AH801

IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC 1985, c L-2.*

BETWEEN:

Teamsters Canada Rail Conference (CTY-West)

(TCRC)

-and-

Canadian National Railway Company

(CN)

Interpretation of Item 17 of the February 5, 2014 Memorandum of Agreement

Arbitrator: Graham J. Clarke
Date: November 29, 2022

Appearances:

TCRC:
K. Stuebing: Legal Counsel
R. Donegan: General Chairperson TCRC-CTY West, Saskatoon
J. Thorbjornsen: Vice General Chairperson TCRC-CTY West, Saskatoon
J. Lennie: General Chairperson TCRC-CTY Central

CN:
V. Paquet: Senior Manager, Labour Relations
K. Mclaughlin: Superintendent, BC North
R. Singh: Manager, Labour Relations, BC
A. Bacchus: Manager, Labour Relations, Yellowhead
K. Macdonell: Senior Manager, Labour Relations

Arbitration held via videoconference on November 22, 2022.

Award

BACKGROUND

1. The parties included a Letter of Understanding in their November 26, 2019, Memorandum of Settlement which established a "Supplemental Arbitration Process" (SAP). The SAP obliged the parties to follow the rules and procedures of the Canadian Railway Office of Arbitration & Dispute Resolution[1] (CROA). The arbitrator agreed to provide 4 hearing dates in 2022 on the condition that the parties would plead no more than 2 cases per day[2].

2. The SAP has an additional relevance to this case given its wording about the parties' grievance process.

3. The parties dispute how to interpret article 121.4 of their collective agreement (CA) which originally read, in part:

> …Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may, except as provided in paragraph 121.5[3], be progressed to the next step in the grievance procedure.

4. On June 19, 2014, during an interest arbitration, Arbitrator Michel G. Picher adopted the parties' own February 5, 2014, Memorandum of Agreement (MOA) which led to the addition of this note (Note) at the end of article 121.4:

> Note: The Company must respond to the Union's grievance particulars at each step of the Grievance Procedure.

5. The TCRC advised that the instant grievance was just one of many which contested CN's alleged ongoing failure to respond to many grievances despite the 2014 addition of the Note. In the TCRC's view, the Note's language is mandatory and requires a remedy, including a cease and desist order, to force CN to respond to all grievances.

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[1] Memorandum of Agreement Establishing the CROA&DR
[2] May 7, 2021 Hearing Notice.
[3] Article 121.5 deals with "time claims", *infra*.

6. CN argued that article 121.4, when read in its entirety, does not require it to respond to every grievance. In CN's view, when the parties' added the Note, they meant that if CN decided to respond then that response would provide particulars rather than just denying the grievance. If CN did not respond, then the negotiated process in article 121.4 would apply.

7. During the arbitration, the parties mentioned a new collective bargaining session may be on the horizon, something which provides them with an opportunity to revisit article 121.4.

8. For the following reasons, and subject to the caveats set out in this award, the arbitrator agrees with the TCRC that the Note requires CN to respond with particulars at each level of the grievance procedure. However, since the parties have already negotiated what happens if CN does not provide a decision, the effect of that failure is that the grievance moves to the next grievance step. The Note, which added a requirement for proper particulars, did not eliminate the rest of the wording in article 121.4.

CHRONOLOGY OF FACTS

9. The parties did not contest to any great extent the facts. They simply had divergent views on article 121.4 and the impact of the Note's addition in 2014.

10. **April 2013**: When collective bargaining commenced for a new CA[4], the article 121.1 grievance procedure contained three steps, each of which required CN to respond to the TCRC's grievances:

> (a) Step 1 - Presentation of Grievance to Immediate Supervisor
>
> Within 60 calendar days from the date of cause of grievance the employee or the Local Chairperson may present the grievance in writing to the immediate supervisor, **who will give a decision in writing within 60 calendar days of receipt of grievance**. Time claims which have been declined or altered by an immediate supervisor or delegate, will be considered as being handled 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 the case of an appeal against discipline imposed within 30 calendar days of the date on which the employee was notified of the discipline assessed, the Local

[4] The language the parties negotiated would be added to multiple, but separate, collective agreements.

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 specific provisions involved. The written statement in the case of an appeal against discipline 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.**

(Emphasis added)

11. **April 2013**: The expired CA at article 121.4 dealt with situations where CN did not respond despite its article 121.1 obligations:

121.4 Any grievance not progressed by the Union within the prescribed time limits shall be considered settled on the basis of the last decision and shall not be subject to further appeal. The settlement of a grievance on this basis will not constitute a precedent or waiver of the contentions of the Union in that case or in respect of other similar claims. **Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may, except as provided in paragraph 121.5, be progressed to the next step in the grievance procedure**.

(Emphasis added)

12. **April 12, 2013**: In its bargaining demands[5], the TCRC sought to add a requirement for particulars and additional consequences if CN failed to respond to any grievance:

> Grievance Procedure (4.2, 4.3, 4.16, BCR, ACR)
>
> **Mandatory grievance responses that must be substantive.**
>
> **Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits at any step of the grievance procedure the grievance will be settled in the Union's favour**. Any grievance which involves, a disputed time claim such claim will be paid, any dispute involving discipline, all discipline will be removed and the employee will be exonerated, any case involving discharge, the employee will be exonerated and the discipline will be removed from the employees record and such employee will be made whole for all loss of benefits and loss of earnings.
>
> (Emphasis added)

While the parties later negotiated two different tentative agreements, neither included the TCRC's demand that a failure to respond would result in a grievance being settled in its favour.

13. **January 2014**: The TCRC's members rejected a first tentative agreement.

14. **February 5, 2014**: CN and the TCRC reached a second MOA[6] which included Item 17:

> Add the following NOTE to Article 84 of collective agreement 4.16, Article 32 of collective agreement 4.2 and 121 of Collective Agreement 4.3, Article 9 of ACR collective agreement and Article 104 of BCR collective agreement:
>
> "NOTE: The Company must respond to the Union's grievance particulars at each Step of the Grievance Procedure."

15. **March 27, 2014**: After the TCRC's membership rejected the February 15, 2014 MOA, the parties appointed Mr. Michel G. Picher as Interest Arbitrator to mediate and, for any remaining issues, to finalize the parties' new CA[7].

[5] Ex-4; Tab 21; Page 188/213.
[6] Ex-4; Tab 2
[7] Ex-4; Tab 4; Interest Arbitration Award dated June 19, 2014.

16. **June 19, 2014**: Arbitrator Picher's award determined, *inter alia*, that the parties' February 5, 2014 Memorandum of Agreement remained "the best indicator of the agreement the parties would have achieved through free collective bargaining". As a result, the parties added the Note to article 121.4 of the CA.

17. **March 2021**: In the SAP[8], the parties set out their procedure for grievances like the instant one. Paragraph 5 addressed situations where CN has not provided a step III grievance response:

> 5. **Once selected, if a grievance does not have a step III grievance response, the Company must provide one within 60 days, and thereafter the parties will endeavour to reach a joint statement of issue**. If the parties cannot reach a joint statement of issue, the parties may proceed on an exparte basis. The JSI or Exparte Statement of Issue must be exchanged between the parties no later than 30 days prior to the scheduled hearing date.
>
> (Emphasis added)

ANALYSIS AND DECISION

Introduction

18. Neither party put forward arguments alleging a past practice and/or an estoppel[9]. The challenge in this case is that the 2014 MOA changes made article 121.4 a type of Frankenstein provision that on its face seems to contradict itself. The extrinsic evidence to which the parties referred merely demonstrated their contrasting views whether CN had an obligation, without exception, to respond with particulars at each level of the grievance procedure.

19. The TCRC requested that the arbitrator enforce, via a cease and desist order, what it described as the Note's clear mandatory wording for grievance responses. CN countered that any interpretation had to respect the full text of article 121.4.

20. Both the TCRC and CN are correct, in part. The arbitrator will first briefly summarize the applicable interpretation principles. The arbitrator will then decide on the proper interpretation for the provisions in dispute.

[8] The Memorandum of Settlement dated November 26, 2019 for the current CA included the parties' agreement to create the SAP and named certain labour arbitrators. The parties' later March 2021 agreement established the SAP's process.
[9] See, for example, CROA 4606.

Applicable principles of interpretation

21. An arbitrator must interpret the words the parties used in their CA. It does not matter what a party might have intended if the words to which they agree mean something else. The parties have the ultimate responsibility to ensure the language of their contract reflects their mutual intention.

22. In CROA 4631, the arbitrator noted:

> 13. A rights arbitrator cannot amend the collective agreement. Article 14 of the parties' Memorandum of Agreement Establishing the CROA&DR makes this explicit:
>
> > The decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.
>
> 14. For interpretation cases, Arbitrator Moreau described the importance of evidence and the plain and ordinary meaning of negotiated provisions in CROA&DR 3601:
>
> > Arbitrators follow several presumptive rules of interpretation when construing a collective agreement. One of the lead rules is that the provisions in a collective agreement must be read according to their plain and ordinary meaning. That rule will only be set aside when it has been demonstrated, with clear and reliable evidence, that the parties have agreed to an interpretation that is different from its ordinary meaning.
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> 15. In CROA&DR 4606, this Office described how past practice and estoppel can impact collective agreement interpretations.

23. In a non-railway case, Arbitrator Surdykowski provided a helpful summary of labour arbitrators' obligations when interpreting the parties' negotiated language[10]:

> 23. **A grievance arbitrator cannot rewrite the parties' agreement. In the absence of an ambiguity established or resolved by extrinsic evidence, collective agreement wording trumps all considerations other than legislation, and a grievance arbitrator must interpret the collective agreement as written**. An arbitrator cannot amend or imply terms into a collective agreement because he considers it fair or appropriate to do so, or because of his view of what the parties must have or could not have intended. Although has been written about collective agreement purpose, fairness, internal anomalies, cost or administrative difficulty, or the effect on the parties or bargaining unit employees, such considerations can only come into play

[10] Compass Minerals Canada Corp v Unifor Local 37-0, 2017 CanLII 72647

> when the grievance arbitrator must choose between equally plausible interpretations of the collective agreement language in issue – a situation which rarely presents. The grievance arbitrator is tasked with determining what the collective agreement provides or requires, not what he thinks it should provide or require, regardless of the effect on either party or on bargaining unit employees. **The employer, the union, and bargaining unit employees are entitled to no more or less than the benefit of the bargain described by the words contained in the collective agreement**. Clear collective agreement wording prevails over all considerations other than legislation. It is up to a party that is dissatisfied with the consequences of the collective agreement bargain as determined by a grievance arbitrator to seek a collective bargaining solution. **It is no part of a grievance arbitrator's job to save the parties or either of them from the consequences of the agreement as written by them.**
>
> (Emphasis added)

24. The arbitrator will apply the foregoing principles when interpreting the parties' CA.

The TCRC is correct that CN must respond to its grievances.

25. The CA makes it clear that CN has an obligation to respond to the TCRC's grievances. There is no other way to interpret the language in article 121.1, *supra*, about each grievance step:

> 1. Step 1: "…give a decision in writing within 60 calendar days of receipt of grievance";
>
> 2. Step 2: " The decision will be rendered in writing within 60 calendar days of receipt of the appeal"; and
>
> 3. Step 3: " 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.

26. Evidently, a "decision in writing" means CN has an obligation to respond.

27. The 2014 Note increased CN's pre-existing duty to respond by adding a requirement for particulars. This avoids perfunctory and unhelpful responses like "The Company disagrees with the Union's position". In the MOA, CN agreed to the obligation to respond to the TCRC's "grievance particulars". But the Note did not render null and void other agreements the parties had negotiated in the CA about grievance responses.

28. The arbitrator agrees with the TCRC that a grievance process will not function well unless the parties exchange clear details about each other's position. This is even more important for the railway model of arbitration since they have the added responsibility of providing an arbitrator with a full and complete Record[11]. By contrast, in regular arbitrations, the parties only gradually create that Record after multiple arbitration days and *viva voce* evidence.

29. The arbitrator understood from the hearing that the parties continue to resolve many of their disputes, including by discussing grievances at joint conference pursuant to article 121.1(c). Neither party produced statistics to describe how often there is no response to a grievance. The arbitrator understands that this arbitration is not about a blanket refusal by CN to respond to any and all grievances, a different scenario which might raise the issue of the need for good faith in contract administration.

30. The arbitrator might have accepted the TCRC's arguments if the only provisions in issue were the 2014 Note and article 121.1 which sets out the CA's three grievance steps. But the arbitrator must go further and consider what other agreements the parties have included in the CA about their grievance procedure.

CN is correct that the parties have already addressed in the CA what happens if it does not provide a response.

31. The arbitrator cannot focus on the 2014 Note in isolation when considering the TCRC's grievance. The arbitrator must instead examine the full text of article 121.4, along with other related CA provisions.

32. This analysis demonstrates that the parties have already agreed between themselves what will happen if, despite the clear obligations in article 121.1, CN fails to respond within the time limits. For time claims, article 121.5, unlike 121.4, essentially upholds the TCRC's grievance whenever CN fails to respond within the required time limits:

> 121.5 **In the application of paragraph 121.1 to a grievance concerning an alleged violation which involves a disputed time claim, if a decision is not rendered by the appropriate officer of the Company within the time limits specified, such time claim will be paid**. Payment of time claims in such circumstances will not constitute a precedent or waiver of the contentions of the Company in that case or in respect of other similar claims.

[11] The arbitrator recently commented on the importance of the Record for these parties' railway arbitrations: Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 102424 at paragraph 52.

(Emphasis added)

33. For all other claims, the parties have agreed in article 121.4 what happens if CN does not respond within the time limits:

> 121.4 Any grievance not progressed by the Union within the prescribed time limits shall be considered settled on the basis of the last decision and shall not be subject to further appeal. The settlement of a grievance on this basis will not constitute a precedent or waiver of the contentions of the Union in that case or in respect of other similar claims. **Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may, except as provided in paragraph 121.5, be progressed to the next step in the grievance procedure.**
>
> Note: The Company must respond to the Union's grievance particulars at each step of the Grievance Procedure.
>
> (Emphasis added)

34. As noted in the chronology, the TCRC's initial bargaining demands sought to apply the same concept found in article 121.5 (time claims) to all situations where CN did not respond. However, the TCRC did not obtain this change either consensually in the MOA or from Arbitrator Picher.

35. Paragraph 5 of the SAP further illustrates how the parties have turned their minds to situations where arbitration is approaching, and CN has not provided a Step III response:

> 5. Once selected, if a grievance does not have a step III grievance response, the Company must provide one within 60 days, and thereafter the parties will endeavour to reach a joint statement of issue…

36. This paragraph requires CN to provide a particularized step III response within 60 days ***if*** it had not yet done so.

37. In short, CN has the obligation to respond, including with particulars, to the TCRC's grievances. However, the arbitrator cannot interpret the Note in isolation. The parties have negotiated what happens if CN does not respond. For time claims, the TCRC's grievance succeeds. For all other claims, the TCRC can move to matter to the next step in the grievance process.

38. This is how the parties' CA applies to their grievance procedure. The arbitrator cannot enforce only some of the parties' obligations while ignoring other relevant CA language.

DISPOSITION

39. The arbitrator upholds the TCRC's grievance in part. The addition of the 2014 Note changed the status quo[12]. It required CN henceforth to respond to the TCRC's "grievance particulars" at every level of the grievance procedure. The arbitrator issues a declaration to this effect.

40. However, the TCRC did not persuade the arbitrator to issue a cease and desist order. The effect of that order would be to redact from the parties' CA, and the SAP to a more limited extent, the negotiated wording governing situations where CN did not provide a response. For time claims, the TCRC's grievance will prevail if CN fails to respond.

41. For all other situations, the parties have agreed that the failure to respond means the grievance will move to the next step in the process. For SAP cases, CN has agreed to provide a step III response within a 60-day period.

42. A change to this negotiated procedure must come from the bargaining table and not from an arbitrator.

43. The arbitrator remains seized to deal with any issues resulting from this award.

SIGNED at Ottawa this 29th day of November 2022.

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Graham J. Clarke
Arbitrator

[12] The addition was not "meaningless" as had been suggested at one point in 2014: Exhibit 4; Tab 3.