could support the IBEW’s argument that the term “Trainee” is synonymous with the use of the word “employee” throughout article 12. For example, article 12.26 imposes an obligation on “S&C employees”, as opposed to just “employees”, to assist “Trainees” with “S&C equipment and systems”.

49. Article 12.27 refers as well to “A Trainee” and indicates what happens if he/she fails any “training-related test twice…”.

50. However, the argument that article 12 applies exclusively to Trainees breaks down thereafter. Whereas articles 12.26 and 12.27 had no difficulty referring to “Trainees”, the parties chose to use only the general term “employee” in articles 12.28-12.30 under the next heading “Expenses And Travel Time”.

51. Moreover, the parties never used the term “Trainee” again after article 12.27. In other words, the parties used either “Trainee” or “Training Program” in every article from 12.1 to 12.27. But never thereafter.

52. Articles 12.28-12.30 read[2]:

> 12.28 **An employee** who is required to take training at a location which is outside of his working area but leaves and returns to his place of residence on a daily basis, will be reimbursed the actual reasonable cost of noonday meal, and will be paid travel time at pro rata rates for all time traveling if no accommodation is provided.
>
> 12.29 **An employee** who is required to take training away from his working area who is unable to leave and return to his place of residence on a daily basis will be allowed actual reasonable expenses necessarily incurred. **Such employee** will be paid travel time at pro-rata to a maximum of 10 hours per day for time travelling outside of regular hours of duty, except that travel time will not be allowed between 21:00 and 07:00 hours when sleeping accommodation is available.
>
> 12.30 **An employee** will be permitted to travel to his place of residence on weekends provided that such employee is available for his first training assignment following the weekend. **Such employee** will be assisted by the application of the terms of the Weekend Travel Assistance Letter which is currently in effect and as may be reissued from time to time. In addition, such employee will be allowed actual reasonable meal expenses necessarily incurred, however, he will not be eligible for payment of any time spent travelling.
>
> (emphasis added)

53. Unlike in earlier articles, there is no reference to the term “Trainee”. In earlier articles, such as 12.12, 12.20 and 12.26, the parties used both the term “Trainee” and “employee”, presumably to avoid repetition.

54. On several occasions, the parties have used the expression “such employee” in article 12. In various articles[3], such as article 12.2, “such employee” clearly referred to a Trainee:

> 12.2 **A compulsory Trainee** must be able to speak, read and write the English language, or the French language in the Province of Quebec, and must be able

[2] Article 1.2 reads: The use of the masculine gender includes the feminine and vice versa.
[3] Other comparable articles include 12.4; 12.4; 12.14; 12.20; 12.21; and 12.24.

> to successfully pass the Company selection process for the position of an S&C Apprentice. **Such employee** will be classed as an S&C Apprentice and compensated at the Apprentice starting rate of pay.
>
> (Emphasis added)

55. But in articles 12.28-12.30 and onward, the parties stopped using the term "Trainee". They chose instead to use the term "employee".

56. For example, article 12.28 governs the situation where an "employee" can take training and also return to his/her home "on a daily basis". Unlike in article 12.3 where the parties used the specific term "Trainee", in article 12.28 they just used "employee".

57. In articles 12.29 and 12.30, the parties again used the term "employee" to begin the article and then the phrase "such employee" to refer to this person. This differs from their earlier practice of using the word "Trainee" and then using "such employee" to refer to that person (article 12.2, *supra*.).

58. Article 12.32 also uses the term employee rather than "Trainee". The article further does not refer to the "Training Program", which the parties must have capitalized for a reason[4], but instead simply to "training":

> 12.32 If, through mutual agreement in writing between the employee and the appropriate Company Officer, an employee's annual vacation is rescheduled to enable him to take training, the provision of article 18.8 shall not apply and the employee affected shall be granted vacation at a mutually convenient time.

59. Article 18.8, to which 12.32 refers, concerns employees' vacation entitlements.

[4] For example, article 12.6 refers explicitly to the "S&C Apprentice Training Program".

60. Article 12.33 also refers to an “employee” rather than a “Trainee”. Employees receive a benefit if they provide “formal training” to others:

> 12.33 An employee required to develop a formal training course or provide such formal training to fellow employees will be afforded $15.00 per day in addition to their regular rate of pay when so engaged.
>
> Formal training will not be considered as normal day-to-day on the job training provided to fellow employees for the proper performance of work.

61. Restricting the meaning of the word “employee” in article 12.33 to that of a designated “Trainee” would modify the parties’ agreement. Arbitrator Schmidt’s decision in AH653 dealt with new employees attending an apprenticeship program at the WTC. It is unlikely such Trainees would also be developing formal training courses for the purposes of article 12.33.

62. However, the arbitrator accepts that some Trainees, such as those vying for a promotion to a S&C Technician position, could have the expertise in their current position which would allow them to train other employees.

63. But, even allowing for that possibility, it seems highly unlikely that the parties intended to deny the payment of $15.00 per day to all employees who might develop a formal training course, or provide formal training to others, unless they also happened to be designated Trainees under article 12.

64. Moreover, the parties did not define the “Training Program” mentioned in article 12.1. Article 12.33 suggests the parties also agreed on the concept of “formal training”,

an expression used to describe something which went beyond “normal day-to-day on the job training”.

65. If “formal training” was synonymous with the term “Training Program”, then the parties could have simply used the latter term. Instead, they agreed on different language which necessarily expands the scope of article 12.

66. Articles 5.1 and 6.1 begin with the phrase “Except as otherwise provided…”. Article 12, given its drafting and the parties use of the term “employee”, is the type of article to which this phrase could apply, depending on the facts.

Disposition

67. The arbitrator concludes that article 12.29, which applies to Trainees, also covers other employees who take training, travel and incur expenses.

68. The IBEW did not convince the arbitrator that article 12 was designed to apply solely to Trainees, given the collective agreement’s wording. Mr. Morin was an employee to whom article 12, and particularly article 12.29, applied.

69. The arbitrator accordingly dismisses the grievance.

Dated this December 7, 2017 in the City of Ottawa.

Graham J. Clarke
Arbitrator