AH661

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 2015-00086 – 36-Hours Notice of Assignment Change

ARBITRATOR: Graham J. Clarke

Appearing for IBEW:

R. Church — Legal Counsel
S. Martin — IBEW Senior General Chairman
L. Couture — IBEW International Representative
C. Menard — IBEW Regional Representative
L. Hooper — General Chairman West
A. Gauthier — Grievor

Appearing for CN:

F. Daignault — Manager, Labour Relations
S. Grou — Sr. Manager, Labour Relations
S. Lauzon — Sr. Manager, S&C
T. Orr — Asst. Chief Engineer S&C
D. Blackburn — Supervisor, S&C
G. Blanchard — Supervisor, S&C

Award

BACKGROUND

1. The IUOE alleged that CN failed to provide 8 employees with at least 36 hours notice of a change in starting time for the week beginning August 30, 2015. The IUOE argued that this notice had to be given at least 36 hours before the end of the employees' prior work week. If CN failed to follow that practice, then employees would be owed overtime for all hours below 36.

2. CN suggested that it provided oral notice to employees of a change in their start time for the following week. Without admitting that it had any obligation to do so, CN also provided written notice of that change on the Thursday of the employees' prior work week. CN argued far more than 36 hours passed between the Thursday notice and the employees' new starting times on the following Monday[1].

3. The arbitrator dismisses the grievance. CN provides notice to employees during their working hours. But there is no wording in the collective agreement which limits the running of that notice once it has been given. Had the parties desired to limit how the notice ran, then they could have used the expression "thirty-six (36) working hours' notice". Without the hours being so limited, the 36-hour notice continues to run following the end of the employees' work week.

COLLECTIVE AGREEMENT PROVISIONS

4. Article 5, titled Hours of Service and Meal Period, describes a day's work (article 5.1) and regular assignments (article 5.2). Article 5.1 specifies that, generally, a day's work is 8 consecutive hours:

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

[1] There were also new start times for Sunday and Tuesday, but the majority of employees would have new start times on the following Monday.

5. Article 5.2, which has existed unchanged for almost 100 years, imposes a notice requirement before changing an assignment's fixed starting time:

> 5.2 Regular assignments shall have a fixed starting time, which will not be changed without thirty-six (36) hours' notice to the employees' affected. Employees' time will start and end at a designated point.

5. The IBEW also drew the arbitrator's attention to article 10.4 which requires that bulletins for positions contain certain information, including the position's "hours of work". The arbitrator does not find that that requirement impacts the giving of notice under article 5.2.

FACTS

6. On Thursday August 27, 2015 at 5:45 pm, CN sent an email to employees advising them that some of the start times for their shifts for the August 31 work week were changing. CN seemingly often notifies employees on Thursdays about changes; employees call this the "Thursday Lottery".

7. There was a small dispute whether CN had earlier provided oral notice to the same effect. Given the arbitrator's conclusion, this decision does not turn on whether CN also provided earlier, or concurrent, oral notice to its employees.

8. The grievors had different start times. Mr. Gauthier, who testified at the hearing, started work at 17:00 during the week of August 23, 2015. CN's notice advised him that his new start time would be 07:00 for the week starting August 30, 2015 (E-1; CN Brief; Paragraph 18).

9. CN alleged, and it was not disputed at the hearing, that the 8 grievors completed their work week[2] the following day on Friday (U-1; Tab 10). In other words, whether they saw the email on Thursday evening or the following day, notice had been given. CN also

[2] The parties' comments indicated that the work performed by S&C gangs does not necessarily correspond with a normal Monday-Friday work week.

clarified that 8 of the 10 grievors were apprentices who would not have held bulletin positions (article 10).

11. On occasion, CN would not be able to provide the full 36-hour notice to employees. There appeared to be an understanding that CN would then pay the employees overtime for any hours worked up to the time when the 36-hour notice would have been valid. In this case, the IBEW argued that none of the hours on the intervening weekend counted for the purposes of the 36-hour notice.

ANALYSIS

10. Did CN respect its obligation to provide IBEW members with thirty-six (36) hours' notice of a change in their starting time?

IBEW Position

11. The IBEW argued that notice under article 5.2 was not valid unless it was given at least 36 hours prior to the end of the employees' current work week. Since there was less than 24 hours before the employees finished their week on the Friday, the IBEW argued that CN failed to provide the full 36 hours.

12. The IBEW explained its position at paragraphs 12 and 13 of its Brief (U-1):

> 12. At the time the language was negotiated, the 36-hour notice could not possibly have been interpreted or understood to mean 36 hours before the next shift on Monday morning, due to the fact that it was a reasonable possibility there would be no way to reach an employee on Saturday or Sunday if they were not on call.
>
> 1. The 36-hour notice as contemplated under Article 5.2 of the Collective Agreement means 36 hours <u>before the end of the current work week.</u> In the case of this grievance, in order to comply with Article 5.2, employees had to be notified by the morning of Wednesday, August 26 for a change in starting time effective on August 31 (the following Monday) if their work week ended on

> Thursday (August 27) or Thursday morning if their work week ended on Friday (August 28).
>
> (emphasis in original)

15. In the IBEW's view, the 36 hours could only run during time when the employees remained "subject to company time" (U-1; IBEW Brief; Paragraph 39).

CN Position

16. CN argued that "36 hours notice" is a straight forward concept. The parties did not choose "working hours" or "working days". Neither did they require any notice to be in writing. In CN's view, it gave notice orally and in writing to employees during their shift. That notice started the clock running before the new start time could take effect.

17. CN argued that it had provided the grievors with far in excess of 36 hours notice for the future change in their starting time. Depending on the grievor, between 82 and 109 hours had elapsed between the giving of notice and the new start times (E-1; CN Brief; Paragraph 45).

18. CN referred to CROA&DR 2769 (#2769) as authority for how 36 hours should be calculated. In that case, the employer provided notice on a Friday for a change effective the following Monday. The IBEW noted that #2769 dealt with a different railway and collective agreement.

19. The negotiated language at issue in #2769 read:

> "8.8 Hours of service shall not be changed without thirty-six hours' notice, and every effort will be made to discuss any change first with the Local Representative".

20. Arbitrator Picher commented as follows on the thirty-six hours' notice and the effort required to discuss changes:

> In the instant case the obligation is not as absolute. It is sufficient that "every effort will be made" to have discussions with the Union. The evidence before the Arbitrator shows that the local representative, Mr. Robert Charbonneau, did receive a notice 36 hours before the change in the schedule. He then had every opportunity to pursue discussions with the Company on the subject if he wished. However, he did not ask for any discussion and the Company had no reason to believe that he objected to the proposed change.

Decision

21. The IBEW expressed its concern about a scenario where CN could attempt to give employees notice on a Saturday for the following Monday. This would force employees to be on call, or checking their smart phones, when off work. However, there was no evidence that this scenario, which differed from the one involving the 8 grievors, had ever occurred.

22. In the instant case, even accepting the IBEW's evidence that the email was the only notice, the grievors all received this notice on the Thursday of their work week. Moreover, the evidence suggested that, in the usual circumstances, CN provided notice orally and during employees' working hours. This seems understandable, in part due to how long article 5.2 has existed unchanged in successive collective agreements. The employees work in gangs. Giving notice to them orally while they are at work ensures they receive it.

23. The facts in the instant case raise the issue of whether the collective agreement imposes limitations on when CN can give employees an article 5.2 notice during their work week or cycle.

24. The IBEW conceded that the collective agreement did not require CN to provide written notice to employees. Other articles, such as 9.5(a), are explicit when notice must be in writing.

25. The IBEW further accepted that article 5.2's reference to "hours" does not mean "working hours". The use of the expression "working" would have a significant impact. For example, the parties have already used the term "working days" for notice purposes: see, for example, articles 11.1 and 18.8. A "day" and a "working day" are quite different, just like an "hour" and a "working hour".

26. The arbitrator, who does not find article 5.2 ambiguous, has not been convinced that notice given to employees during their work week at CN somehow stops or ceases to run once that work week has ended. There are several reasons for this conclusion.

27. First, the wording of article 5.2 would need to use the expression “working hours” if the notice were to freeze up as soon as employees finished their week. But article 5.2 only refers to hours.

28. Second, the arbitrator agrees with the IBEW that the “intent of the parties was for employees to have some reasonable certainty of what their hours of work will be” (U-1; IBEW Brief; Paragraph 38). In this instance, since the notice runs during non-working hours as well, the employees received far more than 36 hours before starting their shifts the following week.

29. The arrival of a weekend ensured employees received more notice than if they had been told on a Wednesday, for example, that their start time on the Friday of that same week would change. In both instances, employees receive the required 36-hour notice. The 36 hours ran continuously without any interruptions.

30. Third, and this relates to the second point, the IBEW’s suggested interpretation would mean that non-working hours count for notice for changes occurring during the week, but not for weekends. Given the wording in the collective agreement, the arbitrator is unable to reconcile why non-working hours should receive such different treatment.

31. Fourth, and despite the IBEW’s able argument, the wording of the collective agreement does not suggest that a “notice dead zone” arises for the final 36 hours of a work week or cycle. If article 5.2 were intended to operate that way, then it would have included wording such as “36-hours prior to the expiration of employees’ work week or cycle”. An arbitrator in an award cannot add that type of wording without offending article 13.23 which prohibits amendments to the collective agreement.

32. The parties led evidence about their practice when applying article 5.2. Even if the arbitrator had found that article 5.2 was ambiguous, the evidence was contradictory. The arbitrator was unable to draw any inference that the parties had consistently accepted that CN’s right to give proper and effective notice under article 5.2 changed during the final 36 hours of each employee’s work week or cycle.

33. While CN could still give notice, the IBEW maintained that overtime would be owing on the next shift for any hours below 36 when the employee's work week or cycle ended. CN's evidence was that employees could receive notice on the Friday for a Sunday shift starting time.

34. This contradictory evidence did not support the principle Arbitrator Picher applied in CROA&DR 1930, where a clear agreement existed on the interpretation of a particular article of the collective agreement:

> As is well established in the prior decisions of this Office, when a given interpretation of a collective agreement has been knowingly applied between the parties, without objection or grievance over a substantial number of years, spanning the renegotiation and renewal of the Collective Agreement in unchanged terms, the parties are taken to accept the established interpretation as part of their agreement, and the union which has acquiesced in the interpretation so applied cannot assert some different interpretation by means of a grievance. By the renewal of the Collective Agreement without change, in the knowledge of the interpretation applied to Article 10 of the Job Security Agreement by the Company over many years, the parties have effectively agreed that interpretation into the terms of their collective agreement. Any change with respect to the established interpretation is a matter to be resolved in bargaining.

35. See also CROA&DR 4606 which commented on the relevance of finding an ambiguity in the collective agreement when dealing with past practice arguments.

36. The arbitrator similarly did not find any representation from CN to the IBEW to the effect that its right to provide article 5.2 notice could not be fully exercised during the final 36 hours of the work week or cycle.

DISPOSITION

37. Article 5.2 requires CN to provide 36-hours notice to employees of a change in starting time. CN gives this notice to employees when they are at work. The question to be asked therefore is whether 36 hours has passed from the time the employee received notice at work and the start of his/her next shift.

38. The answer to that question in this case is yes. All 8 grievors knew for more than 36 hours that their shifts the following week would start at a different time. This satisfies the requirements of article 5.2.

39. The arbitrator accordingly dismisses the grievance.

Dated this 19th day of March 2018 in the City of Ottawa.

Graham J. Clarke
Arbitrator