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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 2015-00078 – ARTICLE 4.17 STANDBY ALLOWANCE CLAIM (Bureaux)

AWARD

Date: September 18, 2018

Arbitrator: Graham J. Clarke

Appearances:

IBEW

R. Church: Counsel
S. Martin: Sr. General Chairman
L. Couture: International Representative
L. Hooper: General Chairman

CN

F. Daignault: Manager, Labour Relations (Mtl)
D. S. Fisher: Sr. Dir, Labour Relations and Strategy (Mtl)
S. Lauzon: Sr. Manager, S&C Eastern Region

Heard in Montreal on September 12, 2018

NATURE OF THE CASE

1. This case raises two distinct issues. CN alleged that the IBEW missed the time limits for filing this grievance and asked the arbitrator to refuse to hear it. On the merits, the IBEW claims that CN improperly failed to pay the grievor, Mr. Alfred Bureaux, his standby allowance for the period between his last day of work and the date of his retirement. Mr. Bureaux took all his remaining vacation during this period.

2. For the reasons which follow, the arbitrator finds that the grievance is arbitrable. CN waived its right to raise time limits. In addition, the IBEW persuaded the arbitrator to exercise his discretion to extend time limits.

3. On the merits, the adjudicator concludes that in 2012 the parties dealt specifically with the issue of paying a standby allowance during the period of pre-retirement vacation. While employees normally receive their standby allowance even when on vacation, the parties negotiated a different rule for a specific scenario which culminated in an employee's retirement. Mr. Bureaux' situation fell within this negotiated exception.

PRELIMINARY OBJECTION: TIMELINESS OF THE GRIEVANCE

4. Article 13.8 of the collective agreement provides that a grievance must be presented "within 28 calendar days from the cause of the grievance…". In articles 13.12 and 13.13, the parties have agreed what happens to grievances which fall outside the time limits:

> 13.12 When a grievance not based on a claim for unpaid wages is not progressed by the Brotherhood within the prescribed time limits, **the grievance will be considered to have been dropped**. Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may be processed to the next step in the grievance procedure.
>
> 13.13 When a grievance based on a claim for unpaid wages is not progressed by the Brotherhood within the prescribed time limits, **it shall be considered as dropped**…
>
> (Emphasis added)

5. CN referenced both articles when arguing that the IBEW had filed its grievance outside the collective agreement's time limits (E-1; CN Brief; Paragraph 22).

6. Mr. Bureaux' last day at work was June 11, 2015. He went on vacation from June 12 to July 31, 2015. His official retirement date arrived on August 1, 2015.

7. While the IBEW's grievance was dated August 26, 2015, the grievance system the parties employ showed that it had been submitted on September 1, 2015.

8. CN argued that the "cause of the grievance" arose on July 18, 2015 when Mr. Bureaux would have received his statement of earnings. That statement indicated that CN had not paid him a standby allowance during his vacation. The IBEW argued that the cause of action arose only on Mr. Bureaux' August 1, 2015 retirement date.

9. The arbitrator accepts that on either analysis the IBEW did not submit the grievance within the required 28 calendar days. The IBEW argued that Mr. Bureaux had been in Europe and could not have seen the statement of earnings to which CN referred. Neither party provided evidence suggesting exactly when the cause of action arose. The IBEW could have missed the 28-calendar day time limit by just a few days or by as much as several weeks.

10. Under either scenario, the IBEW did not lose its entitlement to bring this dispute before an arbitrator. The IBEW satisfied the arbitrator that CN had waived its right to rely on this timeliness objection. Moreover, the arbitrator would also have exercised the discretion in the Canada Labour Code (*Code*) to extend the time limits in these circumstances.

Waiver

11. Both employers and trade unions can waive their rights and thereby attorn to an arbitrator's jurisdiction. In *Clean Harbors Canada Inc. v Unifor, Local 914*[1], an employer responded to certain grievances. Despite taking those procedural steps, it later objected and claimed that those grievances had been settled. The arbitrator concluded:

> 43. I was satisfied that restoring the disciplinary situation to what it was prior to the agreement in issue was sufficient to constitute a waiver by the Company of its rights under the agreement. **I was satisfied that that, combined with its subsequent conduct in responding to the grievances on the merits without any notice or indication to the Union that it considered the grievance to have been settled by the agreement in issue until some 16**

[1] 2016 CanLII 25999

> **months after the grievances were filed and a little over a month prior to the hearing, constituted an attornment by the Company to my jurisdiction as the arbitrator appointed under the collective agreement to hear the grievances.**
>
> 44. **In the result, I was satisfied that the Company accepted the Union's repudiation of the agreement between the Chief Steward and McDonald, thereby entirely negating that agreement and leaving nothing to be enforced; and that in any event, by its conduct the Company not only waived its right to object to but effectively attorned to arbitrator jurisdiction to determine the grievances on their merits**. I was satisfied that there was nothing which deprived me of jurisdiction to hear and determine the grievances.
>
> (Emphasis added)

12. The evidence disclosed that CN first raised its time limit objection in its September 29, 2017 letter. Between the filing of the IBEW's grievance on September 1, 2015 and that date, multiple steps in the grievance procedure had occurred.

13. The IBEW entered its grievance into CN's system on September 1, 2015. CN denied the grievance on September 28, 2015, but without any mention of time limits.

14. The IBEW filed a second step grievance on October 6, 2015 which CN denied on October 12, 2015, again with no mention of time limits. On November 25, 2015, the IBEW filed a grievance at Step 3 and fully described its position on the merits. On January 5, 2016, the IBEW requested arbitration.

15. The parties had also discussed the issue of vacation and standby allowances during bargaining in late 2016, but CN again did not mention any missed time limit. CN and the IBEW further discussed the grievance at a joint conference on May 30, 2017. All of these events took place before CN raised its timeliness objection in its September 29, 2017 letter.

16. The parties have modelled their grievance system on that followed by the Canadian Railway Office of Arbitration and Dispute Resolution (CROA). That process leaves to the parties the important task of agreeing on the facts (article 13.19). Rather than spend multiple days hearing evidence from witnesses, the parties prefer to create

their own factual record and then have an arbitrator apply the applicable labour arbitration principles to those facts.

17. Hearings take less than a day and are far more cost effective than those which take several days just to hear evidence. Arbitrators issue the award no later than 30 days after the hearing.

18. However, given this expedited process, the parties need to be diligent as they work together to identify both the facts and the legal issues. CN argued that the IBEW waited for years before scheduling this arbitration. The IBEW did obtain extensions. Plus, one will never know how the IBEW might have prioritized the hearing of this arbitration had it known back in 2015 that CN contested the time limits.

19. The arbitrator is satisfied that CN had multiple opportunities to raise its time limit objection. Rather than doing so, it took multiple fresh steps in the grievance process. Those facts support the application of the doctrine of waiver.

CLC Article 60(1.1) – Extending the time to take any step

20. The second reason to dismiss CN's objection comes from article 60(1.1) of the *Code* which reads:

> Power to extend time
>
> (1.1) The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.

21. The parties cannot contract out of this discretion the *Code* grants to labour arbitrators. But neither does it mean that an arbitrator can simply ignore the time limits on which the parties have agreed.

22. As noted above, the parties debated when Mr. Bureaux first knew of the collective agreement breach. CN suggested that he knew in mid-July 2015 when he received his pay statement. The IBEW stated that Mr. Bureaux had been in Europe during his vacation

period. It suggested that the arbitrator should therefore use his retirement date of August 1, 2018.

23. CN referred to CROA&DR 3493 and CROA&DR 3468 in support of its position that the arbitrator should not use the power in article 60(1.1) of the *Code*. Those cases dealt with situations involving "laxity" on the part of the trade union. In CROA&DR 3493, arbitrator Picher described some of the factors to consider:

> In the leading decision of Re Becker Milk Company Ltd. and Teamsters Union, Local 647 (1978), 19 L.A.C. (2d) 216 (Burkett), a board of arbitration was called upon to consider the virtually identical provisions of the Ontario Labour Relations Act, R.S.A. 1970, c. 232, s. 35(5a), **the board of arbitration found that it was appropriate to consider three factors: the reason for the delay given by the offending party; the length of the delay; and the nature of the grievance.**
>
> (Emphasis added)

24. While more recent cases have expanded on some of the factors which arbitrators consider[2], the arbitrator is satisfied that the delay in this case was extremely minor when compared to the facts in the cases submitted by CN. Moreover, the process demonstrates that CN suffered no prejudice in responding to the IBEW's arguments on the merits. The fact that CN waited roughly 23 months before first raising a timeliness argument is similarly relevant to the exercise of the arbitrator's jurisdiction.

25. The arbitrator finds, in addition to the application of the doctrine of waiver, that reasonable grounds exist to extend the collective agreement's time limits in this case. The short time period in issue, combined with the IBEW's diligence, provide reasonable grounds. Moreover, CN did not satisfy the arbitrator that it had been prejudiced by the missed delay.

26. The arbitrator will accordingly decide the grievance on its merits.

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[2] See, for example, Arbitrator Sims' decision in Telus Communications Inc v Telecommunication Workers Union, USW Local 1944, 2017 CanLII 85557

COLLECTIVE AGREEMENT PROVISIONS

27. The parties did not contest that CN employees receive a standby allowance even when on vacation (E-4; CN Brief; Paragraph 22). The IBEW negotiated this premium for its members which is valued at 7.5 hours of regular salary per week.

28. However, in 2012, CN and the IBEW negotiated new wording for the collective agreement regarding standby allowances. They included new and identical wording in both article 4 (Standby Allowance) and article 18 (Vacations). Articles 4.17 and 18.19 both read:

> Pre-Retirement Vacation
>
> 4.17 Notwithstanding any other provision(s) of the collective agreement, commencing with the last day at work, employees on pre-retirement vacation will not be paid standby allowance.
>
> Pre-Retirement Vacation
>
> 18.19 Notwithstanding any other provision(s) of the collective agreement, commencing with the last day at work, employees on pre-retirement vacation will not be paid standby allowance.

29. This negotiated wording leads to three initial observations.

30. First, the parties, by using their own "notwithstanding clause", have directed the arbitrator not to consider whether other provisions of the collective agreement might be inconsistent with the newly added principle for the standby allowance. The overall right to receive a standby allowance premium when on vacation remains in force, except in the specific situation to which this newly negotiated wording applies.

31. Second, these articles only apply to a specific time period commencing with an employee's "last day at work".

32. Third, these articles apply only to those employees who are on "pre-retirement vacation". The parties have not defined the expression "pre-retirement vacation". The arbitrator therefore must interpret those words in their ordinary and normal sense. In other words, what is their plain meaning? As the parties' both noted, an arbitrator cannot amend the wording they negotiated for their collective agreement (article 13.23).

FACTS

33. Mr. Bureaux started working for CN in 1979. His retirement started on August 1, 2015.

34. Mr. Bureaux' "last day at work" for CN was June 11, 2015. From June 12, 2015 to July 31, 2015, i.e. the period between his last day of work and his retirement date, he used all his remaining accumulated vacation. Some of that vacation had been earned during 2014 and the rest in 2015.

35. From April 14 to May 4, 2015, Mr. Bureaux took 3 of the 6 weeks vacation he had earned in 2014. In accordance with the collective agreement, CN also paid him a standby allowance during this 3-week vacation period (E-4; CN Brief; Paragraph 24).

36. Mr. Bureaux had originally claimed standby allowance on CN's system for the vacation period following his "last day at work" on June 11, 2015. CN cancelled this claim for standby allowance on the basis that articles 4.17 and 18.19 applied to this specific scenario.

THE PARTIES' ARGUMENTS

IBEW

37. The IBEW urged the arbitrator to find that a difference existed between "annual vacation" and "pre-retirement vacation", as the latter term is used in articles 4.17 and 18.19:

> 20. In the Union's view, the fact that the Grievor's annual vacation was taken after his last day of work is irrelevant in determining his entitlement to Stand-by allowance. What we urge the Arbitrator to find is that the annual leave in question was not "pre-retirement vacation", but annual vacation leave, which had vested in the Grievor.
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> 21. If the Arbitrator agrees with the Union in the present grievance that the Grievor was on annual vacation leave, and not pre-retirement leave, Article 18.2 requires that the compensation for this time include the Stand-by Allowance.

38. The IBEW reiterated its argument when describing how this case involved an employee's vested rights:

> 80. The Grievor in this case was not on pre-retirement vacation. He was on his annual vacation leave, a vested right for which the Collective Agreement stipulates he shall be compensated as though he was working – which includes a Stand-by Allowance.
>
> 81. It is settled law that a vacation leave entitlement accumulated under a Collective Agreement – including the level at which that leave is compensated – is a benefit which vests to each employee, and which the Company cannot unilaterally alter as it has done here.
>
> (Emphasis in original)

39. Similarly, the IBEW suggested that an employee's choice about the timing for taking his/her vacation should not lead to different compensation results:

> 99. The Company's interpretation is inconsistent and unreasonable, as it leads to a situation where an arbitrary deadline is being drawn based on when an employee chooses to take their annual vacation time (or, potentially, when the Company permits that employee to take their time), whether it be earlier in the year or immediately prior to their retirement date.
>
> 100. Employees in both scenarios have worked and earned their vacation allotment and compensation under Article 18. It is the employees' vested right.
>
> 101. It would be unreasonable to accept the Company's interpretation and treat these employees as different for Stand-by Allowance purposes based simply on when they utilized their annual vacation leave and when they choose to retire.

CN

40. CN argued the 2012 wording it had negotiated in articles 4.17 and 18.19 regarding vacation and standby allowances was clear and unequivocal:

> 34. That provision is unequivocal and clear, and overrides any other provision of the agreement. The parties' intentions are beyond a doubt, there is nothing ambiguous, or left to interpretation. This provision removes any possibility of

> standby allowance for an employee who has commenced pre-retirement vacation.
>
> 35. The removal of standby allowance from pre-retirement vacation was negotiated between the parties in 2012 and was incorporated into the revised collective agreement thereafter. The clause is clear and unambiguous.

41. CN also addressed the IBEW's argument distinguishing between annual vacation and pre-retirement vacation:

> 50. The complex and imaginative interpretation of the Union to the effect that pre-retirement vacation must be "split" into two distinct categories is not supported by the clear language of the agreement. Obviously, had the parties intended such a distinction, the would have clearly described such an extra-ordinary fracture in the wording of the collective agreement. The clear language makes it clear that there was no intention to split the pre-retirement vacation into different sub-categories as the union implores you should.

42. CN also noted that some employees had avoided the consequences of articles 4.17 and 18.19 by returning from vacation to work for a short period of time. This would change the "last day of work" so that a standby allowance would be owing for all vacation days they had taken prior to their new "last day of work" (E-4; CN Brief; Paragraph 57).

ANALYSIS AND DECISION

43. The arbitrator agrees with the parties that the wording in 4.17 and 18.19 is not ambiguous. While both parties also filed extrinsic evidence, the arbitrator has not considered it.

44. The issue for the arbitrator is whether the parties' agreed wording added in 2012 regarding standby pay applied to Mr. Bureaux' situation. The arbitrator concludes that it does.

Did the standby allowance "vest" for vacation earned in 2014 and available to Mr. Bureaux in 2015?

45. The IBEW argued that Mr. Bureaux' entitlement to both vacation and the standby allowance had vested for that vacation earned in 2014 and available for his use in 2015.

It also noted that CN's payroll system used different codes to identify the year in which an employee earned his/her vacation entitlement.

46. The arbitrator agrees partially with this proposition.

47. There is no issue that Mr. Bureaux earned vacation during 2014 and could use it in 2015. For a portion of that vacation which he used in April 2015, CN paid him a standby allowance.

48. Mr. Bureaux earned further vacation as the partial year of 2015 progressed. He used what remained of his accumulated vacation, earned in both 2014 and 2015, during the bridging period between his last day of work on June 11, 2015 and the start of his retirement on August 1, 2015.

49. All of this vacation was "vested" in the sense that CN was obliged to provide it to him, either in time off or in pay. The cases the IBEW submitted support the notion that only clear language can remove a right which has already vested under the collective agreement. CN provided Mr. Bureaux with all his remaining vested vacation entitlement during the period from June 12, 2015 to July 31, 2015.

50. But a different conclusion applies to the standby allowance. This allowance is now a conditional rather than vested right.

51. The right to vacation *and* to a standby allowance, which once went hand in hand, must be analyzed given the 2012 negotiations and the parties' addition of articles 4.17 and 18.19 to the collective agreement. Those articles make it clear that a standby allowance is not owing in a specific situation.

52. And this result remains true, as the parties have agreed, regardless of "any other provisions of the collective agreement". The focus accordingly must be on Mr. Bureaux' factual situation in 2015 rather than on a general analysis of employees' rights in articles 4 and 18 to receive a standby allowance on top of their vacation.

53. Perhaps at one time there might have been a debate whether articles 4.17 and 18.19 could apply to vacation and the standby allowance earned prior to the 2012

amendments. In other words, would both have vested if earned prior to the introduction of the new language? The arbitrator expresses no opinion on that scenario, other than to distinguish it from the facts in this case.

54. CN also satisfied the arbitrator that a payroll system which distinguishes between past vacation earned, and current year entitlements, simply reflects accounting principles which track these liabilities. The entitlement remains vacation, though the accrued amounts need to be allocated to the appropriate fiscal year.

Does "pre-retirement vacation" differ from annual vacation?

55. The IBEW argued that Mr. Bureaux' annual vacation "leave", earned in 2014, differs from "pre-retirement vacation". In its view, only the vacation earned in 2015 constitutes "pre-retirement vacation". The arbitrator does not dispute the IBEW's sincere belief that this is what they negotiated. But CN had an equally sincere belief that the amendment applied to all vacation between the last day of work and retirement, regardless of when it was earned.

56. Given the arbitrator's above comments about vesting, and absent clear wording to the contrary, the word "vacation" in articles 4.17 and 18.19 means vacation. The parties did not use, for example, a different word like "leave", which the IBEW used at times in its Brief.

57. The use of the adjective "pre-retirement" simply describes when the vacation is taken. It has not created a distinction based on when the employee earned the vacation. The parties could have agreed to limit the word "vacation" to that earned in the current fiscal year, but no wording exists to that effect. Instead, they just used the word "vacation".

58. If an employee takes vacation after his/her "last day at work", then, in the absence of the parties agreeing on a definition for the expression "pre-retirement vacation", any vacation the employee uses falls under that category.

Does the 2012 amendment in articles 4.17 and 18.19 apply to Mr. Bureaux' situation?

59. Mr. Bureaux used all his remaining vacation as a bridge between his last day of work and the start of his retirement. Mr. Bureaux did not return to work to cause a break in this bridge. The parties did not dispute that after his last day of work on June 11, 2015,

CN took back its vehicle, its tools and ended Mr. Bureaux' access card privileges to all CN property.

60. In this scenario, Mr. Bureaux' last day of work for the purposes of articles 4.17 and 18.19 was June 11, 2015. He did not return to work at any point thereafter.

61. Was he on "pre-retirement vacation" at this point and did he remain so until the date his pension started? The arbitrator concludes he was.

62. CN acknowledged that other employees had interrupted their vacation period prior to their retirement by returning to work briefly. CN paid those employees standby pay for all the vacation they took prior to their brief return to work. This was simply an application of the general rule that employees would receive a standby allowance on top of their vacation. CN had similarly paid Mr. Bureaux a standby allowance for the vacation he took in April 2015.

63. While not examined in detail, and the arbitrator is not making an express finding on this point, if an employee were paid out his remaining vacation, rather than using it as a bridge, then the standby allowance might be included in calculating the final amount. This could result from the fact that the employee did not use any remaining vacation time as a bridge between the last day of work and the start of retirement. Articles 4.17 and 18.19 seem to contemplate a situation where an employee takes an uninterrupted vacation from his/her last day of work to the date of retirement.

64. The IBEW urged the arbitrator to distinguish between vacation earned in 2014 and that earned in 2015. In its view, only the partial vacation earned in 2015 constitutes "pre-retirement vacation". The arbitrator's difficulty with this argument is that the collective agreement contains no such distinction. It could have been negotiated, but the wording in articles 4.17 and 18.19 does not distinguish between when the vacation was earned. Those articles simply refer to vacation.

65. Looked at another way, what was Mr. Bureaux' status between June 12 and July 31, 2015? Clearly, he was on vacation. The wording in 4.17 and 18.19 then clarifies that the phrase "pre-retirement" must be read in a manner consistent with the expression "last day at work". Thus, the period during which Mr. Bureaux was on vacation after his last day at work constituted "pre-retirement vacation".

66. The arbitrator is satisfied that if an employee uses vacation as an uninterrupted bridge between the last day worked and retirement, then that time constitutes "pre-retirement vacation". For vacation taken in such circumstances, when the employee has returned all CN property and no longer has access to CN premises, then the parties have agreed in articles 4.17 and 18.19 that no standby allowance will be paid.

DISPOSITION

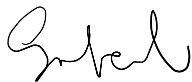
67. For the reasons expressed herein, the arbitrator concludes that the parties in 2012 negotiated an exception to the usual rule that employees receive a standby allowance on top of their vacation.

68. If employees opt to use vacation time as a bridge from the last day worked to the date of retirement, then, in that specific situation only, a standby allowance will not be added to their vacation entitlement.

69. Articles 4.17 and 18.19 clearly lead to this result, especially since the parties have agreed that those articles take precedence over any others in the collective agreement.

70. The arbitrator is accordingly obliged to dismiss the IBEW's grievance.

SIGNED at Ottawa this 18th day of September 2018



Graham J. Clarke
Arbitrator