AH809-M

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

BETWEEN:

Teamsters Canada Rail Conference

(TCRC)

-and-

Canadian Pacific Kansas City Railway

(CPKC)

Grievance Re: Crew Change Numbers Chapleau Terminal

Arbitrator: Graham J. Clarke
Date: March 8, 2024

Appearances:

TCRC:
K. Stuebing: Legal Counsel, CaleyWray -Toronto
W. Apsey: General Chairperson CTY East, Smiths Falls
E. Mogus: General Chairperson LE East, Oakville
G. Chambers: Local Chairperson LE - Chapleau

CPKC:
A. Cake: Manager Labour Relations, Calgary, AB
D. Zurbuchen: Manager Labour Relations, Calgary, AB

Arbitration held via videoconference on February 29, 2024.

Award

BACKGROUND

1. In AH809[1], the parties contested the arbitrability of the TCRC's grievance. The instant award deals with the merits of that grievance about the February 15, 2022 weekly placement process[2] (Process) in Chapleau, Ontario. That Process leads to the numbers for the locomotive engineer (LE) and conductor (CTY) pools and the LE spareboard.

2. The parties' collective agreement (CBA) contemplates them mutually agreeing on how to administer the Process. The CBA does not contain a precise formula for calculating the numbers.

3. The TCRC argued in favour of its proposed numbers which would provide additional opportunities for some of its members. CPKC disagreed with the TCRC's analysis and argued that it had followed the CBA Process. It further disputed that an arbitrator had jurisdiction to resolve the parties' failure to agree about the February 15, 2022 Process.

4. The TCRC also alleged that it had come to an agreement with CPKC on the proper numbers. CPKC objected to what it described as an entirely new argument which had never been raised in the grievances or in the parties' Joint Statement of Issue (JSI). The JSI limits an arbitrator's jurisdiction when hearing railway arbitrations given that the parties can plead their entire case in just a couple of hours. In the current CBA, the parties have agreed that each side will have a maximum of 45 minutes to argue its case[3].

5. The TCRC objected to CPKC putting its facts in the JSI despite never commenting on the merits of this case at any point during the grievance procedure.

6. For the reasons which follow, the arbitrator agrees with CPKC that the TCRC's argument about a binding agreement only came to light when it filed its brief. Even if the

[1] *Teamsters Canada Rail Conference (TCRC) v Canadian Pacific Railway Company*, 2023 CanLII 8290
[2] The parties have also described this process as "crew change numbers" and "Pool and Spareboard Crew Sizing".
[3] CBA, article 41.07(3).

arbitrator had entertained the TCRC's argument, the facts show that the parties did not act consistently with having reached an agreement.

7. The arbitrator further concludes that the parties negotiated language which required them to mutually agree on the Process numbers. However, they did not remit any failure to agree to arbitration. The CBA's only dispute mechanism required the parties to escalate the matter to higher union and management levels.

8. The arbitrator must accordingly dismiss the TCRC's grievance.

CHRONOLOGY OF FACTS

9. The Record the parties create under the "railway model" of arbitration is crucial to the expedited nature of the process, especially for CBA interpretation cases. This section will review some of the key elements from that Record.

10. **February 8, 2021**: CPKC sent the TCRC a mileage report[4] which the parties consider as part of the Process. In an email that same day[5], entitled "Chapleau Miles – 01Feb2021 – 07Feb2021", the TCRC wrote to CPKC:

> Just spoke with Gary, LEs 12 in both pools and 3 on the spare. CTY 11 in both pools.

11. **February 11, 2021** at 12:45: CPKC's David Marchioni wrote[6] to the TCRC in an email thread entitled "Chapleau Crew Change Numbers!!!":

> Union team,
>
> If we setup in the pools we will have ZERO on the BK spareboard.
>
> We will stay with the current week numbers for next week.

The TCRC responded:

> The CA entitles members to be setup when the numbers call for it. Gary and I have been getting flack for the odd time we have deviated. This calls for a setup account of traffic. I would strongly suggest you go by the numbers, I see by CC draft that you didn't.

[4] TCRC Documents, Tab 6.
[5] TCRC Documents, Tab 7.
[6] CPKC Documents, Tab 8.

12. **February 11, 2021** at 2:58 pm: CPKC wrote in an email[7] with the subject "Re: Chapleau Weekly Crew Change: February 14, 2021 ***Draft***":

> I have attached the Draft for the upcoming Chapleau Crew Change. Please advise if we are good with the Pool numbers, the employees on off status, and if there are any other concerns.

13. **February 11, 2021** at 3:08 pm: The TCRC responded[8] "Numbers are NOT correct. Please adjust".

14. **February 12, 2021** at 9:31 am: CPKC Superintendent Devin Cole responded[9] to TCRC:

> I'm good with running the correct number in the pools. Just remember that there could be more than usual cross pooling.

The TCRC responded[10]:

> Ok Devin no problem, also Paul Charron just advised he is supposed to be on the Crew Change for the upcoming week, he needs to added to the pool (sic).

15. **February 14, 2021** at 10:33 pm: The TCRC wrote to Devin Cole[11]:

> Devin,
>
> the pool numbers are still incorrect. Gary sent in 12 in both pools 3 on the spare and I sent in 11 in both pools, as per below you said that's what we would go with. Crew change has been completed with 11 and 3 for the LEs and 10 for the CTY. Can you please explain? From here on out we want to see the correct numbers and your involvement Pat or a VP for the future crew changes.

16. **February 15, 2021** at 17:41: CPKC did not respond to the TCRC's email which led to this follow up[12]:

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[7] TCRC Documents, Tab 9.
[8] TCRC Documents, Tab 9.
[9] TCRC Documents, Tab 9.
[10] TCRC Documents, Tab 9.
[11] TCRC Documents, Tab 12.
[12] TCRC Documents, Tab 12.

> Can someone answer this email? I don't think it is fair for Gary and I to have to take flack from the membership who are pissed off when they should have been set up and weren't after we were told they would be.

17. **February 15, 2021** at 8:20 pm: CPKC's Pat Remillard responded[13]:

> Mike,
>
> Devin and I went through this with CMC today, we will call you tomorrow.
>
> What time works for you?

The TCRC's Mike Fortin responded: "10 am".

18. **February 16, 2021** at 11:28: CPKC never called Mr. Fortin which resulted in this email[14]:

> I have yet to hear from you and doubt I will today. I have copied in the affected members of Marchioni's decision to arbitrarily forgo to increase the pools as per the CA and leave as was. As I stated yesterday I don't think it fair that Gary and I have to explain this to the membership, so I took the liberty to copy some of the affected members so one or all of you can explain to them why they were not setup/promoted like they should have been. We are already being asked the questions that should be answered by the company.

19. **February 16, 2021** at 12:33: CPKC's Pat Remillard responded[15] and indicated they would deal with General Chairperson CTY East Wayne Apsey:

> Mike,
>
> This message and your tone is inappropriate. We will deal directly with Wayne on the subject.

20. **February 16, 2021** at 20:01: Mr. Fortin responded[16] and noted: "The Union will handle this as a CA violation and lost wages".

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[13] TCRC Documents, Tab 12.
[14] TCRC Documents, Tab 12.
[15] TCRC Documents, Tab 12.
[16] TCRC Documents, Tab 12.

21. **April 7, 2021**: The TCRC filed a grievance[17] at Step 2 which read in part:

EVENTS

On February 8, 2021 a mileage report was sent to the Union via email from the Company indicating an increase in both LE and CTY pools. 12 in both LE pools and 3 on the spare, and 11 in both CTY pools. On February 11, 2021 the day the weekly crew adjustment was to be sent out Trainmaster David Marchioni sent out a message via email to forgo a set up and leave as is, as he thought there would be nobody on the Trainperson's spare. We both said no, there was no valid reason to leave it. The trend and amount of traffic had very clearly called for an increase, and a short fall on the spareboard was a ridiculous, and unfounded argument. Our reasoning was well founded not only by the provisions in the Collective Agreement, but would affect manpower in anyway.

VIOLATIONS

The Union contends that the Company is in violation of CTY 74, more specifically Article 74.05 and LE Article 62 more specifically Articles 62.01 and 62.08. M**ileage regulations are a mutual agreed upon event, so as members can earn money fairly and accurately. Sometimes we can't always "go by the numbers" but those are negotiated and agreed upon, not do whatever one feels like. In this instance a thread of emails, hurt feelings, the involvement of a Senior Vice President, and a conference call with both General Chairs by the Company all to basically violate the Collective Agreement and disenfranchise people who deserved to be set up in the pools who were not. Disgraceful to say the least.**

…

RESTITUTION

The Union contends that the Company has violated both CTY and LE collective agreement Articles dealing with mileage regulation. The Union demands that the Company cease and desist from this practice immediately, and make whole TCRC members R Parry, P Martel, and D Jackson for LE lost wages plus interest, and P Espirat, and C Pratt for CTY lost wages plus interest.

The Union reserves the right to allege a violation of, refer to, and/or rely upon any other provisions of the Collective Agreement, and/or any applicable statutes, legislation, acts, or policies.

(Emphasis added)

[17] TCRC Documents, Tab 14.

22. CPKC did not respond to the TCRC's Step 2 grievance.

23. **June 18, 2021**: The TCRC filed its grievance[18] at Step 3 and further described the events from its perspective:

> **Issue in Dispute:**
>
> The issue in dispute is the Company's decision to ignore the Collective Agreement, ignore the Union Local Chairs at Chapleau with the handling crew mileage, crew changes.
>
> **History of Dispute:**
>
> On Monday February 8, 2021 a mileage report was sent to the Union via email from the Company as per the agreed upon terms for the handling of the WPP.
>
> This report showed account of the miles earned an increase in both LE and CTY pools would be taking place for the upcoming weekly crew change.
>
> **On Thursday February 11, 2021 Trainmaster Marchionni contacted the LC's by email and advised that the Company would be unilaterally not adhering to the weekly numbers and would in fact not be setting up any employees to the respective boards, even though the miles earned called for these increases.**
>
> …
>
> **Union Position:**
>
> The Union contends that the Company is violating the agreed upon terms of the Collective
>
> Agreement and in particular the following;
>
> Article 15.01 (3), 7), 8), 10, 11), 74.01, 74.10, 62.01, 62.02, 62.05, 62.06, 62.08 as well as all seniority aspects of the CBA.
>
> The Company provided the numbers to the local Union reps for their perusal and agreement. The local reps agreed that as per the mileages earned that increases to the Pools would be as per all aspects of the CBA.
>
> The Company waited until just before the WPP Bulletin was to be released to advise the Union that they would be unilaterally making the decision on the WPP. They had 3 days to discuss with the reps but chose to what they wanted. This is not uncommon in a lot of things happening but where crew change is

[18] TCRC Documents, Tab 15.

> concerned, we have had a few problems with the Terminals of Chapleau and Schreiber.
>
> The Company by doing what it has done has not only taken away seniority of those who would have been entitled to their promotions to the Conductors Pools, and those whom would have been promoted to the ranks of Locomotive Engineer on any of their respective boards. They not only took promotion rights away as provided in the CBA, but employees would have also lost wages based on the higher rates of pay.
>
> The Company's crewing model is insufficient to meet the operation and the negative effects of this are cascading into multiple violations, including manipulation for manager use.
>
> The General Chairman was also contacted and the Company again as shown within the email correspondence chose to ignore. Unfortunately, the Company was more concerned with the local reps words used in his email (nothing damaging by any means) then they were about their unilateral decision and violations. **The Union as soon as it was made aware on the Thursday that the Company would not adhere to the agreed upon terms started communication on such. The Company had 3 more days they could have fixed things before the actual implementation of the WPP took place on the Sunday night. Simply put, they did not care**.
>
> Another example of an abuse of Management Rights. (sic)
>
> (Emphasis added)

24. **August 12, 2021**: CPKC responded at Step 3[19] but limited its response to raising three objections about the arbitrability of the TCRC's grievance.

25. **February 8, 2023**: AH809, *supra*, definitively dismissed CPKC's three objections.

26. **January 19, 2024**: The parties filed their JSI[20] for this arbitration. For the first time, CPKC set out its position on the merits for the TCRC's April 7, 2021 grievance and referenced again some of the objections already dismissed by AH809.

ISSUES

27. The parties' materials raise two issues requiring resolution:

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[19] CPKC Documents, Tab 3.
[20] TCRC Documents, Tab 1.

1. Did the parties reach an agreement on adjustments to the pools and spareboards? and

2. Can an arbitrator resolve a failure to agree about adjustments to the pools and spareboards?

28. The arbitrator will also deal with both parties' procedural objections.

ANALYSIS AND DECISION

Did the parties reach an agreement on adjustments to the pools and spareboards?

29. The TCRC argued that Mr. Cole's February 12, 2021 email, *supra*, constituted a binding agreement that CPKC failed to respect:

> 96. When Trainmaster Marchioni suggested that the Pools would not be increased as Mike Fortin had stated, Mr. Fortin immediately objected. Superintendent Cole responded, "I'm good with running the correct number in the pools. Just remember that there could be more than usual cross pooling" (Tab 11, emphasis added). Mr. Fortin responded, "Ok Devin, no problem, also Paul Charron just advised he is supposed to be on the Crew Change for the upcoming week, he needs to be added to the pool. Thank you, Mike" (Tab 11).
>
> 97. This ought to have been the end of the matter. The Union and Company local officers had mutually agreed that the Union's "correct" numbers would be used. The Union was content that potential "more than usual cross pooling" could ensue. This was a worthwhile condition on which to ensure that the Union's correct Pool numbers would be implemented the following week.
>
> 98. The Company's abrupt defaulting on Superintendent Cole's express commitment was not answered or explained by the Company at any point in the ensuing discussions or grievance process.

30. In its Reply, CPKC objected to the TCRC allegedly adding a new issue/argument in its brief. From CPKC's perspective, the TCRC's grievances, as well as the JSI, never raised this argument:

> 27. Again, at the Union's para. 97 they claim that there was mutual agreement. This simply is not the case and in fact is a new position put forward by the Union. Glaringly absent from the Union's step 2 grievance, step 3 grievance and position within the JSI is a claim that the Company and the Union had mutually agreed locally to the pool and spareboard numbers. In fact, the Union has claimed that the local Union representatives were ignored. As clearly outlined within the JSI, reference to the February 8th and February 11th emails are

> made. There is no reference whatsoever to an email between the local representative and former Superintendent Devin Cole. The Company can only assume that the Union has been lying in the bushes with this information and position to wait until the doorstep of arbitration to bring forward this evidence and position to prejudice the Company's ability to properly respond. Had the Union wished to take this position, it ought to have been outlined within the JSI. The Company objects to the Union's position that the Union and Company local officers had mutually agreed that the Union's correct numbers would be used. This is simply untrue.

31. CPKC, whose failure to provide any response on the merits at any level of the grievance procedure will be dealt with below, satisfied the arbitrator that the TCRC never raised this issue/argument in the grievance process or in the JSI.

32. The railway arbitration model deals with both disciplinary and non-disciplinary matters. The Record in discipline cases benefits from the obligation to hold an investigation which results in a written transcript. Moreover, if an employer fails to provide key documents, then an arbitrator may declare any discipline void *ab initio*.

33. Discipline cases therefore provide an arbitrator with a significant Record for the expedited arbitration.

34. Non-disciplinary cases present greater challenges. The parties have not negotiated a process which would mandate evidentiary statements and document disclosure. In some cases, the lack of disclosure until the eve of an arbitration could impact the fairness of the process[21].

35. While an arbitrator in a regular labour arbitration might remedy these challenges through expensive adjournments, the current parties have required an expedited process. They do not want an arbitrator to decide a single case after multiple hearing days sometimes over a number of years. Instead, their agreement often requires an arbitrator to hear multiple cases in a single day.

36. To get these benefits, the parties have accepted certain important obligations, such as clearly identifying the issues before the arbitrator.

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[21] See, for example, *Teamsters Canada Rail Conference v Canadian National Railway Company*, 2022 CanLII 102424.

37. In AH825[22], the arbitrator dealt with a similar issue (footnotes omitted):

> 25. The arbitrator agrees with CP that the TCRC took a new position in its Brief despite the parties' agreed upon JSI. A vague reference to an ET in a Step 1 grievance, and nothing else thereafter, does not justify filing a Brief which focussed mainly on the arbitral case law examining ETs.
>
> 26. There are several reasons for this conclusion.
>
> 27. First, the parties' expedited arbitration process is not equipped to handle surprises, whether from pleading a new issue or disclosing new documentation only when the parties exchange their Briefs:
>
>> 29. Since there was no objection to the timing of the disclosure to Dr. Snider-Adler's report (Expert Report), the arbitrator will not comment further on that specific aspect of the case. However, from a systemic point of view, the arbitrator reiterates the concerns previously expressed about the late filing of medical information. This impacts the success of the parties' railway model and an arbitrator's ability to ensure a fair hearing. This same concern exists if a party waits until just prior to an arbitration before obtaining clearly relevant medical or expert evidence.
>
> 28. Second, as noted in AH689, a vague one-off reference does not then allow a party to plead a different case at arbitration [Footnotes omitted]:
>
>> 31. The arbitrator agrees with the sentiments expressed by these experienced railway arbitrators. The situation may well be different in regular arbitration where the parties have not negotiated the types of procedures which exist in this expedited regime. A regular labour arbitration system can also take many days to hear a single grievance, which allows for more leeway than does the parties' expedited regime in this case.
>>
>> 32. The parties benefit from an extremely efficient expedited arbitration system. In order to obtain those benefits, they have negotiated clear provisions which require that all issues be identified and discussed during the grievance procedure. A vague oral reference to alcohol and 3 AA meetings during the investigation, especially given the IBEW's burden of proof for prima facie discrimination, infra, was insufficient for CN to know that Mr. S alleged that his rights under the CHRA had been violated. Documentation was only produced for this issue roughly 18 months after Mr. S's termination.
>>
>> 33. There is further prejudice which can arise from the addition of a new issue close to the arbitration date. CN could not explore that issue

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[22] *Teamsters Canada Rail Conference v Canadian Pacific Railway Company*, 2023 CanLII 2619

> during its investigation or conduct a timely supplementary investigation. The arbitrator notes further that the CHRA contains time limits for complaints.
>
> 34. The IBEW expanded its grievance beyond that which was discussed throughout the grievance procedure. The arbitrator accordingly upholds CN's objection. This conclusion, however, would not apply to situations where a party was willfully blind to a clear duty to accommodate situation.
>
> (Emphasis added)

> 29. Third, by pleading a different case, the TCRC obliged CP to use its limited rebuttal time to address an entirely new issue not found in the JSI. This is not only disruptive to the other party which had to prepare to plead 4 cases in just 2 days, but it deprives the arbitrator of a succinct rebuttal about the agreed-upon issues in the case.

38. The arbitrator has concluded that no binding agreement existed in this case.

39. For similar reasons to those cite above in AH825, the TCRC first raised this argument in its brief. There may be vague references to Mr. Cole's email, but the arbitrator can find nothing in the grievance steps or the JSI alleging that an agreement existed and that the TCRC filed a grievance to enforce that agreement.

40. Even if the arbitrator were wrong on that essential procedural point which goes to the heart of the railway model's incredible efficiency, a review of the facts does not disclose a clear agreement. Beyond the interpretation challenges which a single email[23] can present, the parties continued to contest the numbers even after Mr. Cole's email.

41. The arbitrator appreciates the challenges for both parties in identifying the legal issues early in the process. But that identification is at the heart of this arbitration regime since the late addition of issues can prevent an arbitrator from running a procedurally fair hearing. It is for that reason that the railway model has, for decades, imposed harsh consequences for actions, however innocent, which prejudice the process.

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[23] See AH837: International Brotherhood of Electrical Workers (System Council No. 11) v Canadian National Railway Company, 2023 CanLII 99782

Can an arbitrator resolve a failure to agree about adjustments to the pools and spareboards?

42. The arbitrator will divide this question into two parts.

<u>The TCRC objected to CPKC adding new information in the JSI after failing to provide any information during the grievance process</u>

43. As noted above, CPKC did not provide a response on the merits of the TCRC's grievance. It failed to respond in any way at Step 2. CBA section 40.02 states:

> Step 2 - Appeal to the Designated Company Officer
>
> If a grievance has been handled at Step 1, within 60 calendar days from the date decision was rendered under Step 1 the Local Chairman may appeal the decision in writing to the designated Company Officer.
>
> **If Step 1 has been bypassed then, within 60 calendar days of the date of the cause of grievance, the Local Chairman may present the grievance in writing to the designated Company Officer who will give a decision in writing as soon as possible but in any case within 60 calendar days of date of the appeal.**
>
> The appeal shall include a written statement of the grievance along with an identification of the specific provision or provisions of the Collective Agreement which are alleged to have been misinterpreted or violated.
>
> (Emphasis added)

44. In its Step 3 response[24], CPKC suggested that section 40.04 dealt with a failure to respond:

> 40.04 Any grievance not progressed by the Union within the prescribed time limits shall be considered invalid and shall not be subject to further appeal. **Where a decision on a grievance concerning the meaning or alleged violation of any one or more of the provisions of the Collective Agreement and in which a wage claim is involved, is not rendered by the appropriate officer of the Company within the prescribed time limits, the claim shall be allowed as presented but this shall not be considered as a precedent or waiver of the contention of the Company as to similar claims. Where a decision on an appeal against discipline imposed is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may be progressed to the next step of the grievance procedure.**
>
> (Emphasis added)

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[24] TCRC Documents, Tab 3.

45. CPKC's response at Step 3 only raised technical objections. For the instant arbitration, when CPKC sought to add its evidence for the first time in the JSI, the TCRC objected[25]:

> 100. As noted, the Company neglected to offer any substantive defence of its actions in its sole grievance response. The Company, instead, waited until the JSI process to proceed with responses.
>
> 101. The Union objects to the new positions that it declined to raise in nearly three years since the grievances were filed. These new positions include allegations—recall of employees from layoff, reference to past practice—that have never been substantiated or discussed at any time prior to now. The prejudice to the Union is obvious if CPKC is able to neglect to respond to Union's grievances for years, then introduce fully new positions at arbitration.
>
> 102. To permit CPKC to advance such never before seen positions would hand the Company carte blanche to never respond to grievances, then transform their zero positions anywhere on the record into a comprehensive brief. In CROA Case No. 4870, Arbitrator Cameron found such conduct to be in breach of the Collective Agreement, stating, "No answer is not a good answer. This is not a practice to be encouraged" (Tab 22, para 26).
>
> 103. Without prejudice and in the alternative, the Union will address each of CPKC's brand new positions in sequence.

46. In its Reply[26], the TCRC took further issue with new positions CPKC allegedly put forward in the JSI:

> 4. At para 7(e), CPKC suggests for the first time ever that February 1, 2021 was an "anomaly week." This is a brand new, prejudicial position that is not in any way consistent with the record of discussions between local Union and Company officers. This novel position must be given no weight.

47. The arbitrator notes in passing that CPKC in AH826[27] had argued that if the TCRC did not contest the fairness of an investigation at Step 1 then it was precluded from doing so at Step 2:

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[25] TCRC Brief, paragraphs 100-103.
[26] TCRC Reply, paragraph 4.
[27] Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2023 CanLII 26693

> 13. As the arbitrator understands this objection, CP argued that if the TCRC does not contest the fairness of the investigation in its Step 1 grievance, then it is precluded from ever doing so.

48. The arbitrator dismissed CPKC's objection in AH826 and referenced comments made in AH809 about the purpose of the grievance procedure (footnotes omitted):

> 24. This Step format grievance procedure escalates matters to more experienced representatives at each step. Step 1, if engaged, involves the employee and a supervisor, or possibly the Local Chair and the designated Company Officer. Step 2, where a grievance may also start, involves the Local Chair and a designated Company Officer. Step 3 allows the General Chair to appeal the decision to the General Manager, both of whom have significant labour relations experience.
>
> 25**. Evidently, the CA's intent is to encourage a full discussion of the dispute and to encourage early resolutions of "differences"**. Step 3 ensures senior representatives for each party have a solid understanding of "all differences" prior to incurring the significant costs associated with arbitration.
>
> 26. **At Stage 3, unlike during the arbitration hearing, nothing prevents the parties from particularizing their full positions given that the next step will be before an arbitrator. In other words, neither the General Chairman nor the General Manager are estopped from putting forward their full and final positions at Step 3. If it were otherwise as CP suggested in its argument, then CP, which failed to respond at Step 2, would be precluded from responding at Step 3.**
>
> 27. In the instant case, the TCRC at Step 3 provided further particulars about the CA provisions it alleged CP had violated. **The arbitrator finds nothing inappropriate about providing more detailed information to CP at Step 3 than had been provided at Step 2. Putting details into the Record for an arbitrator's later use is an essential component of a successful railway arbitration**.
>
> (Emphasis added)

49. CPKC takes an eyebrow-raising pleading risk if it foregoes its opportunity to address the merits of a grievance during the grievance procedure. For decades, arbitrators have emphasized the importance of the integrity of the Record for this expedited arbitration regime.

50. For current purposes, the Record, even if the arbitrator had excluded CPKC's new facts in the JSI, nonetheless provided enough background information. The evidence

showed that the parties failed to agree on the Process numbers for differing reasons. In February 2021, CPKC indicated why it did not agree with the TCRC[28]:

> Union team,
>
> If we setup in the pools we will have ZERO on the BK spareboard.
>
> We will stay with the current week numbers for next week.

51. The parties could not agree on the numbers despite the CBA's obligation to do so. The issue then becomes what, if anything, an arbitrator can do about that.

<u>Can the arbitrator resolve the parties' failure to mutually agree?</u>

52. In its brief, the TCRC[29] invited the arbitrator to resolve the parties' disagreement over the proper numbers for the Chapleau crew change:

> 90. As set forth above, the Company provided the weekly mileage report from February 1-7, 2021 to the Union's local representatives on February 8.
>
> 91. These reports are CPKC generated and provided and the CCA is clear that the promotions are made based on miles. The weekly miles reflect what earning capabilities exist.
>
> 92. In view of the mileages earned in Chapleau the prior week, increases to the Pools would be necessary in order to fulfill the requirements of Articles 62 and 74 allowing the promotion of Chapleau employees with respect to their seniority rights. The mileage report provided values that supported the amount of work was there to have Locomotive Engineers move from the spareboard to pool service, between pool service, and CTY who are qualified Locomotive Engineers to be set up permanently as a Locomotive Engineer.
>
> 93. The mileage report provided on February 8, 2021 calls for the exact numbers that the Mr. Fortin and Mr. Chambers proposed later that same day. Based on that mileage report, the 12 Locomotive Engineers called for by the Union provided for 3882 miles per employee. This is as close to perfect a staffing as can be provided.

53. In its Reply, the TCRC highlighted that CPKC's decision had denied its members certain opportunities:

> 48. As TCRC has repeatedly shown, the February 1-7 2021 report provided for an increased number of employees to earn 3800 miles—therefore, the promotion opportunity must follow. Had the report not shown the current

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[28] CPKC Documents, Tab 8 (February 11, 2021 David Marchioni email).

[29] These paragraphs and others in the Record illustrate the TCRC's general position.

number of pool/spare Engineers' ability to earn 3800 miles, it then there should not be a promotion and perhaps should be a demotion. Regardless, contrary to para 78, this should not be a unilateral decision. Above all, the mileage report must be respected.

54. CPKC countered[30] that the arbitrator could not resolve the parties' failure to agree without amending the current CBA language:

> 56. The original letter referenced in Article 62.08 and 62.09 can be found at the Company's Tab 9. This letter was agreed to during negotiations and was a Company demand. The Union is taking this matter before an Arbitrator, while the parties are currently in negotiations to reach a new agreement. This is not a current demand of the Union and has not been since this grievance was filed. **Instead, the Union is attempting to have an Arbitrator add language to the Collective Agreement which would exceed the Arbitrators jurisdiction.**
>
> …
>
> 61. Again, the Company must mention that the parties are currently in negotiations and the parties were previously in negotiations in 2021, the year this grievance was filed. Neither time did the Union bring forward a demand to action this language in an attempt to make a change and/or resolve any dispute. Instead, the Union is bringing this matter before an Arbitrator to attempt to resolve. **The Company believes that any proposal to change this language belongs at the bargaining table, as it was when the language was originally created, not before an Arbitrator.**
>
> (Emphasis added)

55. The current CROA Memorandum of Agreement[31] notes at section 14:

> 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.

56. CBA section 15 contains the parties' negotiated language about the weekly placement process. The parties agreed to work collaboratively when establishing the weekly crew change system (15.01)[32]:

> 15.01 FILLING OF VACANCIES

[30] CPKC Brief, paragraph 56, 61 and during oral argument.
[31] The parties provided the recent November 1, 2023 version.
[32] The parties provided the arbitrator with their 2022-2023 consolidated collective agreement which updates some of the references made in AH809.

(1) At locations where the existing Crew Change System does not fall under the following national guidelines, **those locations will need to jointly (local Company and Union officers) establish a Weekly Crew Change System within 120 days of ratification**. If unable to implement within the specified time frame issues may be advanced to the appropriate General Manager and General Chairman.

(Emphasis added)

57. Sections 15(8-11) of the CBA further highlighted the collaboration expected from both parties:

(8) **Adjustments to the pool(s) and spare board(s) will be determined by local company and union officers at the agreed upon time each week**.

(9) The final weekly crew changes will be posted at the agreed upon time each week. **Any subsequent corrections will be dealt with through the local management and local chairman or as mutually agreed**.

(10) Employees will advise the CMC of their desired changes through a weekly bid system.

(11) **Administration of the agreement will be done locally and any unresolved issues may be advanced to the General Chairman and General Manager**.

(Emphasis added)

58. CPKC's Reply argued that the CBA already provided a remedy if the parties could not mutually agree:

21. **Importantly, at the Union's para. 73, they state that Mr. Apsey (The General Chairman) escalated the mater to Ms. Remillard (The General Manager). This is exactly what the Collective Agreement language outlines should happen should there not be agreement locally**.

22. As there was not agreement locally or at the GM/GC level, the business must run. The Company has a responsibility to its customers and the Country to keep freight moving. The weekly pool and spareboard numbers remained unchanged from the previous week and a balance of craft (EN/CO) was achieved to best run the business while maintaining employees' opportunities to continue to make their miles.

(Emphasis added)

59. Parties to a collective agreement frequently include language which obliges them to agree on something. In some agreements, the parties further agree to send any dispute to an outside arbitrator, such as those about the proper salary for a new classification or the content of a job description[33].

60. In other situations, however, arbitrators have recognized that they may not have the authority to intervene[34] when the parties have agreed to agree but then fail to do so[35].

61. In the instant case, the parties have not negotiated wording which sends their disagreement about the Process numbers to an arbitrator. Neither have they agreed that the mileage report alone will determine the numbers. In short, the parties have not tasked an arbitrator with the authority to decide who is right.

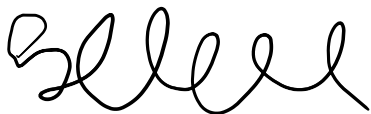
62. There is no allegation that anyone acted in bad faith under the CBA, a scenario which might give rise to other arguments.

63. For current purposes, this suffices to dismiss the grievance. The TCRC did not persuade the arbitrator that alleged lost "opportunities" granted the jurisdiction to resolve the parties' failure to agree on the numbers. Had CPKC's decision resulted in the independent violation of other CBA provisions, then arbitral relief might follow.

DISPOSITION

64. For the reasons given above, the arbitrator dismisses the TCRC's grievance on the merits.

SIGNED at Ottawa this 8th day of March 2024.



Graham J. Clarke
Arbitrator

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[33] See, for example, *Power Workers' Union, Cupe Local 1000 v Toronto Hydro-electric System, 2023 CanLII 52618* at paragraph 122.
[34] *United Steelworkers, Local 1-2010 v 3 Nations Logging LP*, 2020 CanLII 15336 at paragraph 62.
[35] See, for example, *National Steel Car Ltd. and U.S.W.A., Loc. 7135*, Re, 1990 CanLII 12757.