

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 OF CONDUCTOR FERNS
Concerning Article 51 of Agreement 4.16
AH-760**

SOLE ARBITRATOR: John Stout

APPEARANCES:

For the Company:

Vanessa Paquet – Manager Labour Relations

For the Union:

Ken Stuebing - Caley Wray

HEARING HELD BY VIDEOCONFERENCE ON JANUARY 6, 2022

INTRODUCTION

[1] I was appointed by the parties pursuant to a Letter of Understanding 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. The hearing was held by videoconference on January 6, 2022.

[3] After carefully considering the parties' submissions, and for reasons elaborated upon below, I am allowing the grievance and remitting the issue of remedy back to them for consideration.

THE CURRENT DISPUTE

[4] The matter before me involves a grievance filed under Agreement 4.16, which is the collective agreement that applies to the Union's members working on CN's eastern mainline railroad.

[5] In particular, the Union filed a grievance on November 13, 2017, on behalf of Conductor Ferns, alleging that the Company violated Article 51 of Agreement 4.16 by failing to provide rest.

EX PARTE STATEMENTS OF ISSUE

On November 3, 2017, Conductor Ferns was ordered on train M383 with an on-duty time of 1510 and his rest being due at 0110. Mr. Ferns did not register off duty until 0315, two hours and 5 minutes past the time rest was due to commence.

It is the Union's position that the Company is in violation of Articles 51, 85, 85.5 and Addendums 123 of the 4.16 Collective Agreement along with arbitral jurisprudence.

The Union contends that Company records confirm that M383 arrived at Kerwood, where Conductor Ferns was to be relieved in advance of his rest being due, but the Company did not have transportation in place to ensure that Conductor Ferns rest was respected.

The Union contends that the Company continues to ignore awards of the CROA office, Ad Hoc awards and the CIRB as it continues to have Conductors in road service work past the time rest is due to commence despite the mounting jurisprudence to the contrary.

Given the continual and blatant violation of the Collective Agreement and arbitral jurisprudence the Union now seeks a significant remedy in the amount of 1,000 miles at Yard Conductor Rates of pay under the provisions of Addendum 123 of the 4.16 Collective Agreement.

The Company disagrees with the Union's position.

AWARD OF THE ARBITRATOR

[6] Conductor Ferns was ordered to operate train M38331 03 from MacMillan Yard (near Concord, Ontario) to Sarnia Yard (the objective terminal) on November 3, 2017. Conductor Ferns went on duty at 1510. In accordance with Article 51.5(a), Conductor Ferns filed his rest notification with the rail traffic controller (RTC) at 2140. At this point, Conductor Ferns had provided more than three-hour's notice and his rest was due to commence at 0110 on November 4, 2017.

[7] On this day, the Sarnia Yard was congested and could not handle the arrival of additional trains. Arrangements were made to have Conductor Ferns' train held at Kerwood, which is approximately 30 miles from Sarnia. Conductor Ferns' train arrived at Kerwood at approximately 2220 and remained stopped until he was relieved.

[8] The Company advises that they chose to relieve Conductor Ferns pursuant to Article 51.7(a) ii, which involved a plan to deadhead/transport him to his home/objective terminal (Sarnia) where he would be relieved of duty. According to Company records a taxi was initially ordered from their transportation provider

(Halcon) for 2300; however, there was a shortage of taxis in the Sarnia and London area. Ultimately, the Company chose to use the available taxi to relieve a different train crew that also required relief, which was operating ahead of Conductor Ferns' train.

[9] The crew on Conductor Ferns' train contacted the RTC at 0001 on November 4, 2017, and they were advised that a relief crew was en route. Later, at approximately 0140 the RTC Chief contacted Conductor Ferns and his crew, advising that the relief crew was still on its way.

[10] The relief crew was transported by the Transportation Supervisor, arriving at Kerwood at 0240. Conductor Ferns was then transported back to Sarnia and ultimately booked off duty at 0315 on November 4, 2017, which was two hours and five minutes past the time his rest was due to commence.

[11] The Company relies upon Article 51.7(b), which provides:

Except in circumstances beyond the Company's control, such as accident, impassable track, equipment malfunction, plant failure, etc., trains service employees will be relieved of duty by the time rest booked is due to commence.

[12] A January 15, 1986, internal document clarifying the application of Article 51 (the "1986 Interpretation") has been relied upon by Arbitrator Michel Picher and quoted by him in **CROA 3280** and **AH 558**. The following excerpt is relevant to this matter:

Sub-paragraph 51.7(b) establishes the Company's responsibility to relieve trainmen of duty by the time rest booked is due to commence. This applies in all cases, except where circumstances beyond the Company's control make this impossible. A number of examples of such circumstances are contained in the sub-paragraph. And, while such circumstances are not necessarily limited only to the examples cited, the Company cannot rely on situations which do not affect its ability to comply with this requirement as a reason not to relieve trainmen by the time rest booked is due to commence. The question has been asked:

Q. IN CIRCUMSTANCES BEYOND ITS CONTROL, IS THE COMPANY DIVESTED OF THE RESPONSIBILITY OF RELIEVING TRAINMEN FOR REST?

A. No. Trainmen will be relieved as soon as possible after the time rest booked is due to commence.

[13] Article 51.4 provides train service employees with a mandatory right to book rest en route. Train service employees are required to provide three-hour's notice in accordance with Article 51.5 so that the Company has the necessary time required to make a good faith assessment of the situation and if necessary, make the required arrangements for the rest to be provided pursuant to Article 51.7, see **AH 558**. Once the Company makes a good faith assessment of the situation and they determine that the employee cannot complete their tasks prior to the time rest booked is due to commence then they must make every reasonable effort to arrange for the employee to be relieved so the rest may be provided by the required time.

[14] In this case, it was established well in advance that Conductor Ferns and his crew would not make it to their objective terminal. Sarnia Yard was congested and the train ahead of Conductor Ferns was also not going to make the objective terminal. A situation of congestion in an objective terminal is not one of the enumerated exceptions found in Article 51.7(b), nor did the Company try to argue that the congestion at the Sarnia Yard was a situation beyond their control. Rather, the Company relies on the unavailability of taxis from their transportation provider Halcon.

[15] I have great difficulty with the Company's response to this situation. First, it is clear that they waited until 2300 to order transportation, which was one hour and twenty minutes after Conductor Ferns requested rest and forty minutes after his train was stopped at Kerwood. The Company has provided no explanation for why they delayed in making transportation arrangements. The delay then became exasperated by the fact that another train closer to Sarnia also needed relief so

the Company had the taxi relieve that crew and made other arrangements to relieve Conductor Ferns and his crew.

[16] The Company has not in my view provided any adequate or reasonable explanation as to why they delayed in taking any action to provide transportation when they knew full well that Conductor Ferns' train (and the train ahead of him) would not reach the objective terminal in the time required to provide the requested rest.

[17] I do not accept that a lack of taxis falls within the exceptional circumstances enumerated in Article 51.7 (b). The exceptional circumstances provided for under Article 5.7 (b) contemplate issues that cannot be foreseen and are beyond the Company's control. The transporting of a crew for the purposes of providing relief is not beyond the Company's control and they must make reasonable efforts to have the appropriate resources in place to ensure that the crew are provided with the rest that they are entitled under Article 51. The Company's reliance upon one transportation provider and their failure to have other options readily available is unreasonable in my view.

[18] I accept the Union's evidence that there are some 64 taxi services in the Sarnia and London area. In addition, if the Company had acted with more haste, then they ought to have been able to act in a timelier manner and dispatched alternate relief to Conductor Ferns. In my view, if the Company had acted reasonably and without delay, then they would have a much better case.

[19] I find that the Company did not act in a timely manner, and they did not make reasonable efforts to have appropriate resources in place to ensure that Conductor Ferns was provided relief by the time rest booked was due to commence. Therefore, I also find that the Company violated Article 51 of Agreement 4.16.

[20] Turning to remedy, the Union argues that in these circumstances a substantial remedy under Addendum 123 is warranted. The Union relies on what they characterize as a “history” of the Company abusing employee’s rest rights. The Union points to **AH 558**, which involved a similar situation at the same Sarnia terminal and *CIRB Decision 315*, which addressed systemic rest violations in the Central Region.

[21] The Company disagrees with the Union, and they are of the view that any violation that might be found was not wilful or egregious and therefore should not attract a penalty under Addendum 123. In addition, the Company argues that Addendum 123 contemplates a joint process, which would include discussion before an arbitrator weighs in on the issue of remedy.

[22] Arbitrator Picher addressed the application of Addendum 123 in **CROA 3310**, where he stated:

It does appear to the Arbitrator that the parties intended the letter to apply to situations where a violation of the collective agreement was blatant and indefensible, and clearly should not have been committed by local management. It is in this context that the deterrent character of the remedy is to be understood. The letter is an agreement between the parties to establish a disincentive to violations of the collective agreement being resorted to simply as a means of doing business, ensuring that violations of the collective agreement do not pay.

[23] Leaving aside the Company’s position that Addendum 123 requires a joint process, I am of the view that Addendum 123 does not apply in these circumstances. While the Company’s conduct was unreasonable and, in some ways negligent, I agree with them that their conduct was not blatant and indefensible. I accept that the Company acted in good faith when they assessed the situation and they believed that they would be able to provide transportation for relief. However, they did not act within a reasonable period of time, and they did not make reasonable efforts to have the appropriate resources in place to ensure that Conductor Ferns was provided with the rest that he is entitled to under Article 51.

[24] Having found that the Union's requested remedy pursuant to Addendum 123 does not apply to the circumstances before me, it is my view that the issue of remedy ought to be remitted back to the parties for resolution.

[25] I shall remain seized to address the issue of remedy in the event that the parties cannot agree upon a remedy within a reasonable period of time.

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

A handwritten signature in dark ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

John Stout - Arbitrator