IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY

(the “Company” or “CN”)

and

TEAMSTERS CANADA RAIL CONFERENCE

(the “Union” or “TCRC”)

GRIEVANCE P-0583-2019-00058
Concerning Application of Rest Provisions
(Article 35) of Agreement 4.3
AH-756

SOLE ARBITRATOR: John Stout

APPEARANCES:

For the Company:

Richard J. Charney, Norton Rose Fulbright Canada LLP
Tiffany O’Hearn Davies, Norton Rose Fulbright Canada LLP

For the Union:

Ken Stuebing - Caley Wray

HEARING HELD BY VIDEOCONFERENCE ON JANUARY 5, 2022

INTRODUCTION

[1] I was appointed by the parties pursuant to a Letter of Understanding (LOU) made in accordance with item 21 of the November 26, 2019, Memorandum of Settlement between CN and the TCRC-Conductors, Trainmen, Yardpersons (CTY) , which establishes an arbitration process that conforms to the respective Grievance Procedure(s) and the Canadian Railway Office of Arbitration & Dispute Resolution (CROA&DR) rules and procedures.

[2] The parties filed extensive written briefs prior to the hearing. A hearing was held by videoconference on January 5, 2022.

[3] This award addresses three preliminary objections raised by the Company that the grievance before me is "inarbitrable."

[4] After carefully considering the parties' submissions, and for reasons elaborated upon blow, I am dismissing the Company's objections.

THE CURRENT DISPUTE

[5] The matter before me involves a grievance filed under Agreement 4.3, which is the collective agreement that applies to the Union's members working on CN's western mainline railroad.

[6] The Union characterizes the current dispute as being a "group" grievance filed on behalf of Conductors and trainpersons working out of the Winnipeg, MB Terminal for the Company's continuing failure to adhere to the rest en route provisions in accordance with Article 35 of Agreement 4.3.

[7] The Union filed the following Ex Parte Statement of Issue:

> On 11 November 2018, Division 583 filed a group grievance indicating multiple violations of Article 35 of the 4.3 Collective Agreement during the period of 01 October until 31 October 2018.
>
> It is the Union's position that the provisions of Article 35.10 to 35.16 provide employees the right to be off duty by the time rest is due to commence

in 10 hourswhen 3 hours' notice is properly provided to the Company.

In 1986, the Union and the Company made significant changes to the Rest Article of the 4.3 Agreement. At that time, the Company committed to having Train Service Employees relieved of duty by the time rest was due to commence. The only exception to that was when circumstances beyond the Company's control, such as accident, impassable track, equipment malfunction, plant failure, etc. However, the Company committed in those circumstances beyond their control that "Trainmen will be relieved as soon as possible after the time rest booked is due to commence".

The Company has consistently, over the years since then, committed to taking steps to fulfill its obligation to have Train Service Employees relieved of duty by the time rest was due to commence, in compliance with Article 35 of the 4.3 Collective Agreement.

The Union and the Company have negotiated remedies over the years in an effort to make the compliance with Article 35 beneficial to the Company. The Union's position is the Company has consistently failed to live up to their obligations to have Members of the TCRC-CTY relieved of duty by the time rest is due tocommence.

Accordingly, the Union seeks an order that the Company cease and desist its ongoing breaches of Article 35 of the 4.3 Collective Agreement, in addition to suchother relief that the Arbitrator deems necessary in order to ensure future compliance with the article in question.

[8] The Company has raised three objections to the grievance being heard. Those three preliminary objections are as follows:

- The group grievance is inarbitrable because it was brought as a single grievance when it is in fact a compilation of 251 individual grievances regarding alleged violations of CN's rest rules.
- In the alternative, if the group grievance can be advanced in its current format, the group grievance is inarbitrable because the group grievance is vague and completely void of particularity.
- In a further alternative, if the group grievance can be advanced in its current format, the grievance is inarbitrable because it was not progressed in accordance with the mandatory three-step grievance process in Article 121.1 of Agreement 4.

[9] The Union argues that the three objections must be dismissed, *inter alia*, because:

- There is no impediment to group or policy grievances of this kind being advanced;
- The parties have a robust history of adjudicating such grievances at CROA; and
- It would be administratively unfeasible and render the rest of the rights in Article 35 of little force and effect if such grievances were required to be adjudicated only on an individual basis.

RELEVANT PROVISIONS OF AGREEMENT 4.3

[10] The relevant provisions of Agreement 4.3 pertaining to the filing of grievances and the grievance procedure are as follows:

> ARTICLE 121
>
> Grievance Procedure
>
> 121.1 A grievance concerning the interpretation or alleged violation of thisagreement (including one involving a time claim) shall be processed in thefollowing manner:
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> An appeal against discharge, suspension, restrictions, including medical restrictions, demerit marks in excess of 30, or demerit marks which result in discharge for accumulation of demerits, shall be initiated at Step 3 of thisgrievance procedure. All other appeals against discipline imposed shall be initiated at Step 2 of this grievance procedure.
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> (a) Step 1 - Presentation of Grievance to Immediate Supervisor
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> Within 60 calendar days from the date of cause of grievance the employeeor the Local Chairperson may present the grievance in writing to the
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> immediate supervisor, who will give a decision in writing within 60 calendardays of receipt of grievance. Time claims which have been declined or altered by an immediate supervisor or delegate, will be considered as beinghandled at Step 1.
>
> (b) Step 2 - Appeal to District Superintendent (Transportation)
>
> Within 60 calendar days of the date of the decision under Step 1, or in thecase of an appeal against discipline imposed within 30 calendar days of thedate on which the employee was notified of the discipline assessed, the Local Chairperson or the General Chairperson may appeal the decision in writing to the District Superintendent (Transportation).
>
> The appeal shall include a written statement of grievance as it concerns the interpretation or alleged violation of the agreement, and identify the specificprovisions involved. The written statement in the case of an appeal againstdiscipline imposed

shall outline the Union's contention as to why the discipline should be reduced or removed.

The decision will be rendered in writing within 60 calendar days of receipt of the appeal.

(c) Step 3 - Appeal to Vice-President

Within 60 calendar days of the date of decision under Step 2 the General Chairperson may appeal the decision in writing to the regional Vice-President.

The appeal shall be accompanied by the Union's contention, and all relevant information concerning the grievance and shall be examined in a meeting between the Vice-President, or delegate, and the General Chairperson. The Vice-President shall render his decision in writing within 30 calendar days of the date on which the meeting took place. Should the Vice-President consider that a meeting on a particular grievance is not required, he or she will so advise the General Chairperson and render the decision in writing within 60 calendar days of the date of the appeal.

BACKGROUND FACTS

[11] It is necessary to set out some background facts in order to provide some context for the preliminary objections.

[12] The Company operates a railway headquartered in Montreal, Quebec. The Company's railway network runs the east-west corridor across Canada and into parts of the United States of America.

[13] The Union represents employees working in the railway industry across Canada, including many of whom work for the Company.

[14] The parties collective bargaining relationship is mature, and they are parties to a Memorandum of Agreement Establishing the Canadian Office of Arbitration & Dispute Resolution (CROA&DR MOA). CROA&DR has a number of union and employer members in the railway industry. CROA&DR was originally established in 1965 and it has for many years been the office that resolves the vast majority of disputes between its constituent members. However, the members, including these parties, also have pursued "*ad hoc*" arbitrations, such as the matter currently before me.

[15] The grievance was filed on November 11, 2018, when the Union forwarded a copy to Mike Stevenson, Superintendent, Symington Yard (Winnipeg), as per Article 121.1(b) of Agreement 4.3., which is Step 2 of the grievance procedure. The Company did not object to the filing of the grievance at Step 2 of the grievance procedure. The Company also did not render a decision in writing within the 60 calendar days provided for under Step 2.

[16] On February 5, 2019, the Union forwarded a copy of the grievance to Doug Ryhorchuk, Vice President Operations, Western Region pursuant to Article 121.1(c) of Agreement 4.3, which is Step 3 of the grievance procedure. The Union specifically requested a meeting to discuss the grievance.

[17] On June 19, 2019, the Union proposed a Joint Statement of Issue.

[18] On June 24, 2019, the Company wrote to the Union advising that they did not accept the grievance as "valid" indicating that the collective agreement requires grievances to be progressed individually. In addition to citing the provisions of Article 121, the Company referred to **CROA 4557**, which is an award by Arbitrator Sims issued on July 19, 2017. It was the Company's view that the award of Arbitrator Sims precluded the submission to CROA&DR of separate grievances in one statement of issue. Notwithstanding the Company's objection to the validity of the grievance, the Company also indicated that it was their view that there was no grievance unless the Union's claim is the RX payment was improperly declined. The Company concluded by indicating that they considered the grievance to be invalid and of no merit.

[19] On July 19, 2019, the Union provided the Company with a Ex Parte Statement of Issue, substantially similar to the Ex Parte Statement of Issue outlined earlier in this award, including the Company's objection to the form of the grievance.

[20] On July 23, 2019, the Union provided CROA&DR with notice to file the grievance for arbitration. On that same day, Donna Crossan, CN's Labour Relations Manager wrote to CROA&DR advising of the Company's objection to the form of the grievance and

raising a new objection based on the failure to have a meeting at Step 3 of the grievance procedure.

[21] The parties subsequently agreed to have the grievance referred to me (without prejudice to any previously raised objection) and have me hear the preliminary objection on January 5, 2022.

AWARD OF THE ARBITRATOR

[22] It is trite to say that an arbitrator's jurisdiction is derived from the applicable labour relations statute, in this case the *Canada Labour Code* R.S.C 1885, c.L-2 (the "Code"), and the collective agreement.

[23] In this case, the *Code* provides for the resolution of all differences by arbitration or otherwise and sets out the powers of an arbitrator. The relevant provisions are as follows:

> **Provision for final settlement without stoppage of work**
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> **57(1)** Every collective agreement shall contain a provision for the final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.
>
> **…**
>
> **Powers of arbitrator, etc.**
>
> **60(1)** An arbitrator or arbitration board has
>
> > (a) the powers conferred on the Board by paragraphs 16(a), (b), (c) and (f.1)
> >
> > (a.1) the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is conflict between the statute and the collective agreement;
> >
> > (a.2) the power to make interim orders that the arbitrator or arbitration board considers appropriate;
> >
> > (a.3) the power to consider submissions provided in the form that the arbitrator or the arbitration board considers appropriate or which the parties agree;

> (a.4) the power to expedite proceedings and to prevent abuse of the arbitration process by making orders or giving directions that the arbitrator or arbitration board considers appropriate for those purposes; and
>
> (b) the power to determine any question as to whether a matter referred to the arbitrator or arbitration board is arbitrable.
>
> **Power to extend time**
>
> (1.1) The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.

[24] The requirement of a labour relations dispute resolution process, such as arbitration, is a matter of public policy in all jurisdictions across Canada and it is a necessary component of maintaining peaceful labour relations during the life of a collective agreement. In this case, like most others, the parties also have included a grievance procedure, which is a mechanism for processing and resolving complaints before they are referred to arbitration.

[25] It is not open to parties to exclude the possibility of filing a grievance and referring it to arbitration, see *Parry Sound (District) Social Services Administration v. OPSEU, Local 324* [2003] 2 SCR 157. However, the parties are free to craft a grievance procedure to meet their own specific needs and provide that compliance with the grievance procedure is a pre-condition to submitting a matter to arbitration.

[26] In *Canadian Broadcasting Corporation v. N.A.B.E.T.* (1973), 4 L.A.C. (2d) 263, Arbitrator Shime describes the traditional categories of grievances arising under a collective agreement:[1]

- Individual employee grievances where the subject-matter of the grievance is personal to the employee

[1] This list is not exhaustive; for example, it is now well accepted that an employer may also file a grievance under a collective agreement.

- Group grievances where a number of employees with individual grievances are joined together in filling their grievances. This type of grievance is really an accumulation of individual grievances.
- Union or policy grievances where the subject matter of the grievance is of general interest and where individual employees may or may not be affected at the time that the grievance is filed;
- There is a hybrid type of grievance which is a combination of the policy and the individual grievance. In this type of situation, although one individual may be affected, he may affected in a way that is of concern to all members of the bargaining unit. Thus, the individual may grieve on the basis of how he is particularly affected while the union may also grieve citing the individual case as an example of how certain conduct may affect the members of the bargaining unit generally.

[27] In each case, it is the particular language of the collective agreement that must be reviewed to determine if the parties have agreed to different definitions, processes, or procedures for different types of grievance, see Brown and Beatty *Canadian Labour Arbitration, 5th Edition*, 2:59 and 2:60.

[28] The Ontario Court of Appeal decision in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters & Joiners of America, Local 2486* (1975), 8 O.R. (2d) 103 (C.A.), is considered the leading case with respect to the interpretation of a grievance article in a collective agreement. In that case, the Court of Appeal found that it is reasonable to interpret grievance provisions broadly and in conformance with their intended purpose so that a union may file a grievance on behalf of their members, independent of their members right to grieve. In terms of the form of a grievance, Justice Brooks stated:

> …these cases should not be won or lost on the technicality of form, rather on the merits and as provided in the contract and so the dispute may be finally and fairly resolved with simplicity and dispatch.

[29] This broad and liberal interpretation of grievance procedure articles has been subsequently endorsed by the Ontario Divisional Court in *Re Communications Union Canada and Bell Canada* (1976), 71 D.L.R. (3d) 632 (ON SCDC), where they added:

> Nothing can be more calculated to exacerbate relations between employers and employees, than to be told that their differences, plainly designed to be finally settled by arbitration as the statute requires, cannot be examined because of a defect in form.

[30] The Supreme Court of Canada also endorsed the broad and liberal approach to interpreting and determining compliance with procedural requirements found in a collective agreement. In *Parry Sound (District) Social Services and OPSEU, Local 324, supra*, Justice Iacobucci endorsed the view that procedural requirements should not be strictly enforced in those instances where the employer suffers no prejudice.

[31] The language in Agreement 4.3 relating to the filing of grievances is drafted in broad terms and in compliance with the statutory requirement to have all disputes resolved by arbitration or otherwise. The parties have not chosen to define specific categories or types of grievances in their collective agreement. One may certainly categorize certain grievances arising under this collective agreement as individual, policy, group or in some cases a "remedy" grievance (see **CROA 4106**). However, the parties themselves have not included any language that defines different types of grievances.

[32] Article 121 does provide that certain grievances (discharge, suspension, restrictions, including medical restrictions, demerit marks in excess of 30, or demerit marks which result in discharge for accumulation of demerits) shall be initiated at Step 3 and other appeals against discipline imposed shall be initiated at Step 2. However, the language in Article 121 does not provide a different process for policy or group or any other types of grievances.

[33] In this case the grievance was filed at Step 2 without objection. At the hearing, the Company conceded that based on the current practice between the parties they could not object to the fact that the grievance was filed at Step 2. The Company's objection is with respect to the form of the grievance and failure to have a meeting at Step 3.

[34] The grievance filed by the Union in this matter involves a number of their members and incidents of a similar nature all related to the alleged failure of the Company to grant employees their requested rest in violation of Article 35 of Agreement 4.3. The

Union's requested remedy is not an individual remedy. Rather a systemic remedy is being sought by the union (i.e., cease and desist order) applicable to all similar situations involving their members. While the matter before me may be described as a group grievance, it might also be described as a policy grievance since it is a grievance of general interest, and the Union seeks a systemic remedy on behalf of all employees. The dispute falls clearly within the definition of a grievance under Agreement 4.3.

[35] I agree with the Union that there is nothing in Agreement 4.3 that specifically restricts the right of the Union to file a grievance on behalf of a number of their members involving similar circumstances and seeking a systemic remedy.

[36] I acknowledge that the language in the collective agreement is couched in the singular and not the plural. However, I do not see that as an impediment to having a number of similar violations raised in a single grievance. The provision must be interpreted in context and having regard to the legislative mandate to have all differences resolved by arbitration or otherwise. In addition, the Union has previously processed grievances with claims on behalf of numerous employees in a single grievance **CROA 3822**, **CROA 3570**, and **CROA 3467**. While some of these grievances have been referred to as "policy" grievances, some would also be fairly characterized as group grievances as well. In any event, there is no specific language limiting the Union's right to file a grievance on behalf of their members.

[37] The Company argues that Agreement 4.3 does not contemplate group grievances. The Company relies on a number of awards that they say stand for the proposition that a group grievance cannot be brought until specifically permitted under the collective agreement. The Company relies on *Re United Packinghouse Workers v. Burns & Co. (Eastern) Ltd.* (1967), 18 L.A.C. 164 (Revile) and a number of other cases to support their argument in this regard.

[38] In my view the cases relied upon by the Company are all distinguishable from the matter before me. In particular I find that the following awards are distinguishable:

- *Re United Packinghouse Workers v. Burns & Co. (Eastern) Ltd., supra,* was decided in 1967 and the language in the collective agreement is different from the matter before me.

- In *Hayes Forest Services ltd. and USW, Local 1-85* 2005 CarswellBC 3942, the issue before Arbitrator McPhillips was not a preliminary objection but rather a question of individual entitlement to damages as a remedy. In this case the Union does not seek an individual remedy for the affected employees. Rather, the Union seeks a cease and desist order.

- In *Cariboo Pulp and Paper Co. and Unifor Local 1115,* 2019 CarswellBC, Local 1115, the Union had filed both individual grievances and a "policy grievance" with respect to the same complaints, which were of a continuing nature. The arbitrator was appointed to hear the "policy grievance" but not the individual grievances. In those circumstances, the arbitrator found that absent the consent of the parties or direction from an arbitrator who has been appointed to each individual grievance, the Union could not proceed with the policy grievance.

- In *Re Southern Railway of British Columbia v. C.U.P.E, Local 7000* (2001), 99 L.A.C. (4th) 138 (Larson) involved situation involving four employees involved in one incident but received different discipline. The Union filed one grievance, which the arbitrator found was proper. However, the arbitrator found he was only appointed to hear one individual grievance.

[39] In addition to being distinguishable based on their facts, to the extent that the cases relied upon by the Company may stand for the proposition that a group grievance cannot be brought in the absence of specific language, I respectfully disagree. In my opinion, such a proposition does not reflect the important public policy considerations, which are endorsed in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters & Joiners of America, Local 2486, supra,* and those cases that have subsequently followed. In my view, the Union, as the representative of the members of the bargaining unit has a right to file a grievance on its own behalf and on behalf of their members. While it is open to a Union to negotiate limits on their right to file certain grievances, any limitation must be explicit and not implied or presumed based on some inherent individual or group nature of a dispute.

[40] In terms of **CROA 4557**, which is also relied upon by the Company, I agree with the Union that Arbitrator Sims' award is clearly distinguishable. In that case, Arbitrator

Sims was dealing with a situation where the Union had consolidated three separate, unrelated, and distinct grievances into one Ex Parte Statement of Issue for a single adjudication at CROA&DR. The grievances before Arbitrator Sims were all processed separately through the grievance procedure.

[41] I do not read Arbitrator Sims decision as being an impediment to filing a single grievance encompassing a number of individuals involved in similar alleged violations of Agreement 4.3. Rather, Arbitrator Sims, interpreting Agreement 4.3 and the CROA&DR MOA found that separate grievances cannot be consolidated unless the parties agree to consolidation. In this case, I have before me only one grievance seeking a systemic remedy that was pursued by the Union through the grievance procedure and then referred to arbitration.

[42] Accordingly, I find that Agreement 4.3 does not in any way preclude the filing of a single grievance encompassing multiple individual employees and similar violations of the collective agreement. Therefore, the Company's objection to the form of the grievance is dismissed.

[43] I now turn to address the Company's objection that the grievance is too vague and void of particularity. In my view, this objection is also without merit.

[44] I note that when the grievance was filed the Union attached a chart, which indicates the date, train, Conductor, subdivision, order, on duty, request time filed, RTC, ITD, FTD, off duty time hours and overage for all 251 incidents that they rely upon to illustrate how the Company is failing to provide rest to employees contrary to Article 35. The Union has also clearly identified the Articles in the Collective Agreement they allege were violated and the remedy that they are requesting at arbitration. The grievance on its' face clearly provides the particulars of the dispute and what the Union is seeking.

[45] I agree with the Company that there are many situations where an employee may work beyond the threshold number of hours (10) and not be in violation of Article 35. However, all those situations would include facts that the Company would be aware of if

they properly considered the employee's rest request. The Company's brief sets out a number of facts that they want to have particularized, which are in my view facts that are clearly within their own knowledge. By way of example, the Union has provided the time when each request was made, the reason for any denial and who might have been involved is something that is clearly within the knowledge of the Company. Moreover, it is also clearly within the Company's knowledge to determine whether the employee was paid a premium for working more than 10 hours.

[46] In addition, I note that the Company never raised any issue with respect to particulars at either Step 2, when the grievance was filed or when the matter was appealed to Step 3 of the grievance procedure. This is despite the fact that the Company felt compelled to object to the grievance on basis of its form at Step 3 and later object to a failure to have a meeting at Step 3. Frankly, the Company appears to have had more than enough information to respond to the grievance in its June 24, 2019, letter. In any event, I am satisfied that the Union has provided enough information on the chart attached to the grievance and in their brief for the Company to know and meet the case brought against them.

[47] This brings me to the Company's final ground of objection, based on the failure to hold a Step 3 meeting. Once again, I find no merit to the Company's objection.

[48] I accept that the grievance procedure is couched in mandatory language. However, the language also contemplates that the Company may consider that a meeting is not required at Step 3, and they may render their decision in writing. The Union requested a meeting in their February 5, 2019, Step 3 referral letter. However, the Company did not respond to the request, and they did not schedule a meeting. Instead, they provided a written response some four months later on June 24, 2019, where they outline both their objection to the form of the grievance and their decision on the merits. The logical conclusion that follows from these events is that the Company did not require a meeting to discuss the grievance in order for them to render their decision. In the alternative, it is my view that the Company cannot be allowed to reap a benefit for its own failure to respond and schedule a meeting. In my view, the June 24, 2019, letter is the

Company's Step 3 response and the grievance procedure had been exhausted and complied with by the parties. The Union referred the grievance in accordance with Article 121.3 of Agreement 4.3. The LOU permits proceeding without Joint Statement of Issue, on an "exparte basis." Therefore, I find that the grievance was properly referred to me and I have jurisdiction to hear and determine the matter.

[49] Accordingly, for all the reasons stated above, the Company's three objections are all dismissed. I would request that the parties discuss how to efficiently litigate this grievance. In this regard, I might suggest that the Union select up to ten incidents to rely upon and argue the grievance on that basis. However, I leave it to the parties to try and work these issues out and they may contact me if they need assistance resolving any dispute. The parties are also requested to contact my assistant to schedule a date for the hearing of the merits of the grievance.

Dated at Toronto, Ontario this 17th day of January 2022.

John Stout - Arbitrator