AH662

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY (CN)

And

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

#CN-IBEW 2015-00064 – MONT-JOLI COMPENSATION CLAIM

Arbitrator: Graham J. Clarke

Appearing for IBEW:

R. Church: Counsel
C. Menard: Regional Rep IBEW
N. Taillon: Technician S&C

Appearing for CN:

F. Daignault: Manager, Labour Relations
D.S. Fisher: Sr. Director L. R. and Strategy
S. Lauzon: Sr. Manager, S&C
J. Gilbert: Manager, S&C

Heard in Montreal on May 29, 2018.

AWARD

Nature of the Case

1. The IBEW grieved on behalf of Mr. Viateur Bernier, a Signals and Communications Technician, claiming that CN failed to pay him $60 for each day when he performed work in the Mont Joli territory. In the IBEW's view, CN had previously paid other employees $60.00 per day for this work and was therefore obliged to do it for Mr. Bernier as well.

2. CN argued there was nothing in the collective agreement providing Mr. Bernier with an entitlement to this payment. The fact a supervisor may have authorized those amounts in the past did not amend the collective agreement's wording.

3. The arbitrator understands why Mr. Bernier would feel entitled to the $60 payment, since he understood a CN supervisor had previously authorized it for other employees. But for several reasons, the arbitrator must agree with CN that the collective agreement the parties negotiated does not provide Mr. Bernier with an entitlement to this payment.

Collective Agreement Provisions

4. Articles 10.8 (b) and (c) deal with CN employees working on a "Region adjacent".

> 10.8(b) Employees may be required to perform work of **an expected duration of one week or less** on a **Region adjacent** to their seniority territory.
>
> 10.8 (c) Upon written mutual agreement between the System General Chairman of the Brotherhood and the appropriate S&C Officer, employees may be required to perform work of **an expected duration of less than ninety (90) days** on a **Region adjacent** to their seniority territory.
>
> (Emphasis added)

5. Both parties referred to the decision of Arbitrator Schmidt in Ad Hoc 647 (AH647) who interpreted article 10.8. Mr. Bernier filed his grievance in 2015; Arbitrator Schmidt issued her decision regarding a different matter in 2016.

6. AH647 dealt with an article 10.8 scenario of employees working in a "Region adjacent" to their seniority territory:

> The Union submits that the Company violated the collective agreement between them, and in particular article 10.8 when it required 12 employees from the Great Lakes Region ("GLR") to work on part of an adjacent region – the Champlain Region – without entering into an agreement with the Union.

7. In AH647, the employees worked for a three-day period. Arbitrator Schmidt interpreted article 10.8(b) and noted how it differed from article 10.8(c), which required a "mutual written agreement" for work exceeding one week:

> **I do not accept, however, that when these articles are read together (as both parties agree they must be) that it is reasonable to conclude that the Company must obtain the Union's consent before sending employees to perform work of an expected duration of a week or less on Region adjacent to their seniority territory**. This is simply because, while article 10.8 (c) expressly requires the Union's consent in circumstances where the assignment of the employees is for a significant duration (as many as 89 days), article 10.8 (b) is silent about Union consent, when the assignment is up to one week in duration.
>
> There is no precondition in article 10.8 (b). Had the parties intended to require a written agreement in the case of the performance of work on an adjacent Region that was expected to be a week or less, it would have been completely unnecessary to include article 10.8 (b) at all in the collective agreement. It would have absolutely no purpose, given that article 10.8 (c) ostensibly captures all assignments to adjacent Regions up to 89 days, including such assignments of up to one week. Clearly, article 10.8 (b) was inserted into the collective agreement for a reason. That purpose was to give the Company sole discretion to assign employees to an adjacent Region for brief periods of time.
>
> Every clause in a collective agreement must have a purpose. **The only meaning that can reasonably be ascribed to Article 10.8 (b) is that no mutual agreement is necessary for the Company to require employees to**

> **perform work on a Region adjacent to their seniority territory when its expected duration is one week or less. Therefore, there is no ambiguity that arises from a reading of these clauses, and no need to consider parole evidence of past practice.**
>
> (Emphasis added)

8. Arbitrator Schmidt determined that article 10.8 allows CN to assign employees unilaterally to work in a Region adjacent as long as that work does not exceed one week in length. For work which goes beyond one week, CN must negotiate a written mutual agreement with the IBEW.

9. In the instant case, the parties debated, *inter alia*, the meaning of the expression "Region adjacent" as it is used in the collective agreement.

Facts

10. CN owned, sold and later bought back the Mont Joli subdivision. The IBEW argued that those transactions are crucial to interpreting the term "Region adjacent" in the parties' collective agreement. The parties provided contradictory evidence at the hearing, much of which the arbitrator suspected was new and had never been discussed between them. This can complicate an otherwise model expedited arbitration regime, as recently noted in AH664.

11. The IBEW at paragraph 8 of its Brief distinguished AH647 and argued that article 10.8 is not "engaged" in this case:

> 8. However, to be clear, in the present case the Union is not asserting that Articles 10.8(b) and (c) are engaged in the present case. What distinguishes this case from prior cases involving Article 10.8(b) and (c) – in particular, Ad Hoc 647 – is the fact that the territory in question, the Mont Joli subdivision, is <u>not</u> a "Region" covered by the Collective Agreement, and therefore, this grievance is not a traditional Article 10.8 case.
>
> (Emphasis in original)

12. The IBEW furthered submitted that Mont Joli was not subject to its collective agreement until very recently. Another IBEW bargaining unit did the S&C work for the

Mont Joli subdivision under the “X-Rail collective agreement”. Since IBEW members historically could not apply for work on that territory, this prevented Mont Joli from being a “Region adjacent” for collective agreement purposes:

> 14. In the Union’s submission, “a Region adjacent” as the term is used in Article 10.8(b) and (c) refers to only the Regions recognized and cover (sic) under the Agreement 11.1. The Mont Joli Subdivision was not part of any territory falling under the jurisdiction of Agreement 11.1.

13. CN described how it had sold the Mont Joli subdivision section of track to Chemin de Fer du Quebec in January 1998. It repurchased it in November 2008. CN commented that the IBEW did not demand that its members perform the work in 2008 because it felt it was in a conflict of interest given that it also represented the X-Rail bargaining unit employees. CN further insisted that ever since the 2008 repurchase it had used both external contractors and its own employees, represented by the IBEW, to perform Mont Joli S&C work.

14. CN argued that Mr. Bernier had never worked in a “Region adjacent” for the purposes of article 10.8. Even if one assumed for argument purposes that he had worked in a “Region adjacent”, then article 10.8(b) did not require any type of agreement between CN and the IBEW as determined by AH647.

15. CN argued it had paid Mr. Bernier for his daily work as well as for his expenses in accordance with Appendix N of the collective agreement (page 68). CN did not dispute that one of its supervisors in the past appeared to have authorized $60.00 payments to certain IBEW members, like Mr. Taillon who testified, but argued that that did not bind CN or impact the proper interpretation of the collective agreement.

16. Mr. Bernier did not attend the arbitration and did not testify about the specifics of the July 2015 work.

17. Appendix N provides employees with one of three categories of reimbursement of expenses: a) Company provided accommodation; b) Reasonable expenses for meals and lodging which they necessarily incur; or c) All inclusive expense option. Essentially, the parties have agreed on the amounts reimbursed for meals where the employee either returns home each day or stays in CN provided accommodation. As an alternative, the parties have agreed to an all-inclusive expense amount of $109.67.

18. In 2012, the parties negotiated a daily meal reimbursement amount of $41.57. The alternative all-inclusive amount was $109.67. The IBEW suggested the $60.00 amount Mr. Bernier claimed was the difference between the $41.57 and $109.67. That difference amounts to $68.10, but the IBEW explained the discrepancy by indicating it rounded the number down to $60.00.

19. In its Brief, the IBEW described why Mont Joli was not a “Region adjacent” and why CN ought to have paid Mr. Bernier a per diem of $60.00, in addition to the expenses already paid, for his work on July 2 and 3, 2015:

> 17. This particular case is a unique situation due to the fact that the Mont-Joli subdivision is not a “Region adjacent,” prior cases adjudicating Article 10.8 are, respectfully, not directly on point.
>
> 18. In the circumstances, the Union asserts that Mr. Bernier should be paid the per diem rate of sixty dollars ($60.00) per day for the two days the Company had him working off of his Region.
>
> 19. While this particular amount is not specifically set out in the Collective Agreement, this is the rate negotiated in Off Region Agreement, and the Union submits that the Arbitrator has the jurisdiction in this case to award damages which would be replicative of what the Grievor would have earned had the Company properly applied the Collective Agreement.

20. The IBEW’s position at the arbitration seemed to differ from that put forward in its original July 24, 2015 grievance (U-2; IBEW Exhibits; Tab 4) where it suggested Mr. Bernier had performed work in the Champlain East region while being regularly assigned to the Champlain West Region:

> La FIOU a été mis au courant que M. Viateur Bernier, à la demande de la compagnie, a travaillé dans la région de Champlain Est. M. Bernier a été envoyé pour faire des travaux de modernisation sur la subdivision Mont-Joli. Aucune entente entre le syndicat et la compagnie n’a été signé pour le travail à l’extérieur de la région Champlain Ouest, de plus le CN a un contrat d’entretien avec la compagnie X-Rail pour l’entretien des S&C sur cette subdivision.

21. In its Step 3 grievance letter dated October 17, 2015 (U-2; IBEW Exhibits; Tab 6), the IBEW noted that a “Region adjacent” only referred to areas where it represented employees:

> First, we must be very clear on this point, “a Region adjacent” refers to only the Regions recognized and cover under the Agreement 11.1. (sic)

22. The IBEW also referred to the wording of articles 10.8(b) and (c) in support of its claim:

> The intent of 10.8(b) is for the Company to have the ability to protect work without first having to apply the provisions of Article 10.8(c). Article 10.8(b) does not relieve the Company from applying the provisions at a later time when practicable to do so. It is also understood and a long standing practice that when required to perform work under such provisions that an Off Region Agreement will provide addition per diem payments. (sic)

23. CN argued that the IBEW fundamentally changed its position regarding the application of article 10.8 after Arbitrator Schmidt later issued her March 5, 2016 decision in AH647.

24. The arbitrator notes that, after an initial dispute about the description of the matter in the IBEW’s original ex parte statement, the parties mutually agreed to a slightly modified Statement of Issue which states, in part:

> The Union contends that the Company violated Article 10.8 (b) and (c) of Collective Agreement 11.1 on July 2nd and 3rd 2015. The Union claims that articles 10.8 b) and c) applied in this case and requests the employee be paid, in addition to the expenses already provided, $60 per day for the 2 days. Additionally to this the Union requests that the Company make immediate arrangements to properly adhere to the requirements of Article 10.8(b) and (c).

25. The IBEW’s evolving position ultimately did not impact the resolution of this arbitration.

Analysis and Decision

26. A rights arbitrator must interpret and apply the collective agreement. The parties have noted this well-known principle in article 13.23 of their collective agreement. They have further agreed that an arbitrator will not modify or add to the Agreement's scope, presumably since they prefer that the Canada Industrial Relations Board resolve such scope issues:

> 13.23 Disputes arising out of proposed changes in rates of pay, rules or working conditions, modifications in or additions to the scope of this Agreement, are specifically excluded from the jurisdiction of the Arbitrator and he shall have no power to add to or to subtract from, or modify any of the terms of this Agreement.

27. Accordingly, any entitlement Mr. Bernier may have to a $60.00 per diem must flow from the parties' negotiated wording in the collective agreement. An arbitrator does not have an independent equitable jurisdiction to issue relief, such as general damages, for matters which fall outside the collective agreement.

28. The IBEW acknowledged it bore the burden of proof and presented its case first. Despite Mr. Church's able submissions, the arbitrator concludes that no violation of the collective agreement occurred. There are several reasons for this conclusion.

29. First, paragraph 14 of the IBEW's Brief, *supra*, posits that its collective agreement defines CN's Regions. Despite the use of the capitalized word "Region", the collective agreement does not define it. In interpreting article 10.8 in AH647, Arbitrator Schmidt noted that the employees went from the Great Lakes Region (Ontario) to the Champlain Region (Quebec).

30. During the hearing, CN indicated that Champlain West covered Quebec and Champlain East applied to the Maritimes. The 147-mile Mont Joli subdivision exists mainly in the Quebec region, except for 13 miles of track in New Brunswick. Despite the IBEW's allegations in its initial grievance, the parties did not dispute at the hearing that Mr. Bernier performed all of his July 2015 work in Quebec.

31. The evidence describing CN's "Regions" accords with the terms used in Appendix L of the collective agreement (page 65), though sometimes different terms are used to describe the same Region. For example, Champlain West (Quebec) is

described in Appendix L as the St. Lawrence Region, while Champlain East (Maritimes) is described as the Atlantic Region.

32. The arbitrator notes that Exhibit A to Appendix L specifically refers to “Mt. Joli” in the description of the Atlantic Region, a fact which is consistent with the evidence heard that a small portion of the Mont Joli subdivision is found in Champlain East.

33. The IBEW did not persuade the arbitrator that the collective agreement somehow excluded Mont Joli from the Champlain East and West Regions because of CN’s sale and later repurchase of that line. There is no collective agreement wording to support that argument. On the contrary, the existing wording in article 10.8 remains consistent with both the terminology employed in Appendix L, as well as the fact scenario explored in AH647.

34. Second, while the IBEW argued that 10.8 was not “engaged” for Mr. Bernier’s situation, it seemingly still relied on 10.8 to support its argument that “(I)t is a long standing practice that when required to perform work that is not in an employee’s seniority region, an Off Region Agreement will provide addition (sic) per diem payments” (U-1; IBEW Brief; Paragraph 16).

35. As the arbitrator understands this position, the IBEW suggested that CN had an obligation to negotiate an agreement, just as if Mr. Bernier had been covered by article 10.8(c). It is unclear to the arbitrator how a collective agreement can concurrently be both not “engaged”, but also the source, based on a past practice, for a per diem payment. CN’s position was that Mr. Bernier worked entirely within the Champlain Region West (Quebec) and was paid his wages and expenses in accordance with the collective agreement.

36. Where an ambiguity in the collective agreement exists, a past practice argument may demonstrate how the parties have interpreted and consistently applied an article: CROA&DR 4606. It is unclear how one can apply a past practice argument when the IBEW argues that articles 10.8(b) and (c) are *not* “engaged in the present case” (U-1; IBEW Brief; Paragraph 8). The IBEW expressly advised that it was not alleging an estoppel. In the arbitrator’s view, an argument based on past practice necessarily needs to be attached to an article in the collective agreement. In AH647, Arbitrator Schmidt had determined that articles 10.8(b) and (c) were not ambiguous.

37. Third, the arbitrator had a similar difficulty understanding the genesis for a collective agreement obligation requiring CN to pay the $60.00 per diem. That may be an amount paid under article 10.8(c) when the parties must negotiate an agreement. But, as noted above, the arbitrator did not understand how the obligations of 10.8(c), which apply only to work requests exceeding one week in length in a "Region adjacent", could be engaged in Mr. Bernier's case which involved 2 days work in his own Region.

38. The IBEW did refer to Appendix N and argued that the $60 came from the difference in the meal allowance and the $109.67. The arbitrator agrees with CN that the payments described in Appendix N are alternative, rather than cumulative. Similarly, the wording in Appendix N did not support the suggested math used to arrive at the $60 figure, *supra*. An amount of $65.00 or $70.00 would appear to more likely, even if one accepted that a rounding exercise should take place.

39. The evidence that a CN supervisor authorized a $60.00 payment was vague. It is clear such payments occurred, but there was no explanation about why or how often. No cases were provided in support of what appears to be a suggestion that the supervisor's actions had effectively amended article 10.8 of the collective agreement. Not every workplace practice becomes a term of the collective agreement: SHP592.

40. The foregoing analysis has attempted to address the arguments that article 10.8 was not "engaged", which was a different position from that found in the parties' mutually agreed Statement of Issue. If one considers the application of article 10.8 to Mr. Bernier's situation, the arbitrator again fails to find any support for the claimed $60.00 per diem. There are several reasons.

41. The IBEW did not demonstrate that Mr. Bernier performed work on a "Region adjacent" under article 10.8. Mr. Bernier performed all his services within the Champlain West Region ie Quebec. As determined above, the scope of the IBEW's bargaining unit does not determine how to interpret the meaning of a "Region adjacent" when considering CN's national rail network.

42. Similarly, Mr. Bernier's work occurred on July 2 and 3, 2015. As such, even if the collective agreement was engaged, the length of the work would have fallen within article 10.8(b). CN has negotiated the right to have employees do such work without needing an agreement with the IBEW. This is precisely what Arbitrator Schmidt found in AH647. Regardless of what the parties may negotiate in their agreements for situations

covered by 10.8(c), those practices have no application for work which lasts for one week or less.

43. The arbitrator noted earlier why an employee like Mr. Bernier would feel slighted if other employees had received $60.00 per day for doing the same type of work he had done in July 2015 in the Mont Joli subdivision. CN did not deny that one of its supervisors had approved this special payment for some employees. But the arbitrator was not persuaded that that situation effectively amended the collective agreement.

44. In sum, the arbitrator could identify no provision the parties negotiated in the collective agreement which entitled Mr. Bernier to the claimed $60.00 payment.

45. As a result, the arbitrator must dismiss the grievance.

SIGNED at Ottawa this 8th day of June 2018

_____

Graham J. Clarke