**AH724-P**

**IN THE MATTER OF AN AD HOC RAILWAY ARBITRATION**

**BETWEEN**

**CANADIAN SIGNALS AND COMMUNICATIONS SYSTEM COUNCIL NO. 11 OF THE IBEW (IBEW)**

**And**

**CANADIAN PACIFIC RAILWAY COMPANY (CP)**

**MOTION FOR PRODUCTION AND PARTICULARS**

**Date:** May 5, 2021
**Arbitrator:** Graham J. Clarke

**Appearances**

**IBEW:**

D. Ellickson — Counsel, CaleyWray, Toronto

**CP:**

D. Zurbuchen — Manager, Labour Relations - Calgary
D. Pezzaniti — Director, Labour Relations - Calgary

Motion for production/particulars heard on May 4, 2021 via videoconference.

# Award

## BACKGROUND

1. On March 26, 2021, the parties appointed the arbitrator to hear a dispute involving, *inter alia*, Article 10 (Staff Reduction) of their Wage Agreement No. 1 (CA). The arbitrator set the matter down for hearing on May 6, 2021. The parties advised that the Rules of the Canadian Railway Office of Arbitration & Dispute Resolution[1] (CROA) applied to their Article 13 arbitrations under the CA.

2. On April 30, 2021, the IBEW advised that an issue had arisen about production and particulars. The parties were not available until May 4, 2021 for the hearing of the motion.

3. For the following reasons, the arbitrator has decided to order production and particulars for issues which have been clearly identified in the grievance procedure and in the parties' ex parte statements.

## GOVERNING PRINCIPLES

4. The arbitrator recently reviewed the legal framework for production/particulars requests in *Teamsters, Local Union No. 91* v *Dynamex Canada Corp*[2] (footnotes omitted):

> 21. The *Canada Labour Code* (*Code*) makes it clear that an arbitrator can order document production and particulars. Section 60(1)(a) of the *Code* provides a Part I arbitrator with several Canada Industrial Relations Board powers, including the production power described in s.16(f.1):
>
> > (f.1) to compel, at any stage of a proceeding, any person to provide information or produce the documents and things that may be relevant to a matter before it, after providing the parties the opportunity to make representations.
>
> 22. Generally, arbitrators will order production of particularized information where it is "arguably relevant" to the dispute. The term "dispute" means from

[1] CROA Rules
[2] 2020 CanLII 36857

> both parties' perspective. However, the request cannot lead to the proverbial "fishing expedition" which has been described as "a search to find the basis of a case as opposed to a search for documents to support a case".
>
> 23. While there may be debates about the extent of this production obligation, the arbitrator prefers the analysis which includes proportionality, an element which Ontario courts now apply to such requests.

5. The issue therefore is whether the information the IBEW requests is "arguably relevant" to the dispute.

## THE PARTIES' DISPUTE

6. The arbitrator does not make findings of fact at this juncture. But the "record" the parties create under the CROA Rules helps identify the parameters of the dispute.

7. In its January 14, 2020 Step 2 grievance, the IBEW took issue with the temporary layoff of permanent employees which it claimed contravened Article 10.1 (CP Exhibits; Tab 3a):

> Specifically, this grievance pertains to Company's violation of Article 10.1 in the application of issuing "temporary" layoff Notices to all permanent bulletined construction positions in Seniority District 1.

8. The IBEW's detailed grievance alleged that those layoffs ought to have been done under the CA or the parties' 1995 Income Security Agreement (ISA):

> The Union has maintained that permanent positions can only be abolished in accordance with the applicable provisions of the CA and or the Income Security Agreement (ISA) and can not be "temporarily" laid off. It would be remiss to note that there is no mention or illustration of a temporary layoff of a permanent position to be denoted anywhere in the CA and accompanying ISA.
>
> It is the Union's position that the Company is violating Article 10 to avoid their negotiated responsibilities and employee entitlements as outlined in the ISA that are applicable when the Company properly abolishes permanent positions as is occurring here.

…

> The Union contends that the Company's baseless interpretation of Article 10 coupled with the repeated efforts to "temporarily" layoff permanent positions is a bad faith and illegal attempt to turn the District 1 permanent Construction positions into seasonal employees without following the provisions of the ISA and the proper good faith consultations required under this Agreement.

9. On February 14, 2021 CP provided an equally detailed response at Step 2 (CP Exhibits; Tab 3(b)), which commented on both Article 10.1 and the ISA:

> The Company maintains it met the requirements under Article 10.1 by providing the required notice period when it was deemed that the workforce had to be temporarily reduced. There is no language restricting the Company from providing layoff notice to only when permanent reductions apply. The Parties have a sophisticated bargaining relationship. If it was the intention of the Parties to limit the Company's ability to lay off on a permanent basis only, such language would have been negotiated and be clearly illustrated in the collective agreement. Further, there are other provisions negotiated between the Parties which address changes of a permanent nature which result in lay off.
>
> …
>
> The Company maintains the provisions of the Income Security Agreement do not apply as these layoffs are temporary in nature, are not a result of any Technological, Operational or Organizational Change nor are they reductions of a permanent nature. As such, the temporary layoffs do not meet the requirements to trigger Material Change nor any provisions under the Income Security Agreement.

10. The parties were unable to conclude a Joint Statement of Issue (JSI) and instead filed ex parte statements identifying the issues. The IBEW's ex parte (CP Exhibits; Tab 3d) argued that CP had improperly used Article 10.1 to avoid the consequences of the ISA:

> The Union contends that Article 10 can not be used to issue "temporary Layoffs" for permanent positions as it results in permanent changes causing a chain reaction and adverse affects.
>
> The Union further contends that the Company has circumvented the provisions of the Income Security Agreement (ISA) by declaring the action as a "temporary layoff" while adhering to the Collective Agreement to force the exercise of

> seniority and deny employees the compensation for the resulting adverse affects.

11. CP's ex parte (CP Exhibits; Tab 3c) commented on several issues, including those related to the application of Article 10.1 and the ISA:

> The Company disagrees with the Union's position and maintains there is no language under the collective agreement which restricts the Company from issuing notices of temporary layoffs to permanent employees. The Company has been consistent in its application of the Wage Agreement pertaining to Article 10 for several years. The negotiated language between the sophisticated parties has not changed.
>
> The Union claims the District 1 Construction group lay-offs that were issued on January 6, 2021 ought to trigger benefits under the Income Security Agreement. The Company maintains these temporary lay-offs that were issued on January 6, 2021 do not meet the definition requirements under the Income Security Agreement and as such, do not trigger any benefits under the Income Security Agreement. The separate provisions under the negotiated collective agreement and Income Security Agreement are clear and provide for the application of different types of layoffs. The Income Security Agreement is only triggered when it meets the definitions as negotiated therein. If the Company was unable to issue temporary layoffs there would be no requirement for article 10 of the wage Agreement to exist.

12. On April 26, 2021, following receipt of CP's ex parte, the IBEW asked for production and particulars:

> Thank you for your Ex Parte Statement of Issue received on Thursday, April 22, 2021. Neither the Statement of Issue nor the company's response to the grievance indicate why layoff notices were issued to the Montreal area employees. We are therefore writing to request all arguably relevant documents and particulars – including why layoffs in the company's view were necessary - in relation to the company's decision to issue layoff notices to the Montreal area employees.

13. CP responded on April 30, 2021:

> The crux of the issue is whether or not the Company is able to issue temporary layoff, so there isn't any evidence to disclose as per your ask below. The temporary layoff notice was issued given the cyclical slow-down in work, which is not uncommon for construction/engineering employees at CP.

14. The IBEW advised CP why it required further information:

> Thank you for your message. From the Union's perspective the crux of the matter is not simply whether the company is able to issue temporary layoff notices to permanent positions, but whether there was a requirement for ISA notice to be given as a result of the layoffs. Therefore, we need a full description of the work that was being and will be performed; what factors caused the slow down; when was the decision made to issue layoffs; how long those layoffs will last; when will the employees be recalled; and for how long. This is the information we are requesting.

15. CP provided further particulars about the work in question, but the parties were unable to resolve their procedural differences which lead to the May 4, 2021 motion.

## ANALYSIS AND DECISION

16. In its Brief, CP provided some information about the AMT project and how its completion after 10 years had led to the layoffs (CP Brief; paragraphs 5-9). To the IBEW, that explanation seemed like a long-term project had ended and the positions had been permanently abolished. In the IBEW's view, this would potentially bring the ISA into play.

17. The IBEW stated further that it could not simply accept CP's assertions but needed the underlying facts and documentation to protect its legal interests. In short, it wanted the particulars of the reasons which supported CP's decision to issue the layoff notices (IBEW Brief, paragraph 55).

18. CP argued that the IBEW was expanding the dispute by adding a new issue i.e., why the layoffs were undertaken. CP stated that the IBEW was improperly adding

something which had not been discussed previously by the parties. In its view, the CROA process prevents this type of expansion[3].

19. The arbitrator does not agree that a party asking for particulars or production has expanded the scope of the matter before the arbitrator. There is a difference between the issues placed before the arbitrator and the evidence/particulars underlying those issues.

20. In the grievance process, and in the ex parte statements, the parties have clearly disputed, *inter alia*, whether certain layoffs violated Article 10 of the CA and whether the ISA ought to have been engaged. Evidently, at this stage, the arbitrator has no idea which party's position will prevail.

21. But the factual matrix underpinning why CP carried out those layoffs is "arguably relevant" to the legal analysis the arbitrator will have to undertake for Article 10 and the ISA. As a result, the IBEW has met its burden on this motion and is entitled to an order for production and particulars about the underlying situation which led to the layoffs.

22. Accordingly, the arbitrator orders CP, within 30 days of receipt of this decision, to provide the following particulars to the IBEW, supported by documentation where available:

- a full description of the work that was being and will be performed;
- what factors caused the slow down?;
- when and why was the decision made to issue layoffs?;
- how long will those layoffs last?; and
- when will the employees be recalled and for how long?

23. Unfortunately, as CP noted in its argument, any decision ordering particulars and production necessarily prevents the parties from proceeding with the merits of this arbitration on May 6, 2021. The arbitration is accordingly adjourned. The parties can contact the arbitrator to schedule a new arbitration date.

[3] In CROA 4263, Arbitrator Picher did not allow a party to add a violation of s. 239 of the Code to the arbitration since it had not been discussed previously by the parties.

24. The arbitrator retains jurisdiction with respect to the interpretation, application, and implementation of this procedural award.

SIGNED at Ottawa this 5th day of May 2021.

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Graham J. Clarke
Arbitrator