AWARD

In the Matter of an Arbitration **AH Case No. 698**

Between

Canadian National Railway Company (the "Company")

And

Canadian Signal and Communications System Council No. 11 of the International Brotherhood of Electrical Workers (the "Union")

Re: Violation of Article 18.2 of Agreement 11.1

Sole Arbitrator: Roger Gunn

Heard in Edmonton on January 22, 2020

Appearing for the Company: Francois Daignault, Manager Labour Relations

Susan Blackmore, Sr. Manager Labour Relations

Appearing for the Union: Raymond Seelen, Counsel

Steven Martin, Senior General Chairman

Lee Hooper, General Chairman

Gurpal Badesha, CN West Regional Representative

Luke Couture, International Representative

Date: February 3, 2020

Background

[1] On September 28, 2017, the Union advanced a Policy Grievance on behalf of all Signals and Communications employees covered by Agreement 11.1 alleging the Company's failure to abide by the language of Article 18.2 of the collective agreement pertaining to the allotment of vacation.

[2] Further to a request by the International Brotherhood of Electrical Workers, System Council No. 11 for the appointment of an arbitrator, Roger Gunn was appointed by the Federal Mediation and Conciliation Service on October 8, 2019. A hearing was held on January 22, 2020 in Edmonton.

[3] The parties agreed to follow the Canadian Railway Office of Arbitration & Dispute Resolution (CROA&DR) rules for this arbitration. Both parties spoke to their written briefs at the hearing.

Preliminary Objection: Timeliness of the Grievance

CN Brief and Arguments

[4] The Company maintained the grievance was not docketed and scheduled for hearing before an arbitrator within two years from the date of the filing of the Step 1 grievance, and as such, is considered dropped by the Union in accordance with Article 13.20 of Agreement 11.1.

[5] Article 13.20 of the Agreement reads:

> Within forty-five (45) calendar days of date of receipt of a request for arbitration the parties shall endeavour to agree on the name of the arbitrator, it being understood that preference will be given to the arbitrator(s) of the Canadian Railway Office of Arbitration and Disputes Resolution. If an agreement is not reached, the party requesting arbitration may then request the Minister of Labour to appoint an arbitrator and advise the other party accordingly. Such request to the Minister of Labour must be made no later than fourteen (14) calendar days following the 45-day period referred to in this paragraph. Grievances not docketed and scheduled for hearing before an Arbitrator, by either party, within two (2) years from the date of the filing of the Step 1 grievance, will be considered dropped, on a "without prejudice or precedent" basis, and both parties shall close their respective files. The parties may, by mutual agreement in writing, waive these time limits.

[6] Initially, the Company submitted that the matter was not arbitrable as the Union had not complied with the timelines in Steps 1 and 2 of the grievance procedure. However, on April 10,

2018, at a semi-annual meeting of the parties, the Company stated they had waived the time limits for Steps 1 and 2, so their preliminary objection on timeliness referred to a violation of Article 13.20 exclusively.

[7] The Company explained the filing of a grievance at Step 1 starts the two year clock ticking. It was on September 28, 2017 that the Union advanced a Policy Grievance at Step 1 of the grievance procedure. Thus, the Union had until September 27, 2019 to both docket and schedule the file for hearing at arbitration. According to the Company, the file was docketed and scheduled on November 21, 2019 by Arbitrator Roger Gunn, which was twenty-four days after the mandatory time had elapsed.

[8] The Company's brief outlined the emails sent in April 2018 from the Company to the Union seeking clarification of the nature of the grievance related to Article 18.2. And on April 30 and May 23, 2018 the Company emailed the Union asking to discuss possible dates for the arbitration. Almost a year later, on April 27, 2019, the Union (Lee Hooper) emailed the Company (Sylvie Grou) suggesting names of arbitrators. Other correspondence was exchanged between the parties concerning this grievance in May, June, July and August, 2019 including an email from Ms. Grou to the Union on May 9, 2019 stating in part, "Considering that almost a year has passed, we will reserve for now on the issue of arbitrability of the dispute based on time limits."

[9] On August 27, 2019 the Union wrote to the Minister of Employment, Workforce Development and Labour, requesting she appoint an arbitrator to hear the dispute. On September 6, 2019 Ms. Grou emailed Mr. Hooper of the Union and stated in part, "So be advised once again that we will have preliminary matters that we intend to raise with regards to this matter."

[10] Other key dates in the Company's brief were, October 10, 2019, the date Arbitrator Gunn contacted the parties to arrange dates for the hearing. On November 5, 2019 the Company informed the arbitrator that it would be raising a preliminary objection on the arbitrability as per Article 13.20. November 18, 2019 was the date the arbitrator confirmed January 21, 2020 as the hearing date. It was subsequently changed to January 22, 2020 on November 21, 2019.

[11] The Company argued the Union made no effort to indicate to the Minister that the matter was urgent, and it also failed to request an extension of the timelines from the Company.

[12] The Company referenced Section 60 1.1 of the *Canada Labour Code* which states as follows,

> 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.

The Company argued there were no extraordinary circumstances in this case to warrant an extension.

[13] The Company referenced a number of authorities including *Becker Milk Company Ltd. and Teamsters Union, Local 647* (1978), 19 L.A.C. (2nd) (Burkett), *Corporation of the City of Brantford and Canadian Union of Public Employees, Local 181* (1983), 9 L.A.C. (3rd) 289 (Samuels) to argue it is incumbent on the offending party to demonstrate there are reasonable grounds for an extension of the time limits and have not done so.

[14] The Company looked to CROA 3493 and 3468 where Arbitrator Picher concluded the Union had not demonstrated reasonable grounds for an extension of the time limits. The Company argued the parties negotiated a consequence for the failure to docket and schedule grievances to arbitration, which the Union is attempting to undo through this arbitration.

[15] The Company submitted that granting the Union relief will cause the Company prejudice and that the Union is trying to change the clear and unequivocal language of the agreement, which is prohibited under Article 13.25

IBEW Brief and Arguments

[16] The Union maintained they have fulfilled the obligations of Article 13 of Agreement 11.1 and that the matter should be heard on its merits, and the arbitrator should dismiss the Company's preliminary objection of timeliness.

[17] The Union argued the subject of the grievance, related to Article 18.2, was a continuous grievance.

[18] The Union stated the Company's Grievance Tracking System was partially to blame for some of the timeliness issues at Step Two. The Union stated they never received a decision from the Company with respect to this step.

[19] The Union stated the parties met on March 21 and 23, 2018 to discuss the grievance. The Union provided Notice to Arbitrate to the Company on April 1, 2018. On April 11, 2018 the parties held a joint conference meeting where the grievance was discussed. On May 23, 2018 the Company's representative Mr. Basil Laidlaw, emailed the Union's representative, Mr. Lee Hooper to discuss potential arbitration dates.

[20] The Union contended the grievance did not progress between the end of May and November 2018 because Mr. Laidlaw's replacement, Ms. Shelly Smith, did not respond to her emails. The parties met again on December 10, 2018 to discuss the grievance and again on February 19, 2019 with the assistance of the Federal Mediation and Conciliation Service. The Company disputed that the meeting with FMCS was about the grievance.

[21] On May 9, 2019 Ms. Sylvie Grou, the Company's Director of Labour Relations informed Mr. Hooper that the Company reserved its right on the arbitrability of the grievance with respect to time limits. Mr. Hooper sent an email to Ms. Grou on June 19, 2019 suggesting the name of an arbitrator and a follow-up email on July 9, 2019. On August 27, 2019 the Union wrote to the Minister requesting the appointment of an arbitrator. On November 21, 2019 the parties agreed to a hearing date of January 22, 2020.

[22] The Union argued the employer was estopped from relying on a timeliness argument as it was not raised with the Union prior to an attempt to draft a joint statement of issue. Therefore, the Union argued, the Company had waived its recourse to the strict time limits of the Collective Agreement.

[23] The Union argued the grievance is not untimely and that it is, by its nature, a continuing dispute and therefore plainly arbitrable under the basic tenets of labour relations between the parties. The Union further submitted the Company's conduct constituted a waiver of their right to strict adherence of the timelines of the Collective Agreement due to their own failure to adhere to the process as outlined in the Collective Agreement.

[24] In the alternative the Union argued the arbitrator should exercise his discretion to extend the timelines under Section 60 (1.1) of the *Canada Labour Code*.

[25] November 5, 2019 was the first time the Company raised the Article 13.20 argument, stated the Union. The Union also argued the Company contributed to the delay in the scheduling of the arbitration and used CROA Case No. 4696 as an example of an arbitrator ruling there were reasonable grounds for an extension of the time limits.

[26] The Union pointed to the case of *Grain Workers Union Local 333 ILWU and Prince Rupert Grain Ltd.* 2016 CanLII 77599 (CALA) which stated, "It was reasonable and consistent with the practice of the union and employer that the time line in the grievance process was extended to allow ongoing local settlement discussions." Similarly, under the management of Basil Laidlaw, the Union argued, the parties had an understanding that a grievance had not been abandoned so long as there were ongoing discussions.

[27] The Union argued there is no evidence the Company would be prejudiced by the arbitration of this matter and requested the arbitrator apply a balancing of the equities approach to evaluating the prejudice that would be suffered by each party should the Company's objection be upheld or dismissed. Denying access to a hearing on the merits far outweighs any prejudice asserted by the Company, the Union argued.

Analysis and Decision

[28] The Company has raised the preliminary objection that policy grievance, Union file 2049-021 (Company reference No. CN-IBEW-2017-00039), alleging a violation of Article 18.2, was

not docketed and scheduled for a hearing before an arbitrator within two years from the date of filing at Step 1. Therefore, the Company considers the grievance dropped by the Union and not arbitrable.

[29] The parties agreed the grievance was filed at Step 1 on September 28, 2017. Thus, according to Article 13.20 the parties had until September 27, 2019 to docket and schedule the grievance for a hearing at arbitration. The Company maintained the grievance was scheduled and docketed on November 21, 2019, the date by which arbitrator Gunn was appointed and a date for a hearing was agreed by the parties. This, the Company pointed out, was twenty-four days after the mandatory time limit had elapsed.

[30] It is important to review the chronology of events pertaining to the matters at hand, given they relate to timelines. The Union filed notice to arbitrate on April 1, 2018 and there were emails between the parties in April and May 2018 about possible dates for the arbitration, but nothing came of these discussions. It was the Company's contention that it was almost a year later, on April 27, 2019 that the Union next communicated to the Company about the grievance under discussion. However, the Union's brief refered to emails sent by Mr. Hooper of the Union to the Company, in mid November and mid December 2018, about this and other grievances. There was they said, a meeting with the company on December 10, 2018 and a meeting with the Company and FMCS on February 19, 2019 to discuss this grievance and other matters. The Company disputed the grievance was discussed with the FMCS. In any event, it was not until April 27, 2019 that Mr. Hooper suggested to Ms. Sylvie Grou of the Company the names of two possible arbitrators, Clarke and Hornung. Ms. Grou replied on May 9, 2019 and suggested a third name, Moreau, for an arbitrator. Mr. Hooper replied over a month later on June 19, 2019 and suggested once again one of the arbitrators he proposed in his April 27, 2019 email, Arbitrator Hornung. The Company claimed it never received this June 19 email. Mr. Hooper followed up with an email on July 9, 2019 to Ms. Grou. She replied the same day repeating their choice of Arbitrator Moreau and stated in part,

> We have been trying to have the Union schedule this case for arbitration for more than a year now, as indicated back in our April 27, 2019 [sic], that is, since the Union's request to proceed to arbitration dated Apri1, 2018. To date we still reserve on the issue of arbitrability of the dispute based on time limits and the provisions of Article 13 of the Agreement.

Mr. Hooper then emailed Ms. Grou on August 28, 2019 saying he had contacted the Minister as no agreement could be reached on an arbitrator. Mr. Hooper went on to state,

> With respect to your claim that you reserve the right on the issue of arbitrability, it is the Union's position that this grievance has been active and we do not agree that you have tried to have this case scheduled for a year and I have spoke about this specific grievance at joint conference in both 2018 and 2019 with Mr. Kambo.

[31] Regardless of who was communicating to whom and when about this grievance, the clock was still ticking toward the two year time limit to have the matter docketed and scheduled for arbitration. Although the Union was making attempts to move the process along, it appears there were large gaps in the communication between the parties relative to this grievance. For example, from June to November 2018 and from mid February to the end of April 2019 there was no communication between the Union and the Company. The Union stated that the Company contributed to the delay in scheduling the arbitration due to the lack of response by Ms. Smith and Ms. Grou's failure to reply to the Union's proposal for an arbitrator. However, it was not until April 27, 2019, over a year since the Union filed their notice to go to arbitration on April 1, 2018, that the Union proposed names of arbitrators to the Company. Ms. Grou replied on May 9, 2019 suggesting Arbitrator Moreau.

[32] It seems to this arbitrator that on or shortly after May 9, 2019 it was clear the parties could not agree on an arbitrator. That would have been an opportune time for the Union to request the minister appoint an arbitrator and would have given the parties over four months to agree on dates for a hearing, rather than wait to the end of August to apply to the Minister for an appointment. That left less than a month for the minister to appoint an arbitrator and for the parties to agree on dates for a hearing, before the two year time limit had expired.

[33] In addition, as the Company pointed out at the hearing, the Union could have made a request to the Company for an extension of the two year time limit. They chose not to, perhaps because there was no guarantee the Company would have agreed to such an extension.

[34] The Union maintained the Company was estopped from relying on the strict time limits of Article 13 because it was not raised with the Union prior to an attempt to draft a joint statement of issue. However, on two different occasions the Company brought to the attention of the Union its concerns around timelines. Once on May 9, 2019, in Ms. Grou's email to Mr. Hooper, the Company said it would reserve on the issue of arbitrability based on time limits. Then again on September 6, 2019 Ms. Grou wrote to Mr. Hooper saying, "With respect to the issue of timeliness…So be advised once again that we will have preliminary matters that we intend to raise with regards to this matter." The Union was aware of the Company's stance on time limits, thus I must reject the notion the Company was estopped from enforcing the strict timelines of Article 13.

[35] The Union asked this arbitrator to grant an extension of the time limits under Section 60 1.1 of the *Canada Labour Code*. However, given the circumstances and facts surrounding this case, I am not prepared to do so. Arbitrator Picher summed it up quite well on page 7 of CROA&DR 3493 stating,

> Boards of arbitration have made it clear that where it is apparent that there was unexplained laxity on the part of the offending party in progressing a grievance, it may

> not be appropriate for a board of arbitration to exercise its discretion to relieve against the time limits.

Arbitrator Picher went on to say on page 8 of that award,

> It is incumbent upon the offending party to demonstrate that such grounds do exist. If, for example, it could be shown that the Union officer having carriage of the grievance was ill or indisposed for a period of time, or absent from his or her duties for some reason beyond that individual's control there might be a basis to conclude that there is a reasonable explanation for the delay and, to that extent, reasonable grounds for granting the extension of time limits. No such explanation is brought forward in the case at hand, however. Indeed, placing it at its highest, the submission of the Union seems to be simply that progressing the grievance in a timely fashion was simply overlooked in the normal crush of business. With respect, that is not a sufficient or compelling explanation, particularly having regard to the language of the parties' collective agreement which clearly emphasises the need to exercise care and expedition in the processing of disputes.

This same reasoning applies to the case before this arbitrator. The Union has not demonstrated reasonable grounds for an extension of time limits.

[36] I therefore find that the grievance 2049-021/2017-00039 is not arbitrable by reason of the mandatory time limit found in Article 13.20 of the Collective Agreement. The grievance is thereby considered as dropped.

SIGNED at Edmonton on February 3, 2020.

Roger Gunn

Arbitrator