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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 2016-00059 – NOON-DAY MEAL EXPENSE (ARTICLE 8.4)

Date: December 11, 2018
Arbitrator: Graham J. Clarke

Appearing for IBEW:

R. Church: Counsel
S. Martin: Sr. General Chairman, IBEW
J. Sommer: Reg Representative - Central
L. Couture: International Representative
G. Badesha: Reg. Representative – West
L. Hooper: General Chairman

Appearing for CN:

F. Daignault: Manager, Labour Relations
S. Grou: Sr. Manager, Labour Relations
S. Lauzon: Sr. Manager, S&C

Heard in Montreal on November 29, 2018.

AWARD

NATURE OF THE CASE

1. The IBEW alleged that CN violated the collective agreement when it refused to pay two employees' claims for a noon day meal expense under article 8.4 of the parties' 2013-2016 collective agreement. The employees' claims arose when they decided to return home each night rather than stay at the place of work and receive the "All inclusive expense allowance" (AIEA) under Appendix N.

2. CN argued that a 2012 amendment to Appendix N set out the employees' full compensation if they chose to return home and that that compensation, which contained a cap, was limited to payments for mileage under Article 15.

3. For the reasons which follow, the arbitrator concludes that the parties in 2012 negotiated an amendment which constituted a fully-contained regime. That regime allowed employees, should they so desire, to drive home each night. The negotiated language further expressly described employees' compensation entitlements, including a monetary cap.

4. No collective agreement violation occurred when CN limited the compensation it paid to the amounts owing under this agreed-to cap.

COLLECTIVE AGREEMENT PROVISIONS

5. At the hearing, the parties referred to various collective agreement provisions. The grievance itself refers specifically to article 8.4 (U-2; Tab 5):

> 8.4 Employees with no headquarters who, due to the requirement of the position held, are unable to return to their residence for their noonday lunch, shall be reimbursed for actual reasonable expenses incurred for the noonday lunch up to a maximum of $9.50, unless such is provided by the Company. This amount is subject to review if conditions warrant on a yearly basis.

> Expenses up to a maximum amount of $ 12.25 will be allowed for any additional meal which employees necessarily incur. This amount is subject to review if conditions warrant on a yearly basis.

6. The IBEW argued that since no lunch was provided to the employees in question, and those employees could not return home for lunch, that they could claim a noonday lunch allowance under article 8.4.

7. The IBEW also referred to article 15 which establishes a mileage allowance:

> 15. Mileage Allowance
>
> 15.1 Effective March 24, 2005, where an automobile allowance is paid, such allowance shall be 30 cents per kilometer.

8. The parties also advised that article 8.2, which previously applied to meals and lodging entitlements for employees who had been absent from their place of residence overnight, had been superseded by Appendix N. Article 8.2 reads:

> 8.2
>
> (a) Employees required to remain away from their headquarters or boarding cars overnight will be paid reasonable expenses for meals and lodging which they necessarily incur.
>
> (b) Employees with no headquarters who are required to be absent from their place of residence overnight will be paid reasonable expenses for meals and lodging which they necessarily incur.

9. Appendix N starts with the following introductory wording which explicitly refers to the suspension of article 8.2:

> **MEMORANDUM OF AGREEMENT** between Canadian National Railway Company and Council No. 11 of the International Brotherhood of Electrical Workers **concerning the suspension of Article 8.2 of Agreement 11.1.**
>
> (Emphasis added)

10. CN and the IBEW then agreed on employees' entitlements when absent overnight:

> IT IS AGREED that:
>
> Employees required to remain away from their headquarters or boarding cars overnight, or employees who have no headquarters and are required to be absent from their place of residence overnight, will be afforded one of the following:
>
> a) Company provided accommodation or,
>
> b) Reasonable expenses for meals and lodging which they necessarily incur or,
>
> c) All inclusive expense allowance

11. The parties advised that they amended Appendix N during the 2012 round of negotiations by adding a note under option (c) ("2012 Note"), which allowed employees to travel home at night rather than staying and receiving the "All inclusive expense allowance":

> **Note: Employees compensated under Item (c) above**, who travel back to their place of residence daily instead of availing themselves of the benefits of Item c), **will be compensated** in accordance with the mileage allowance (for actual kilometres travelled) as contemplated by Article 15 **up to a maximum of the daily all-inclusive allowance** as provided in Item 1.
>
> It is understood that employees who travel home must do so for the entire work cycle they are working.
>
> (Emphasis added)

12. CN traditionally had the right under Appendix N to determine which of options (a), (b), or (c) ("Options") would apply to employees:

> **The Company retains the right to determine which of the foregoing will apply** and, where applicable, will indicate on the monthly bulletins prescribed in Article 10 which of the above options will be applicable. **Once one of the options has been selected for a given situation, it will not be changed**

without prior advice to the appropriate System General Chairman, outlining the reasons for the change…

(Emphasis added)

13. While there was no evidence on this point, presumably CN had determined that Option (c) would apply at the material times thus giving rise to the driving home entitlement from the "2012 Note". Options (a) or (b) do not provide for any right to drive home.

14. Appendix N describes the modalities for Options (a), (b) or (c). For Options (a) or (b), it reads:

In the application of Option a) in instances where meals would not be provided by the Company, **and of Option b)**, expenses of up to the following amount will be deemed as reasonable expenses:

Year 2012: Breakfast $8.65; **Lunch $14.40**; Dinner $18.53; Total $41.57

(Emphasis added)

15. For Option (c), the parties negotiated expanded wording describing the conditions governing the AIEA:

Employees afforded the all inclusive expense allowance will be paid each working day an allowance subject to the following conditions:

1. Effective January 1, 2012: $109.67.

2. In instances of bona fide illness or job related injury, the all inclusive expense allowance will be maintained for up to 3 days.

3. Reimbursement of the all inclusive expense allowance will be made through the Direct Deposit System (D.D.S.) once per pay period by adding it to the employee's regular wages as a separate item.

4. **The payment of the all inclusive expense allowance will supersede any form of living, meals and/or transportation expenses or allowance, including weekend travel assistance which are provided by the Company**. Notwithstanding the preceeding (sic), effective January 1, 2008 a weekend travel assistance in the amount of 16 cents per kilometer is allowed to assist

> employees with weekend travel. As per Appendix R, the determination of the applicable means of transportation will rest with the appropriate Company Officers.
>
> (Emphasis added)

16. The employees involved had claimed a $14.40 lunch allowance (E-2; Tabs 13 and 14). They had also been reimbursed their mileage. The IBEW argued that the employees had made a mistake when they claimed the $14.40 under Appendix N and that Article 8.4 instead governed their lunch allowance entitlement. As is clear from Appendix N, the lunch amount of $14.40 is only available for Options (a) or (b). It is not available for Option (c).

17. CN argued that if employees decided to travel home, rather than stay and receive the AIEA, then the “2012 Note” provided for a mileage allowance. In its view, the parties had not agreed on any other entitlements for employees exercising this new right to return home each night.

18. The IBEW relied on Appendix N’s specific subparagraphs #1 to #4 which set conditions for the AIEA. This language had pre-existed the “2012 Note” and specified in Item #4 that the AIEA of $109.67 superseded any other entitlements “for living, meals and/or transportation expenses or allowance”.

19. As the arbitrator understood the argument, the IBEW argued that the fact that Item #4 applied only to the AIEA, and not to the “2012 Note”, meant employees remained eligible for other expense reimbursement and collective agreement allowances like the noonday lunch in article 8.4.

FACTS

20. As noted above, two employees drove back to their residence each night pursuant to the “2012 Note”. They also submitted claims for lunch in the amount of $14.40. Employees enter these codes themselves into CN’s payroll system.

21. CN later denied the lunch claims and argued that the employees were only entitled to mileage if they chose to return to their home at night instead of staying on site and receiving the AIEA of $109.67. The AIEA as its name implies was intended to cover

expenses like lodging and meals. That is why Item #4 states that the AIEA takes the place of any other “living, meals and/or transportation expenses or allowance(s)”.

22. The IBEW filed a grievance for the two employees and also a policy grievance. The parties disputed the scope of the latter policy grievance which was the only grievance before the arbitrator.

ANALYSIS AND DECISION

Evidence of bargaining history

23. Both parties argued that the collective agreement language was clear and unambiguous (U-1; Para 38; E-1; Para 41). Generally, this means that the parties’ arguments will focus on the language to which they agreed. Extrinsic evidence is not considered for clear and unambiguous language.

24. However, in recent cases between these parties, each has on occasion raised an “in the alternative” argument pursuant to which they then sought to lead evidence of bargaining history: see, for example, International Brotherhood of Electrical Workers System Council No. 11 v Canadian National Railway Company, 2018 CanLII 87236.

25. The specific challenge in the instant case arose from the fact that the IBEW, under an “In the alternative…” argument in its written brief, sought to refer to its 2012 bargaining notes. The IBEW had not previously advised CN of this fact. CN objected since it had no notice of this argument.

26. The parties’ collective agreement, which contains a highly efficient expedited arbitration regime inspired by that of the Canadian Railway Office of Arbitration, clearly contemplates that there will be no factual surprises at arbitration. The collective agreement presupposes that the parties, via the grievance procedure and a joint conference (Articles 13.8 and 13.14), will fully discuss the facts and the issues. The arbitrator then receives oral and written legal submissions from each side on the precise issues they have identified. Ideally, these issues have been set out in a Joint Statement of Issue (JSI), though Ex Parte Statements seem to have become more commonplace of late (Article 13.19).

27. The arbitrator previously mentioned in Canadian National Railway Company v International Brotherhood of Electrical Workers System Council No. 11, 2018 CanLII 52755 that the expedited hearing is not a fact finding process the way it would be for the far more expensive regular arbitrations that others use:

> 26. As the arbitrator mentioned in passing during the hearing about various recent cases, it is challenging when new facts first come to light at an expedited arbitration. Article 13.19 of the parties' collective agreement seems to assume that the parties have fully discussed all relevant facts, especially if a Joint Conference (Article 13.8) has been held.
>
> 27. Article 13.21 regarding the parties' right to present evidence seems to assume that any oral evidence will focus mainly on key contradictions. Otherwise, if the evidence presented raises new facts, then the parties might as well hold a traditional multi-day arbitration. Similarly, raising potentially new grounds for discipline can be problematic in any expedited arbitration process: CROA&DR 4628.

28. At the hearing, the arbitrator expressed to both parties his concern that collective bargaining might be undermined if every interpretation grievance started to examine bargaining history through the use of an "in the alternative" argument. This challenge becomes even more acute if the proposed reference to bargaining history first comes to light only at the expedited arbitration hearing.

29. This is not to say that in appropriate cases a party cannot argue that an article is ambiguous and that the arbitrator must therefore consider extrinsic evidence. But, in order to protect the integrity of the expedited hearing process, at least two pre-conditions would appear necessary.

30. First, the party intending to raise extrinsic evidence should alert the other. A failure to do so almost ensures that an adjournment will be granted which effectively undermines the parties' expedited arbitration regime. A new argument might also conceivably go beyond the proper issues as defined and limited by a JSI or Ex Parte: International Brotherhood of Electrical Workers System Council v Canadian National Railway Company, 2017 CanLII 86408.

31. Second, the use of extrinsic evidence contains an implicit condition that a party must first satisfy the arbitrator that a collective agreement ambiguity exists. It is not enough to assume that fact and then start leading extrinsic evidence about a provision both parties have also described as clear and unambiguous.

32. Without first satisfying that implicit condition, the hearing instead becomes an interpretation exercise of a mutually agreed clear and unambiguous provision, but with the use of extrinsic evidence. This is not how the competing interpretation principles for collective agreements and other contracts were designed to work.

33. The arbitrator does accept, of course, that in appropriate cases extrinsic evidence may be needed to demonstrate that an ambiguity exists: Seneca College v Ontario Public Employees Union, 2018 CanLII 96182 at paragraph 27.

34. The parties ultimately agreed to proceed with the arbitration hearing. The IBEW withdrew all its submissions and documentation relating to bargaining notes and discussions. All pages containing extrinsic evidence from U-1 and U-2 were removed from those volumes and returned to the IBEW.

35. CN agreed to continue the arbitration rather than ask for an adjournment so that it could search through its own bargaining notes. This allowed the arbitration to be completed within a few hours as everyone had originally contemplated.

36. The arbitrator has decided this case based solely on the parties' negotiated wording and has disregarded any comments about bargaining history.

Scope of the grievance

37. CN also objected to the IBEW's position at the hearing that the policy grievance applied to all employees in the bargaining unit. CN argued that the IBEW had expressly limited its grievance to S&C Installation employees working in the Great Lakes District.

38. The IBEW referred to its remedy language asking for relief for "any and all members so affected" in support of its position that the grievance covered everyone in the bargaining unit.

39. The arbitrator agrees with CN that the scope of this grievance is limited to S&C Installations employees in the Great Lakes District. The IBEW's grievances at various levels, as well as its Ex Parte, have contained this express limitation. For example, the IBEW's Ex Parte Statement starts with the following description of the dispute: "The alleged violation of Article 8.4 of Agreement 11.1 on behalf of the Great Lakes District S&C employees with no headquarters".

40. Similarly, in the IBEW's Step 3 policy grievance dated November 17, 2016, the second paragraph starts:

> This grievance pertains to all Great Lakes District S&C Installations employees being denied noon day meal expenses.

41. The later general remedial language which refers to "any and all members so affected" does not change the express scope of this policy grievance.

Entitlement to a lunch allowance

42. CN persuaded the arbitrator that the addition of the "2012 Note" under Option (c) in Appendix N exclusively covered the entitlements for those employees who decided to return home at night rather than receive the AIEA. If employees preferred being reimbursed for meals and lodging, then they could stay and receive the negotiated AIEA.

43. Appendix N makes it clear that CN chooses whether Option (a), (b) or (c) will apply to a situation and notes it in the monthly bulletin prescribed in Article 10. If CN chooses the AIEA Option, then employees, "instead of availing themselves of the benefits of item c)", can take advantage of the right to travel home each night.

44. The benefits of "Item c", i.e. the AIEA, include compensation for lodging and meals. The right to travel home requires employees to forego "the benefits of Item c)". The two options from which to choose, the AIEA or the right to travel home, are intrinsically linked. An employee gets either one or the other. The right to travel home does not bring with it the right to access other provisions in the collective agreement. The "2012 Note" in Appendix N instead describes a fully contained alternative regime with a cap on the cost.

45. There are several other reasons supporting this conclusion.

46. First, the “2012 Note” explicitly states “…employees…will be compensated…up to a maximum of the daily all-inclusive allowance”. The evidence demonstrated that in certain extreme situations, an employee with a long drive could exceed the AIEA maximum. The addition of a meal allowance from Article 8.4 would increase this amount even further.

47. When the parties have expressly negotiated a maximum entitlement, then this militates against an interpretation which suggests that compensation can exceed the maximum.

48. Second, the subparagraphs #1 to #4 in Appendix N, which all pre-existed the “2012 Note”, understandably focus solely on those who are “afforded the all inclusive expense allowance”. The IBEW did not convince the arbitrator that the parties, by not amending this pre-existing language applicable only to the AIEA, intended for those who drove home to remain eligible for all other expenses and allowances. The language in subparagraphs #1 to #4 did not need to be modified, since it dealt exclusively with the AIEA.

49. The parties had already agreed in the “2012 Note” on a maximum amount owing to those employees who choose to return home each night. In applying the *expressio unius est exclusio alterius* principle to the “2012 Note”, the fact the parties did not refer to any other allowances demonstrates that they agreed that mileage would constitute the sole entitlement up to a maximum. Had they agreed to include any other entitlements, they would have done so.

50. The arbitrator can appreciate that employees who drive home may feel that they, unlike their colleagues who take the AIEA, do not receive any compensation for meals they have to purchase when on the road. But that is a matter for negotiation. The arbitrator cannot amend the collective agreement and add this entitlement: Article 13.23.

51. Third, and this is related to the second reason, the parties for Option (c) explicitly agreed on a cap. Not surprisingly, that cap equals that set by the AIEA. The “2012 Note”

described the applicable cap for those who drove home. Subparagraph #4 described the cap for those who received the AIEA. The place in Appendix N where the parties described the cap does not impact the appropriate interpretation for this contractual language.

52. Appendix N initially contains no detail about the AIEA in Option (c). As a result, the parties added more extensive language in subparagraphs #1 to #4 and clarified that it superseded any "living, meals and/or transportation expenses or allowance". The parties did not need to repeat such detail for the "2012 Note", since it already contained the parties' agreement that employees who drove home had an entitlement solely to a mileage allowance which would be capped at the AIEA maximum.

53. Fourth, the IBEW argued that the employees in question did not receive the AIEA and therefore could claim allowances under other collective agreement provisions, like article 8.4 (U-1; Paragraphs 10 etc.). The interpretation challenge with this position is that IBEW members would have no right to drive home each night, but for the newly added wording in the "2012 Note". Under Appendix N's language, CN chooses which of the three Options (a), (b) or (c) employees would be afforded. Until the "2012 Note" was added, none of these options allowed employees to drive home.

54. It was only the negotiation of the "2012 Note" which permitted employees to avail themselves of the option to drive sometimes long distances to return home each night. If that were all it said, then the IBEW might well have a point. But the "2012 Note" goes further and specifies the maximum compensation employees would receive which, not surprisingly, mirrors the AIEA.

55. While not determinative, the employees who claimed a meal allowance also used the lunch rate set out in Appendix N for Options (a) and (b). They did not use the lower lunch rate set out in article 8.4, which is the specific article to which the IBEW's grievance referred. The employees seemed to understand they were operating within the specific regime created by Appendix N.

56. In sum, had the "2012 Note" simply said that employees may opt out of Appendix N and drive home each night, then their resulting entitlements might have remained a live question.

57. But the parties not only created this new driving option, but also negotiated the maximum cost to CN for employees who preferred to drive home. The parties could have agreed to other entitlements, but their wording did not include any. The proper interpretation therefore is that the only entitlement for those who choose to drive is to receive mileage, but with a maximum cap set at the same level as the AIEA payment under Option (c).

DISPOSITION

58. For the reasons expressed herein, the arbitrator must dismiss the IBEW's policy grievance.

Dated this 11th day of December 2018 in the City of Ottawa.

Graham J. Clarke
Arbitrator