AH809

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 Railway Company

(CP)

Preliminary Objections: Chapleau Weekly Placement Process

Arbitrator: Graham J. Clarke
Date: February 8, 2023

Appearances:

TCRC:
K. Stuebing: Legal Counsel
W. Apsey: General Chairperson CTY East, Smiths Falls
E. Mogus: General Chairperson LE East, Oakville

CP:
C. Clark: Manager, Labour Relations, Calgary, AB
A. Cake: Manager, Labour Relations, Calgary, AB

Arbitration held via videoconference on January 26, 2023.

TABLE OF CONTENTS

Award

BACKGROUND

1. On March 22, 2022, the parties signed a Memorandum of Settlement (MOS) (Appendix 2) revising the arbitration process in Article 41 of their collective agreement (CA)[1]. The arbitrator agreed to hear 4 Ad Hoc cases in 2022 and a further 8 in 2023 on the condition that the parties would plead no more than 2 cases per day.

2. The parties intended for the MOS to supplement the regular Canadian Railway Office of Arbitration & Dispute Resolution[2] (CROA) arbitration process given the parties' significant backlog of grievances. Unlike in the CROA process, the MOS does not allow ex parte statements. This essentially provides either party with a veto to the MOS arbitration process.

3. The MOS granted appointed arbitrators the power to attempt to mediate any impasse. If that fails, however, then the matter cannot proceed under the MOS and must return to the CROA arbitration process.

4. The arbitrator provides this description of the MOS system to explain why this award does not examine both CP's objections and, if still required, the merits of the TCRC's grievance.

5. CP raised a preliminary arbitrability objection to the TCRC's grievance which contested the Weekly Placement Process (WPP)[3] at Chapleau, Ontario. The objection raised 3 concerns: i) the alleged consolidation or bundling of multiple disputes into a single grievance; ii) the alleged lack of provisions in the CA authorizing a cease/desist order and iii) the alleged vagueness of a request for employees to be "made whole".

6. The TCRC argued that nothing prevented it from advancing a single grievance on behalf of its members who alleged that CP did not abide by its WPP obligations. In its

[1] The MOS is entitled "Letter Re: Grievance Reduction Initiative & Article 41 Final Settlement of Disputes Without Work Stoppage (Arbitration)"
[2] Croa.com
[3] CP Brief; Paragraphs 11-13: CP called the system the Weekly Crew Change process.

view, there is no obligation to file a separate grievance for each impacted employee. Moreover, the TCRC argued that railway arbitrators have issued cease and desist orders. Similarly, trade unions frequently request make whole orders, though arbitrators often do not examine their particulars unless and until they have made a finding of liability on the merits.

7. For the reasons which follow, the arbitrator dismisses CP's three objections. The TCRC properly filed a single particularized grievance on behalf of its members who may have suffered prejudice. The TCRC can also request a cease and desist order, a remedy which arbitrators have awarded multiple times in the railway sector. Finally, the arbitrator considers routine a request for a make whole order which seeks to provide full compensation for employees after a contractual breach.

CHRONOLOGY OF KEY FACTS

8. This award does not deal with the merits of this dispute either implicitly or explicitly. Nonetheless, the chronology of events which led to CP's objections constitute essential context for an understanding of this award.

9. **February 15, 2021**: For this specific week, the TCRC took issue with CP's WPP in Chapleau.

10. **April 7, 2021**: The TCRC filed a grievance[4] claiming CP had not abided by the "weekly mileage regulations". CP did not respond to the grievance. The grievance involved certain locomotive engineers (LE) and Conductors, Trainpersons & Yardpersons (CTY) covered by the CA. The grievance's particulars included the following:

> 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. Mileage 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.
>
> …
>
> The Union contends that the Company has violated both CTY and LE collective agreement Articles dealing with mileage regulation. **The Union demands that**

[4] TCRC Exhibits, Tab 3

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)

11. **June 18, 2021**: The TCRC filed its Step 3 grievance[5] which included these extracts:

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 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.

…

For the foregoing reasons as well as those adduced in the earlier appeal **the Union requests that the Company cease and desist from continuing to ignore the miles earned which forms part of the process for the WPP, as well as to cease and desist from not discussing with the local reps until an agreement has been reached.** This should not be a one-sided affair all the time. **The Union further request any employee whom lost wages account of not being promoted be paid all wages lost with 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) act or policy.

(Emphasis added)

[5] TCRC Exhibits, Tab 4

12. **August 12, 2021**: CP responded to the TCRC's Step 3 grievance[6] the particulars of which focused almost exclusively on objections:

> **The Company must object to the submission of this grievance based on the fact that the grievance attempts to arbitrarily consolidate/ bundle multiple disputes into a single grievance. More specifically, the Union has attempted to consolidate/bundle multiple employees into a single dispute.**
>
> As the Union is well aware, absent concurrence by both parties, the provisions of the Collective Agreement do not allow for the arbitrary consolidation or bundling of multiple disputes into a single grievance. Each grievance must address the specifics of each alleged violation of the Collective Agreement. Each case in turn, must be assessed on its own merits. **This grievance is improperly filed and as such it will not be accepted. Should the Union wish to further pursue the items in dispute you can do so by filing individual grievances in accordance with the Collective Agreement provided they are still within time limits.**
>
> The Company has not agreed to the wholesale bundling of multiple disputes and therefore any grievance filed as such is invalid.
>
> **Throughout the Grievance procedure within the Collective Agreement, there is no reference to grievances which is pluralized. Rather, the language refers to a grievance. Each singular dispute is then processed as outlined in Article 40 of the Consolidated Collective Agreement.**
>
> …
>
> **Regarding the Union's request for "cease and desist", there are no provisions in the Collective Agreement for submission of a grievance encompassing a request for the Company to "Cease and Desist".** The MOS establishing CROA&DR clearly indicates that a dispute must be progressed through the grievance process and CROA 4557 case law supports that position. The Union's allegation of a cease and desist is a further attempt to seek relief for an allegation of multiple disputes without progressing each through the grievance process.
>
> …
>
> **Without precedent or prejudice to the Company's aforementioned position, it is incumbent on the Union to provide detailed information on alleged lost wages, benefits, and interest. The Company cannot properly respond to this request when the Union is vague and unspecific on what constitutes "made whole."**
>
> (Emphasis added)

[6] TCRC Exhibits; Tab 5

13. **November 28, 2022**: The parties' Joint Statement of Issue (JSI)[7] restricted itself to CP's three arbitrability objections: i.e., i) consolidate/bundle; ii) cease and desist; and iii) "make whole".

DECISION AND ANALYSIS

Introduction

14. Any interpretation of the parties' respective rights and obligations starts first with the governing legislation, which is usually, but not exclusively, the *Canada Labour Code*[8] (*Code)*. The arbitrator must then consider the parties' own negotiated agreements.

15. Railway case law only becomes relevant after that analysis, since those cases do not necessarily involve the same parties and the same CA.

16. In AH805[9], a decision involving these same parties, the arbitrator summarized some of the interpretation principles applicable to collective agreements [footnotes omitted]:

> 11. In short, the arbitrator will consider this non-exhaustive list of principles when interpreting the parties' CA:
>
> 1. An arbitrator interprets not what the parties may have subjectively intended but instead the plain and ordinary meaning of the words they negotiated into their collective agreement;
>
> 2. Exceptionally, and provided certain legal preconditions are met, an ambiguity, a past practice or an estoppel may impact the collective agreement's interpretation;
>
> 3. A rights arbitrator has no authority to rewrite or otherwise amend the collective agreement;
>
> 4. Parties are entitled only to the benefit of their bargain; and
>
> 5. A rights arbitrator does not determine what the parties' appropriate bargain should have been. Changes to the parties' "deal" come solely from collective bargaining.

[7] TCRC Exhibits; Tab 1
[8] RSC 1985, c L-2
[9] Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2022 CanLII 121426

17. If multiple possible CA interpretations exist, arbitrators prefer those which respect the governing legislation and do not lead to absurdities.

Canada Labour Code

18. In the federal sector, the *Code* grants labour arbitrators the statutory authority to resolve "all differences" arising from the parties' CA "concerning its interpretation, application, administration or alleged contravention". The CA must contain a provision for the final settlement of "all differences":

> 57 (1) **Every collective agreement shall contain a provision for 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.**
>
> Where arbitrator to be appointed
>
> (2) Where any difference arises between parties to a collective agreement that does not contain a provision for final settlement of the difference as required by subsection (1), the difference shall, notwithstanding any provision of the collective agreement, be submitted by the parties for final settlement
>
> (a) to an arbitrator selected by the parties; or
>
> (b) where the parties are unable to agree on the selection of an arbitrator and either party makes a written request to the Minister to appoint an arbitrator, to an arbitrator appointed by the Minister after such inquiry, if any, as the Minister considers necessary.
>
> (Emphasis added)

19. While the MOS standing alone, given each party's veto, may not respect the *Code*'s requirements, CROA remains their default system for resolving "all differences".

20. Subject to judicial review[10], the *Code* protects an arbitrator's decision[11] resolving a CA "difference":

> 58 (1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed in any court.
>
> No review by certiorari, etc.

[10] Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65
[11] Section 62 of the *Code* deals with arbitration board "decisions" which are not unanimous.

(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain an arbitrator or arbitration board in any of their proceedings under this Part.

The Collective Agreement

21. Unlike in some collective agreements, the parties have not negotiated extensive wording about individual, group, policy and employer grievances. Instead, there exist general provisions covering wage claims, CA violations and "appeals" against discipline. The CA incorporates the CROA arbitration process which they have historically used to resolve their "differences":

> 40.02 A grievance concerning the meaning or alleged violation of any one or more of the provisions of this Collective Agreement shall be processed in the following manner:
>
> Step 1 - Presentation of Grievance to the Designated Supervisor
>
> Within 60 calendar days from the date of the cause of grievance **the employee 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, **or this Step may be bypassed by forwarding the grievance to the Local Chairman who may initiate the grievance at Step 2.**
>
> 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.**
>
> Step 3 - Appeal to General Manager
>
> **Within 60 calendar days from the date decision was rendered under Step 2, the General Chairman may appeal the decision in writing to the General Manager, whose decision will be rendered in writing within 60 calendar days of the date of appeal.** The decision of the

> General Manager shall be final and binding unless within 60 calendar days from the date of their decision proceedings are instituted to submit the grievance to the Canadian Railway Office of Arbitration and Dispute Resolution for final and binding settlement without stoppage of work.
>
> (Emphasis added)

22. The CA also contains article 41.01 which was formerly "Article 36 LE West and LE East and Article 80 CTY West and CTY East"[12]:

> 41.01 **All differences between the parties to this Collective Agreement** concerning its meaning or violation which cannot be mutually adjusted shall be submitted to the Canadian Railway Office of Arbitration and Dispute Resolution for final settlement without stoppage of work.
>
> (Emphasis added)

23. The parties negotiated wording demonstrates that either can bring a grievance for a "difference" under the CA.

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

[12] The March 21, 2022 MOS which added further sub provisions to article 41, including the creation of this supplemental arbitration process, contains this identical provision.

in its argument, then CP, which failed to respond at Step 2, would be precluded from responding at Step 3[13].

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.

28. The TCRC also referred to seniority implications which might flow from CP's actions. While CP argued that seniority is mentioned 561 times in the CA[14], the arbitrator understands that a violation, if one occurred, could have some seniority implications. The TCRC simply put CP on notice about that aspect of its remedial request should it later succeed on the merits.

Memorandum of Agreement Establishing the CROA&DR (MOA)

29. The CA's reference to CROA brings into play the 2004 MOA[15] which certain railways and trade union have jointly signed. The MOA sets out the Rules and Procedure for CROA grievances. The language is somewhat general since it applies to different employers, trade unions and collective agreements.

30. For example, paragraph 6 of the MOA deals with "disputes":

> 6. **The jurisdiction of the arbitrators shall extend and be limited to the arbitration**, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, **of**;
>
> > **(A) disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged**; and
> >
> > (B) other disputes that, under a provision of a valid and subsisting collective agreement between such railway and bargaining agent, are required to be referred to the Canadian Railway Office of Arbitration & Dispute Resolution for final and binding settlement by arbitration;

[13] See, for example, CP's Brief at paragraphs 14 and 20-23.
[14] CP Brief; paragraph 22
[15] http://croa.com/rules.html

(Emphasis added)

31. Given this background, the arbitrator will now deal with CP's 3 objections in the JSI.

The Company objects to the Union's attempt to arbitrarily consolidate/ bundle multiple disputes into a single grievance. More specifically, the Union has attempted to consolidate/bundle multiple employees into a single dispute.

32. The arbitrator finds no support in the *Code*, the CA or the case law for CP's suggestion that the TCRC cannot file a single grievance on behalf of multiple employees.

33. There are multiple reasons for this conclusion.

34. First, article 41.01 of the CA makes it explicit that both CP and the TCRC can take "all differences" to CROA. That article reflects the *Code's* requirement for the CA to contain a provision for the settlement of all differences. This would allow CP to file an employer grievance, despite no specific CA wording setting out this entitlement.

35. Second, the CA, unlike in some other labour agreements, does not distinguish between individual, group and policy grievances. The only mention of an "employee" bringing a grievance is in Step 1 article 40.02. However, Step 1 says an "employee may present the grievance in writing" but also allows an employee to bypass Step 1 so that "the Local Chairman may present the grievance in writing to the designated Company Officer".

36. There is nothing in this wording suggesting that the TCRC cannot bring a single grievance contesting an alleged CA violation and seeking remedies for any prejudiced employees.

37. Third, CP relies on Arbitrator Sims' decision in CROA 4557[16] to suggest[17]:

> 34. In his decision, arbitrator Sims relied on that Collective Agreement language which "refers to "a grievance" and "the grievance". Arbitrator Sims went on to

[16] CROA 4557
[17] CP Brief; Paragraph 34

> find that the consolidation of disputes without mutual consent from each party rendered the matter as not properly before him…".

38. The first point to note about CROA 4557 is that it deals with different parties and a different collective agreement. Secondly, Arbitrator Sims had before him *separate and distinct* grievances which resulted in the employer objecting to their consolidation without its consent:

> **The Union filed three separate and distinct grievances with the Company**, superficially GTS files: CN-TCRC-4.2-4.3-2014-01845 (dated May 21, 2014), CN-TCRC-4.2-4.3-2014-01996 (dated September 8, 2014) and CN-TCRC-4.2-4.3-2014-0335 (dated February 20, 2015).
>
> The Union filed a single ExParte statement of issue and facts including all three separate grievances with the intent to proceed with a single hearing at CROA&DR.
>
> **The Company's position is that the Union cannot consolidate multiple (distinct) grievances into a single statement of issue with the intent to an Arbitrator hear all separate grievances in one hearing**. The Company contends the Collective Agreement provides for a singular grievance to be progressed by means of statement of issue.
>
> (Emphasis added)

39. Arbitrator Sims concluded that the trade union in that case could not unilaterally consolidate multiple grievances into one CROA arbitration:

> I find this matter is not properly before this CROA arbitrator because the underlying collective agreement and the CROA agreement dealing with an arbitration under that underlying agreement, contemplates only individual grievances and no unilateral ability by one party to consolidate grievances into one CROA process.

40. The reference to an "individual grievance" in the above extract does not mean that a proper grievance must limit itself to a single employee. In the arbitrator's view, Arbitrator Sims concluded in CROA 4557 that the trade union could not bring three distinct grievances and unilaterally consolidate them into one CROA hearing without first obtaining the employer's consent.

41. That is not the situation in this case.

42. At paragraph 35 of its Brief, CP suggested that the TCRC's grievance consolidates multiple disputes:

> 35. The Company maintains it has not agreed to the consolidation of the disputes listed in the Union's submission and therefore any such bundling is inappropriate. The items which have been bundled are as follows:
>
> 1) A request for a cease and desist;
>
> 2) Alleged "ignoring of the Collective Agreement";
>
> 3) Alleged "ignoring of the Union Local Chairs";
>
> 4) Alleged violations of Articles: 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;
>
> 5) The Union's request to make whole "R. Parry";
>
> 6) The Union's request to make whole "P. Martel";
>
> 7) The Union's request to make whole "D. Jackson";
>
> 8) The Union's request to make whole "P. Espirat";
>
> 9) The Union's request to make whole "C. Pratt"; and
>
> 10) The Union's request of "any employee whom lost wages account of not being promoted be paid all wages";

43. CP's suggested interpretation undermines any proper resolution of "all differences", as required by the *Code*, and as found in article 41.01 of the CA[18]. The TCRC has filed a single grievance contesting a course of conduct which it alleged negatively impacted multiple members of its bargaining unit. That is routine in labour relations and entirely proper.

44. A proper grievance can envelope all the elements which CP considers different "disputes" in paragraph 35 of its Brief, *supra*. The TCRC's grievance respects its obligations under the CA which at Step 2 requires: "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".

[18] The CROA MOA also refers to "disputes", *supra*.

45. Fourth, in AH756[19], albeit under a different collective agreement with different parties, Arbitrator Stout previously concluded that a trade union, in similar circumstances to those present in this case, could file a group grievance:

> [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.

46. The same conclusion applies in this case. The TCRC can file a grievance contesting a scenario which occurred and seek redress for its members. Whether the TCRC can prove its case on the merits is another matter.

47. An arbitrator must reject an interpretation which leads to an absurd result. Under CP's suggested interpretation, as the arbitrator understands it, if it underpaid every employee in the bargaining unit by $100, then it could argue that the TCRC could only obtain redress by filing 1000's of grievances i.e., one for each employee. With respect, that CA interpretation makes no sense.

The Company further objects to the Union's request for "cease and desist" as there are no provisions in the Collective Agreement for submission of a grievance encompassing a request for the Company to "Cease and Desist".

48. The arbitrator dismisses this objection for multiple reasons.

[19] Canadian National Railway Company v Teamsters Canada Rail Conference, 2022 CanLII 2021

49. First, from a purely practical perspective, the arbitrator previously issued a cease and desist order in AH657[20], an award involving these same parties. CP did not object to the arbitrator's jurisdiction to make that type of order in that earlier case[21].

50. Second, but only in exceptional circumstances, the CA could restrict an arbitrator's remedial powers. For example, the *Code* allows parties to agree on a specific penalty for an "infraction" which would oust an arbitrator's usual jurisdiction to substitute a different penalty. Section 60(2) of the *Code* makes this exception explicit:

> 60(2) Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause **and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration**, the arbitrator or arbitration board has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.
>
> (Emphasis added)

51. CP pointed to no provision in the CA which would otherwise restrict an arbitrator's broad remedial powers. The JSI did refer to the CROA MOA which contains the relatively standard labour relations wording prohibiting an arbitrator from amending the parties' negotiated CA:

> 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.

52. Third, an arbitrator's remedial powers come from the *Code*'s requirement that parties to a CA use arbitration to resolve "all differences". The facts demonstrate that a difference exists between the parties regarding the application of the CA to the WPP in Chapleau. The TCRC has the right to ask an arbitrator whether CP violated the CA.

53. Fourth, there may be situations where prejudice occurs if a party first raises at the arbitration stage a novel issue or a type of extraordinary remedy, such as a cease and desist order, or perhaps punitive or aggravated damages[22]. Reserving the right to add

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[20] Teamsters Canada Rail Conference v Canadian Pacific Railway, 2018 CanLII 27194 at paragraph 222.
[21] The TCRC's Brief at paragraph 73 lists multiple CROA cases which involved cease and desist remedies.
[22] See a general discussion at Canadian Signals and Communications System Council No. 11 of the IBEW c Canadian Pacific Railway Company, 2021 CanLII 70484

more issues or allegations does not avoid this important principle. As AH689[23] noted, raising a novel issue can undermine the fairness of a railway arbitration:

> 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 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.

54. The arbitrator agrees generally with the TCRC's reference to *Blouin Drywall*[24], though that decision must be read consistently with the important disclosure principles underpinning the parties' railway model of arbitration.

55. The TCRC did not add a request for a cease and desist order at a time when it might cause prejudice to CP. Just the opposite occurred in this case.

56. In its initial April 7, 2021, grievance, the TCRC put CP on notice that it would be requesting a cease and desist order. That provided CP with a full opportunity to start

[23] Canadian National Railway Company (CN) v International Brotherhood of Electrical Workers System Council No. 11, 2019 CanLII 123925
[24] Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486, 1975 CanLII 707

putting together a full and proper Record to ensure that it had the facts it needed to argue against that type of remedy.

57. The arbitrator will comment on further remedial issues when examining CP's third objection.

It is incumbent on the Union to provide detailed information on alleged lost wages, benefits, and interest. The Company cannot properly respond to this request when the Union is vague and unspecific on what constitutes "made whole."

58. The arbitrator dismisses this objection for multiple reasons.

59. First, labour arbitrators almost always separate the issue of liability from the particulars of any remedies. Why spend time and money arguing about the specifics of remedies, such as the precise compensation owing to a reinstated employee, if the entire issue becomes moot if the arbitrator dismisses the grievance?

60. Second, if an arbitrator determines an employer violated the CA, then the parties have first stab at resolving the particulars of any remedial issues. Arbitrators reserve their jurisdiction should the parties be unable to agree.

61. The TCRC and CP routinely resolve remedial issues without the need for an arbitrator. However, as happened in CROA 4505S[25], the parties may on rare occasions ask an arbitrator to resolve remedial issues:

> 1. On November 4, 2016, this Office issued CROA&DR 4505 which ordered CP to reinstate Mr. Danchilla forthwith. The arbitrator retained jurisdiction for any issues related to remedy.
>
> 2. On November 15, 2019, the TCRC advised the arbitrator that, while the parties had resolved certain issues, there remained several still outstanding, including the compensation owing to Mr. Danchilla.
>
> 3. The parties agreed to have this matter heard as an Ad Hoc on July 13, 2020 at the CROA office in Montreal. Due to the pandemic, the hearing took place by way of videoconference.

[25] Canadian Pacific Railway Company v Teamsters Canada Rail Conference, 2020 CanLII 48641

> 4. This award resolves most of the remaining outstanding issues. However, the arbitrator retains jurisdiction since the parties still need either to agree on a compensation amount or submit their final calculations to the arbitrator.

62. Third, and recognizing that this might occur more often in a dismissal case, some of the items claimed, such as interest, may still be accruing. In dismissal cases, almost all potential monetary items keep accruing pending an arbitrator's decision.

63. In any event, CP remains far better positioned to calculate its potential monetary exposure should a grievance succeed. It is not the TCRC's responsibility to do this analysis for them.

64. Fourth, the TCRC's "make whole" request simply asks, should it succeed on the merits, that its members be placed into the situation they would have been in had no CA violation occurred. This routine "breach of contract" request does not prevent the grievance from proceeding on the merits.

DISPOSITION

65. Nothing in this award should be interpreted as deciding anything relating to the merits of this matter. Both parties retain their ability to provide full submissions on the issues during the hearing of the merits.

66. For the reasons explained above, the arbitrator dismisses CP's 3 preliminary objections. The TCRC can bring a single grievance contesting a scenario, like the one which allegedly occurred during the week of February 15, 2021 and request remedies on behalf of any affected employees.

67. The arbitrator further dismisses CP's objection contesting the TCRC's request for a "cease and desist" order. The TCRC has advised CP that its remedial requests go beyond what might otherwise be considered routine. The merits of this case will determine whether the TCRC has any entitlement to that type of remedy.

68. The arbitrator dismisses CP's objection arising from the TCRC's request that any affected employees be made whole. The merits of this case will determine whether CP has any liability. The particulars of any compensation for impacted employees would only occur after a decision on liability.

69. The arbitrator retains jurisdiction for the hearing on the merits of this matter.

SIGNED at Ottawa this 8th day of February 2023.

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Graham J. Clarke
Arbitrator