AH670

IN THE MATTER OF AN ARBITRATION

BETWEEN

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

And

TORONTO TERMINALS RAILWAY COMPANY (TTR)

POLICY GRIEVANCE RELATING TO AN ALLEGED VIOLATION OF ARTICLES 5.1, 5.9, 7.3, 9.9(B) AND 9.26 OF AGREEMENT 11.6 FOR S&C CONSTRUCTION EMPLOYEES

Date: April 2, 2019
Arbitrator: Graham J. Clarke

Appearing for IBEW:

K. Stuebing: Counsel
S. Martin: Sr. General Chairman
S. Pedota: Reg. Representative - TTR
J. Easton: Signals Representative – TTR
L. Hooper: General Chairman

Appearing for TTR:

F. Daignault: Manager, Labour Relations, CN
V. Paquet: Manager, Labour Relations, CN
G. Huggins: Director of Operations, TTR
S. Friedrich: Manager, Employee Relations, TTR

Heard in Toronto on March 20, 2019.

CONTENTS

AWARD

NATURE OF THE CASE

1. On behalf of the S&C construction employees (SCCEs) it represents, the IBEW alleged that TTR had violated certain collective agreement provisions. These alleged violations arose from a January 10, 2018 2-year bulletin resetting conducted under article 9.12 of the collective agreement.

2. The IBEW argued principally that TTR had not met the negotiated conditions to apply a 5/2 work cycle (5 days on and 2 days off) to two of the four SCCE gangs.

3. The IBEW satisfied the arbitrator that TTR violated the collective agreement, including when it applied a 5/2 work cycle for the biennial article 9.12 bidding process. The evidence did not demonstrate that the negotiated preconditions had been met to use 5/2 work cycles for this important seniority exercise.

4. The parties are currently in collective bargaining and have an opportunity to clarify their rights and obligations under articles 5.1 and 9.12 in the next collective agreement.

5. As requested during the hearing, the arbitrator remains seized, but initially leaves the issue of remedy to the parties.

FACTS

6. The collective agreement establishes 3 different work cycles: 8/6 (8 10-hour days and 6 consecutive rest days); 4/3 (four 10-hour days and 3 consecutive rest days); and 5/2 (5 8-hour days with 2 consecutive rest days). All three scenarios result in 80 hours of work over a two-week period.

7. On January 10, 2018, TTR posted a 2-year bulletin for S&C positions, including for SCCEs. TTR assigned 2 gangs out of 4 (8 SCCEs) to a 5/2 work cycle. On a biennial basis, employees use their seniority to bid for permanent positions under article 9.12 of the collective agreement:

> 9.12 Notwithstanding anything contrary in this Agreement, effective January 1, 2006 and every two (2) years thereafter, **employees will have a choice of permanent positions in the same classification and in order of their seniority**. Such choice of positions is to be effective at the start of the first pay period following the selection of the positions. Such exercise of seniority will not result in overtime payments.
>
> (Emphasis added)

8. In order to understand the article 9.12 process, reference must be had to a July 2012 Memorandum of Settlement (MOS), which introduced the current Article 5, entitled "Hours of Work and Meal Period". Article 5, *infra*, established a preference for 8/6 or 4/3 work cycles for SCCEs, though, if TTR met certain specifically worded conditions, it could use a 5/2 work cycle.

9. The grievance disputes whether TTR could use a 5/2 work cycle for the 9.12 biennial bulletining process.

10. In May 2013, TTR's bulletins under article 9.12 had 4 gangs working 8 and 6 work cycles and an extra gang working a 5/2 work cycle (U-2; Tab 3). TTR and local IBEW representatives had discussed this extra gang, though there was a dispute at the hearing whether they negotiated any agreement.

11. In January 2016, a dispute occurred regarding the bulletining process. TTR cancelled the exercise after the IBEW raised certain concerns (U-2; Tab 4). Changes were discussed between TTR and mostly local IBEW representatives which led to two 5/2 work cycles and two 4/3 work cycles (U-1; Paragraphs 42-47; U-2; Tabs 6-7).

12. In late June 2017, however, the IBEW General Chairperson expressed his concerns about possible collective agreement violations, including the fact he had not received copies of the work cycle bulletins as required by article 9.9(b). He also referenced not being consulted pursuant to article 5.9 (U-2; Tab 8). The parties met to discuss these concerns, among other subjects (U-2; Tabs 10-11).

13. On December 29, 2017, TTR provided the IBEW with its proposed bulletins for 2018-2020 (U-2; Tab 12). Gangs 1 and 2 were bulletined for a 5/2 work cycle. Gangs 3 and 4 would have 8/6 work cycles with different start days.

14. The IBEW objected to the proposed bulletin (U-2; Tab 13). TTR continued with the bulletin as originally proposed (U-2; Tab 14) which led to the IBEW's grievance (U-2; Tab 15).

15. The parties' Step 1 and 2 grievance letters described the various issues in this case[1].

16. For example, the TTR referred to its past use of 5/2 work cycles (U-2; Tab 16):

> Dating back to 2014, the Company has had 5/2 work cycles. Until most recently those positions and their assignments have not been under grievance.

17. The IBEW had a different view on those 5/2 work cycles (U-2; Tab 17):

> Additionally, it must also be noted that TTR and System Council have had a relaxed relationship wherein the Union did not force strict adherence to such articles as 9.9 or 9.26 however this decreased Collective Agreement monitoring does not infer Union acceptance or acknowledgement of Agreement 11.6 violations. Furthermore, the Union has been working with the local representatives employed at TTR to improve their knowledge and ability to better understand and monitor compliancy with this Agreement.

18. TTR also commented on its application of article 5.1 and the reasons for it. For example, in its Step 1 response, the TTR noted how it may shift between work cycles over the course of a year (U-2; Tab 16):

[1] Some cases have examined the admissibility of written documents created for the steps in the grievance process: Pavaco Plastics Inc. (Hematite Manufacturing Division) v Workers United Canada Council Union Local 2508, 2018 CanLII 125955. However, the parties in railway expedited arbitrations routinely include such documents in the record, with appropriate redactions if they include settlement offers.

> Through the winter months when construction is slower the work blocks/requests that we receive from (client) are a Monday to Friday 8hrs a day and for operational reasons a work cycle of 4/3 and 8/6 do not meet the requirements as they are 10 hour shifts. During the summer months when construction is at a peak these 5/2 work cycles are often temporarily changed and reflect more of an 8/6 work cycle in accordance to article 5.9…

19. At the hearing, the TTR showed how it had changed the work cycles for gangs 1 and 2 during the summer (E-2; Tab 12).

20. The TTR noted the challenge with foreseeing its needs two years in advance (U-2; Tab 16):

> The Company is to bid positions permanently for two (2) years. Unfortunately, projects and any increase in construction are often not foreseeable two (2) years into the future and as a result the Company requires 5/2 work cycles to align with the work blocks that remain consistent which are the 8 hours Monday to Friday.

21. In its step 2 response (U-2; Tab 18), the TTR referred to "operational reasons" and added:

> In address to the Unions request for evidence to support our operational requirement Article 5.1 does not make mention of a requirement of the Company to provide evidence to support our operational reasons…In an effort to highlight our reasons as to why 4/3 work cycles aren't feasible at this moment due to operational requirements, we have attached a graph summarizing the hours worked within a month by day. We have provided information as far back as the beginning of 2017. The amount of hours worked are indicative of scheduled work required for operational reasons. These graphs also indicate the majority of our scheduled work happens on a Monday and Friday, assigning a gang to work 4/3 reduces manpower on either Mondays or Fridays. Therefore, currently the 4/3 work cycle is not conducive to scheduled work for operational reasons.

22. The TTR provided further information at the hearing indicating that its major construction needs were from Monday to Friday (E-2; Tabs 10-11).

23. The TTR referred to the definition of the word “preference” which is found in article 5.1 (U-2; Tab 18):

> As stated in our Step 1 response, the Company is reading and applying the written word “preference” as defined as “a greater liking for one alternative over another or others.” We do not agree that we are in violation based on the meaning of this word.

24. TTR addressed the IBEW’s argument that the General Chairman had not received copies of bulletins, despite a reference to this requirement in articles 9.9(b) and 9.26 (U-2; Tab 18):

> Before the bulletins were sent a summary was provided via email on December 29, 2017 to yourself Mr Martin System General Chairman, the bulletins were then emailed to Signals All group with a copy to Mr. Sam Pedota. The Company may have presumed as you received the summary in advance that would satisfy Article 9.9(b). As for Article 9.26 there were no bulletins sent out for Signal Coordinator positions outside of the two-year bulletin or to fill a vacancy, there was no additional position created.

25. The evidence demonstrates that the parties treated each other respectfully at all material times, though they had conflicting interpretations over the meaning of their negotiated language in the collective agreement.

ANALYSIS AND DECISION

Establishing the facts for an expedited arbitration

26. There are benefits to the expedited arbitration process the parties have negotiated in article 10 of their collective agreement. The hearing itself took less than a day. A regular arbitration would likely have taken several days had the parties led *viva voce* evidence.

27. The success of an expedited process is ultimately dependent on the parties’ ability to identify the underlying facts. The expedited hearing itself does not lend itself to proper fact finding, despite the parties’ right to call evidence (article 10.18).

28. Instead, the collective agreement presumes that the parties will agree on the facts of a case so that they can then concentrate at the hearing on the issues and legal argument which flow from those facts. Article 10.16 sets out this expectation:

> 10.16 **A Joint Statement of Issue containing the facts of the dispute and reference to the specific provision or provisions of the Collective Agreement allegedly violated, shall be jointly submitted to the Arbitrator in advance of the date of the hearing**. In the event the parties cannot agree upon such Joint Statement of Issue, each party shall submit a separate Statement of Issue to the Arbitrator in advance of the date of the hearing and shall at the same time give a copy of such statement to the other party.
>
> (Emphasis added)

29. Facts may be easier to identify in discipline cases because the parties have agreed under article 10.1 to hold an investigation. This investigative process, which the railway industry uses extensively, results in a transcript for use at the hearing:

> 10.1 An employee having six months or more seniority will not be disciplined or discharged until he has had a fair and impartial investigation. Investigations will be held as quickly as possible.

30. But the facts remain just as important for a grievance about the proper interpretation of the collective agreement. In this case, both parties put in evidence which may not have been raised previously with each other (E-2; Tabs 10-11; U-3). This probably reflects the reality of any expedited process but presents challenges, nonetheless.

31. As any experienced counsel knows, an agreed statement of facts is wonderful in theory, but difficult to achieve in practice. The arbitrator mentions this since some expedited hearings become challenging if the parties raise novel facts only at the hearing: *Canadian National Railway Company v International Brotherhood of Electrical Workers System Council No. 11*, 2018 CanLII 52755. For example, the parties disputed whether they had negotiated an agreement regarding work cycles in 2013.

32. Ultimately, as mentioned at the hearing, the arbitrator will decide this case as best possible based on the record the parties presented.

Preliminary objection: additional remedial requests

33. At the start of the hearing, the TTR raised a preliminary objection regarding the IBEW's alleged addition of new remedial requests. While the grievance itself had asked for compensation, the IBEW's ex parte statement had asked for a declaration and an order for compensation (E-1; Paragraphs 25-26).

34. The IBEW satisfied the arbitrator that its remedial requests fit within its general request for compensation which it made during the grievance procedure. An arbitrator's jurisdiction includes not only resolving the precise issue(s) in dispute, but also providing the appropriate remedies where required: *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*[2]. Arbitrators have the general power to issue declarations and must make orders, where appropriate, so that a party can enforce an arbitral award in court[3].

35. The parties' expedited arbitration process, while inspired by the model found at the Canadian Railway Office of Arbitration, is contained in article 10 of the collective agreement. A JSI or ex parte statement is crucial to the expedited process. Generally, new issues cannot be raised in a JSI or ex parte statement: CROA&DR 3488. The arbitrator noted the distinction between existing and novel issues in CROA&DR 4548[4]:

> 17. CN's ex parte did not attempt to add a new issue which would have caught TCRC by surprise. This differs from a situation where a party raises a novel issue in a late ex parte, or in its hearing brief. Novel issues first raised at a hearing could cause prejudice and lead to an arbitrator upholding an objection, depending on the circumstances.

36. TTR did not satisfy the arbitrator that a remedial request for a declaration and order in the circumstances of this case raised either new unforeseen issues or caused it prejudice.

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[2] 1975 CanLII 707.
[3] See section 66 of the Canada Labour Code.
[4] See also CROA&DR 4666 (French)

Burden of proof

37. TTR argued that the IBEW had the burden of proof to demonstrate a collective agreement violation. This is accurate. The burden of proof does not shift. The IBEW had the burden to demonstrate that TTR had failed to respect the wording of the collective agreement.

38. But there is a difference between the burden of proof and an "evidential burden". The IBEW cannot divine TTR's justification for acting as it did. TTR must provide that evidence. Neither does the burden of proof oblige the IBEW to present evidence from TTR managers, whether past or present. That evidence would come from TTR's evidential burden.

39. In *Peel Law Association v. Pieters*, 2013 ONCA 396 (Peel) (CanLII), the Ontario Court of Appeal examined the difference between the burden of proof, which remains constant, and the shifting of the evidential burden:

> [71] Sopinka J. explained the difference between the burden of proof and the evidential burden in Snell v. Farrell, 1990 CanLII 70 (SCC), [1990] 2 S.C.R. 311, a medical malpractice case. Medical malpractice cases are an apt comparison to discrimination cases because as Sopinka observed at p. 322, "The physician is usually in a better position to know the cause of an injury than the patient". At pp. 328-329 he said that in medical malpractice cases because "the facts lie particularly within the knowledge of the defendant…very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary". He recognized that "[t]his has been expressed in terms of shifting the burden of proof" and went on to explain why that is not correct. At pp. 329-330 he said:
>
> …**It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden. In my opinion, this is not a true burden of proof, and use of an additional label to describe what is an ordinary step in the fact-finding process is unwarranted.** [Citations omitted].
>
> (Emphasis added)

40. In an arbitration, the evidential burden requires the TTR to explain matters which are uniquely within its knowledge. No reversal of the burden of proof occurs when a party has to justify its actions, as discussed further in *Peel*, *supra*:

> [75] Turning to this case, the Divisional Court's reasoning that the Vice-Chair reversed the burden of proof contains two errors.
>
> [76] First, the Divisional Court lost sight of the distinction between the burden of proof and the evidential burden. The Vice-Chair having found a prima facie case existed properly looked to the respondent to provide an explanation.
>
> [77] Second, the Divisional Court went on to state that "by improperly reversing the burden of proof, the Tribunal placed [the librarian] in the difficult position of trying to prove a negative, namely, that her conduct in the performance of her routine duties was not motivated by race or colour." **The shifting of the evidential burden does not put the respondents in the position of having to prove a negative. Rather, it puts them in the position of having to call affirmative evidence on matters they know much better than anyone else – namely, why they made a particular decision or took a particular action.**
>
> [78] I conclude that the Divisional Court erred in law in finding the Vice-Chair reversed the burden of proof.
>
> (Emphasis added)

41. TTR, while never having the burden of proof, still had to explain what facts supported its decision to rely on an exception in article 5.1 of the collective agreement regarding SCCE work cycles.

Estoppel

42. The TTR argued that past practice and estoppel prevented the IBEW from relying on the strict wording of the collective agreement (E-1; Paragraphs 105 and 108). The arbitrator dismisses this argument.

43. CROA&DR 4606 examined the issues of past practice and estoppel:

> 24. Nothing similar exists in the instant case. At no time could the arbitrator find a meeting of the minds to the effect that both CN and the USW agreed that Appendix VIII was a posting provision. It is one thing to demonstrate several

> instances where something was done which may have been inconsistent with the collective agreement's wording. It is quite another to demonstrate that the other party knew of it, and agreed with it through its words or conduct.
>
> 25. While this point was not pleaded, a past practice can also be raised to support an estoppel argument. In Canadian National Railway Co. v. Beatty, 1981 CanLII 2953, a case which contested an arbitrator's application of the estoppel doctrine, the Ontario Divisional Court cited one of the classic descriptions of estoppel:
>
> [17] The arbitrator later sets out the principle as enunciated by Denning L.J. in Combe v. Combe, [1951] 1 All E.R. 767 at p. 770. That exposition of the doctrine was as follows:
>
> The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.
>
> 26. In the instant case, there was no evidence that the USW acquiesced and therefore gave its approval that "Flagman" postings could take place, despite that classification not existing in the collective agreement. A party cannot create an estoppel by unilateral conduct. **There needs to be some promise or assurance which would prevent the USW from arguing that the collective agreement must be applied as it reads. The handful of postings over the year does not create this type of promise or assurance**.
>
> (Emphasis added)

44. The IBEW, though its local representatives, may have shown flexibility to allow TTR to use 5/2 shifts in 2013 and during a later challenging period in 2016 (U-2; Tab 6). But, unlike a Letter of Understanding which is designed to modify the collective agreement, this informality did not change the parties' negotiated wording in the collective agreement. It did not constitute a promise or assurance from the IBEW that it would not insist on its negotiated collective agreement rights.

45. Moreover, the IBEW's General Chairman had limited involvement in these discussions and apparently did not receive copies of the 2016 bulletins under article 9.9(b) (U-1; Paragraph 42). The negotiated protection requiring copies of bulletins for the General Chairman ensures full time union executive members remain aware of events. This reflects the reality that they must oversee multiple collective agreements with different employers.

46. The IBEW later objected to the TTR's use of 5/2 work cycles for SCCEs. For example, in July 2017, the IBEW raised concerns regarding article 5.1, among others (U-2; Tab 8). This predated the January 10, 2018 bulletin resetting. The IBEW later filed the instant grievance following the issuing of the January 10, 2018 bulletin.

47. TTR failed to persuade the arbitrator that either a past practice or an estoppel prevented the IBEW from contesting TTR's interpretation of the collective agreement regarding when 5/2 work cycles could be used.

Did TTR violate article 5.1 when it bulletined the 5/2 work cycles under article 9.12?

48. As noted above, TTR assigned 2 gangs out of 4 (8 SCCEs) to a 5/2 work cycle in the January 10, 2018 2-year bulletin resetting.

49. Article 9.12 provides IBEW members with one chance every two years to exercise their seniority to choose their preferred permanent positions. The negotiated language of article 9.12 bears repeating:

> 9.12 Notwithstanding anything contrary in this Agreement, effective January 1, 2006 and every two (2) years thereafter, **employees will have a choice of permanent positions in the same classification and in order of their seniority**. Such choice of positions is to be effective at the start of the first pay period following the selection of the positions. Such exercise of seniority will not result in overtime payments.
>
> (Emphasis added)

50. For an informed exercise of seniority, the bulletined work cycles must conform to the collective agreement, unless the parties agree otherwise. The work cycles offered

under article 9.12 address the upcoming two-year period. This does not mean, however, given the language of article 5.1, that they are then cast in stone for the next two years.

51. Article 5.1 provides the key negotiated language impacting SCCEs' work cycles[5]. That article, while not providing a guarantee of hours, sets out how employees, including SCCEs, will work 80 hours over a 14-day period:

> 5.1 **The work week** for employees covered by this agreement, **unless otherwise excepted herein, shall be designated by the Company as follows**:
>
> a) forty (40) hours consisting of five (5) days of eight (8) hour shifts, with two (2) consecutive rest days in each seven (7); or
>
> b) forty (40) hours consisting of four (4) days of ten (10) hour shifts, with three (3) consecutive rest days in each seven (7); or
>
> c) eighty (80) hours consisting of eight (8) days of ten (10) hour shifts, with six (6) consecutive rest days in each fourteen (14).
>
> The 8/6 cycle **will preferably** start on a Monday, Tuesday or Wednesday and the 4/3 cycle **will preferably** start on a Monday or Tuesday and **the General Chairman and/or his designate will be consulted prior to any changes**.
>
> **Employees working in S&C Construction shall work a 4/3, or 8/6 work cycle in preference to a 5/2 cycle, unless:**
>
> **i) Required to align with other scheduled work and allotted track blocks for operations reasons; or**
>
> **ii) For S&C training purposes for a duration of 5 days**
>
> Employees working in S&C Maintenance shall work a 5/2 or 4/3 work cycle.
>
> **When the work cycle of an employee changes**, the employee will not suffer lost wages through the course of **fulfilling the requirements of eighty (80) regular hours in the pay period.**
>
> This article shall not be construed to create a guarantee of any number of hours or days of work not provided for elsewhere in this agreement.
>
> (Emphasis added)

[5] It is important to distinguish SCCEs from S&C maintenance employees to whom article 5.1 also applies. The parties clearly agreed on the mandatory work cycles for maintenance employees.

52. The highlighted portions of article 5.1 give rise to various observations:

> 1. TTR designates employees' work week "unless otherwise excepted herein";
>
> 2. Article 5.1 governs both SCCEs as well as S&C maintenance employees;
>
> 3. The parties chose the expression "will preferably" for the start day of 8/6 and 4/3 work cycles. They also agreed that "the General Chairman and/or his designate will be consulted prior to any changes";
>
> 4. S&C maintenance employees "shall work a 5/2 or 4/3 work cycle";
>
> 5. The parties negotiated significantly different language for SCCEs who "shall work" a 4/3 or 8/6 work cycle "in preference to" a 5/2 cycle;
>
> 6. The parties did not repeat the earlier terminology "will preferably" when referring to SCCEs' work cycles. They instead established a clear preference by using the terminology "in preference to" and the word "unless";
>
> 7. The word "unless" leads to two alternative conditions for overcoming this negotiated preference which would allow SCCEs to work a 5/2 work cycle;
>
> 8. As is common with "Hours of Work" provisions, the listed hours do not constitute a guarantee. Similarly, as TTR noted at the hearing, work cycles can change as confirmed by the wording "When the work cycle of an employee changes…";
>
> 9. The evidence to overcome the "in preference to" condition must show that the change was required to align with other *scheduled* work and allotted track blocks for operational reasons[6].

53. The parties did not address to any extent the second condition in article 5.1 i.e. "For S&C training purposes for a duration of 5 days". The precise wording used in this condition may allow for 5 days of training and then a 5/2 work cycle to add up to the anticipated 80 hours of work over a 2-week period. Whatever the parties' intention, it would be hard for that specific condition to justify the bulletining of a 5/2 work cycle for a two-year period under article 9.12. In any event, TTR never relied on this second condition in support of its bulletining during its oral discussions and written correspondence with the IBEW.

[6] The wording may create two separate conditions due to the word "and" or just one condition with several components.

54. The parties also referred to article 5.9 during their submissions:

> 5.9 **Notwithstanding the provisions of Article 5.1, the starting time and rest days for employees in S&C Construction crews, may be established or changed to meet the requirements of the service.** When such changes are to be made, as much advance notice as possible, but not less than seventy-two (72) hours, shall be given to the S&C construction crew affected and, where practicable, the notice will be posted promptly in a place accessible to such employees. **When such changes are made, crews will be advised of the duration of the change, which will not be longer than one month but may be extended due to operational requirements**. **The General Chairman and/or his designate will be consulted prior to effecting these changes**.
>
> (Emphasis added)

55. The arbitrator can deal with article 5.9's application to the 9.12 process summarily.

56. TTR suggested that article 5.9 allowed it to change work cycles (E-1; Paragraph 56). The IBEW disagreed and argued that the article addresses "starting time and rest days" rather than work cycles.

57. As mentioned, article 5.1 work cycles are not cast in stone. That article, which contains wording protecting employees if their work cycle changes, already foresees that work cycles may change as has happened in the past (E-2; Tab 12). Article 5.9 does not address the changing of work cycles[7]. Rather, it allows TTR to change the starting time and rest days for SCCEs who are already working on a specific work cycle.

58. Article 5.9 also contemplates a temporary modification given the phrase "which will not be longer that one month..."[8].

59. Accordingly, the wording of article 5.1, rather than article 5.9, governs the resolution of this case.

[7] The parties could have easily used the expression "work cycle" rather than "starting time and rest days" had this been their intention.
[8] Article 5.9 also notes that the time may be extended "…due to operational requirements".

60. The IBEW satisfied the arbitrator that the SCCEs, for the purposes of the 2-year bulletin under article 9.12, had an initial entitlement to 4/3 or 8/6 work cycles in preference to a 5/2 work cycle. However, this entitlement was not absolute. TTR could assign gangs to a 5/2 work cycle but only if it demonstrated that it met one of the two negotiated conditions in article 5.1.

61. TTR failed to meet its evidential burden, *supra*, that the facts entitled it to bulletin a 5/2 work cycle for a two-year period. There are several reasons for this conclusion.

62. First, the TTR acknowledged that it could not foresee "projects and any increase in construction" for two years into the future (U-2; Tab 16). For article 9.12 purposes, this appears sufficient to deal with the bulletining obligation in this case. That lack of foreseeability prevents TTR from meeting the condition in article 5.1 dealing with "scheduled work".

63. Second, the parties negotiated specific language when it came to 5/2 work cycles for SCCEs. They could have agreed on more absolute language like they did for S&C maintenance employees who "shall work a 5/2 or 4/3 work cycle". The arbitrator agrees with TTR that the proper interpretation of article 5.1 is one which applies the negotiated language in its normal or ordinary sense. The TTR further noted that the language of article 5.1 is clear and unambiguous (E-1; Paragraph 38).

64. Interpreting the parties' negotiated language in its normal and ordinary sense establishes a clear preference for 8/6 and 4/3 work cycles, unless the TTR demonstrates that one of the conditions applies.

65. Third, the exception justifying a 5/2 work cycle does not simply say "for operational requirements[9]". This specific terminology exists elsewhere in the collective agreement (see articles 5.9 and 7.3) and in other decisions put before the arbitrator: (AH646; E-2; Tab 13; Pages 45-46). Instead, the parties added further conditions in article 5.1.

[9] Article 5.1 uses "operational reasons" which is similar, if not identical, to "operational requirements".

66. This leads to the need for evidence about these further conditions. For example, what was the “scheduled work” for which alignment was needed? What allotted track blocks were in issue?

67. Article 5.1 provides flexibility to TTR since 8/6 and 4/3 cycles can “preferably” start on different days of the week which allows for planning of when best to use these different cycles to meet general work requirements. Exceptionally, such as when there is S&C training for a duration of 5 days, a 5/2 work cycle could be used. In other words, the parties agreed that the rule is to use 4/3 or 8/6 cycles, but 5/2 cycles can be used provided TTR meets one of the conditions to which it agreed.

68. For the purposes of the article 9.12 bulleting process, TTR had to demonstrate that it met one of the conditions throughout the 2-year period. The TTR seemingly admitted that it was not possible to foresee its needs for 2 years.

69. The real issue in this case seems to arise not from the number of days worked consecutively in each work cycle, but rather from the number of hours per day. Only the 5/2 work cycle provides for 8 hours a day; the 4/3 and 8/6 work cycles require 10-hour work days.

70. Without TTR meeting its evidential burden to show what facts allowed it to take advantage of the condition(s) in article 5.1, the IBEW must succeed on its argument that article 5.1 was violated. Article 5.1 allows for ad hoc departures from 8/6 and 4/3 work cycles. Moreover, the IBEW has shown flexibility when departures may be required.

71. But the bulletining of 5/2 work cycles during a crucial seniority exercise, as if that work cycle were no different from 8/6 or 4/3 work cycles, runs afoul of the parties’ negotiated language in article 5.1.

72. The TTR referred to AH601 and argued that the IBEW was trying to run the business, whereas that was management’s responsibility. What is really in issue is the fact that the parties negotiated a collective agreement in order to identify their rights and obligations. During the give and take of collective bargaining, the IBEW obtained a work cycle preference for SCCEs. That preference required 8/6 or 4/3 work cycles.

73. Exceptionally, SCCEs could work 5/2 work cycles, but subject to the TTR meeting one of the conditions found in article 5.1. Those conditions could have been, but were not, made subject solely to “operational reasons” or “operational requirements”. The parties instead added more specific language to which an arbitrator must give effect or risk amending the collective agreement contrary to article 10.20.

74. The current work cycle arrangement may not be meeting both parties’ needs. This then becomes a matter for collective bargaining which, fortuitously, is now taking place.

Did TTR violate article 7.3 regarding rest days?

75. The IBEW argued that working an improperly imposed 5/2 work cycle, rather than an 8/6 or 4/3 work cycle, meant employees might have worked on days which would otherwise have been rest days (article 7.3). The TTR countered that article 7.3 can only apply to those working on a 5/2 work cycle, so no compensation would be required.

76. If the parties cannot resolve this issue which relates more to remedy, then it can be, with appropriate submissions, remitted to the arbitrator.

Did TTR violate article 9.9(b) and/or 9.26 by failing to provide the IBEW’s General Chairman and/or Delegate with copies of the bulletins?

77. These two issues arise from the events of January 2018.

78. The IBEW satisfied the arbitrator that TTR violated article 9.9(b) when it failed to provide the IBEW’s General Chairman, Steve Martin, with copies of the bulletins. Conversely, TTR satisfied the arbitrator that no violation of article 9.26 occurred since that article applied to a different situation involving the creation of new positions.

79. The relevant portions of these articles read:

> 9.9(b) Bulletins of S&C construction crews will show crew number and general duties, headquarters, classification, hours of duty, qualifications required whether positions are temporary or permanent, and if temporary the anticipated

> duration. Appointments will be made by the officer issuing the bulletin before the expiration of twenty-eight (28) calendar days from the date of the bulletin. **Copies of the bulletins will be furnished to the General Chairman and/or Designate**.
>
> 9.26 Special Rules for Signal Coordinators
>
> **Positions in the classification of Signal Coordinator may be created** to meet operational requirements as determined by the Company. **Signal Coordinator applicants must have the ability to supervise**, instruct, lead, guide and direct other Signal employees.
>
> (a) A regular bulletin will be issuing advertising the position of Signal Coordinator. **Employees who submit applications for such positions will be required to state their qualifications.** A copy of the bulletin will be supplied to the Local Representative and the System General Chairman and/or designate.
>
> …
>
> (Emphasis added)

80. The parties agreed in article 9.9(b) that the General Chairman and/or Designate would receive copies of the bulletins. The evidence shows that Mr. Martin did not receive the actual January 2018 bulletins as contemplated by this article. Similarly, while other local IBEW representatives assist with collective agreement administration, this does not automatically make them the General Chairman's Designate for article 9.9(b) purposes (E-1; Paragraph 97).

81. Neither does an email summary of the information contained in the bulletins or the fact that Mr. Martin could have found the bulletins relieve TTR of its article 9.9(b) obligations (E-1; Paragraphs 92-93).

82. TTR did not respect the intent of article 9.9(b) when it failed to provide Mr. Martin with copies of the actual bulletins.

83. The appropriate remedy is a declaration.

84. TTR satisfied the arbitrator that article 9.26 deals with the creation of a position as Signal Coordinator. Since no new Signal Coordinator positions were created at the

material times, TTR had no obligation to send an article 9.26 bulletin to Mr. Martin under the wording of this specific article.

DISPOSITION

85. The arbitrator declares that TTR violated article 5.1 of the collective agreement by imposing a 5/2 work cycle for the article 9.12 bulletining process. TTR did not demonstrate that it had met the negotiated conditions for doing so. This is not a reversal of the burden of proof. Rather, it merely notes that the TTR's evidence did not explain why it could invoke one of the conditions in article 5.1 for the 9.12 bulleting process.

86. The arbitrator further declares that TTR failed to respect the requirement in article 9.9(b) when it failed to provide copies of the January 2018 bulletins to the IBEW's General Chairman.

87. The parties limited the hearing to the issue of liability. As noted above, the intent of all three work cycles is for employees to work 80 hours over a two-week period. Should the parties be unable to resolve the remaining issues themselves, then they can conduct the necessary research of past arbitral jurisprudence about, *inter alia*, remedies for situations where an employer violated an hours of service provision like article 5.1, but the employees still worked their regular 80 hours for each two-week period.

88. The arbitrator remains seized.

Signed at Ottawa this 2nd day of April 2019.

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Graham J. Clarke
Arbitrator