AH875

IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE
RAIL CANADA TRAFFIC CONTROLLERS
(the "Union")

- and -

CANADIAN NATIONAL RAILWAY COMPANY

(the "Company")

Re: A. Regallet (Exercise of Seniority; Number 174015)

Date/Place of Hearing: September 15, 2023, Edmonton, Alberta

Arbitrator: Cheryl Yingst Bartel

DISPUTE:

Alleged denial of Article 35 rights to A. Regallet.

Appearing For the Company: Suzanne Fusco, Senior Manager, Labour Relations
Andres Hernandez Gutierrez, Jr. Labour Relations Associate

Appearing for the Union: Jason Bailey, General Chairman
Kieran Spencer, Local co-Chair
Michael Martinson, Vice General Chairperson
Philippe Masson, Local co-Chair

AWARD OF THE ARBITRATOR

Issue and Summary

[1] I was appointed by the parties to arbitrate this dispute on an *ad hoc* basis, using an expedited process agreed upon by the parties. This process is similar to that used by the Canadian Railway Office of Arbitration, to which this Arbitrator has recently been appointed.

[2] Brief written and oral submissions were provided. Oral argument was also very brief; the parties completed argument of all four grievances in approximately an hour. No *viva voce* evidence was received.

[3] Four grievances were heard on the same day. Three of these four Grievances arose from the Company's move of its Rail Traffic Control ("RTC") work to Edmonton from Montreal. This is one of those Grievances.

[4] The issue in this Grievance is whether the Company improperly denied the Grievor the opportunity to exercise his Article 5.7 right to voluntarily demote back to an RTC position and "gain the benefits of that move". The remedy requested is that the Grievor be made whole.

[5] I am satisfied the Grievor is unable to satisfy the requirements of Article 5.7. He therefore has no entitlement to be placed into an RTC position or to receive any benefits flowing from the abolishment of at position, "as if" he still held that position.

[6] After this decision was initially issued, the Union approached the Arbitrator and requested this Arbitrator clarify her reasoning for both this decision and the *Lefebvre Grievance* decision – issued the same day - since transition "work" was still being performed in Montreal when the Grievor sought to return to his role.

[7] This was the first time in over a decade of arbitrating that a party raised an issue for clarification to this Arbitrator after a decision was rendered.

[8] While the Arbitrator initially considered this to be a "new" argument, upon considerable further reflection and under her retained jurisdiction – and as it does not change the original result - the Arbitrator is prepared to provide further reasoning to clarify her word choice and to address the Union's implied question regarding timing of abolishment and the transitional work.

[9] This is not offered to address the Union's frustration with the result – which was made obvious to this Arbitrator by the Union representative – but rather to address the confusion that appears to have resulted from a particular word choice of the Arbitrator. An errata has been incorporated into this Award.

Background Facts

[10] The following background facts are repeated from *CN v. TCRC (G. Lefebvre Grievance).*

[11] In addition to a Collective Agreement (Agreement 7.1), the Company and the Union are signatories to an Employment Security and Income Maintenance Agreement (the "ESIMA"). The ESIMA is a comprehensive, lengthy document that provides for certain benefits on the happening of certain events, including relocation benefits and severance payments for position abolishment.

[12] By letter dated November 18, 2019, the Company provided notice to the Union of its intention to transfer RTC work associated with its Northern Ontario District to the RTC center in Edmonton, resulting in a five desk – and 13 swing position - reduction in Montreal. The desks impacted were listed. The positions in Montreal were to be abolished by this transfer. That letter appended the employees impacted by that change, which did not include this Grievor.

[13] Under Article 8.4 of the ESIMA, the parties agreed that when operational and organization changes occurred under that Article, they would negotiate "on items other than those specifically dealt with in The Plan with a view to further minimizing the adverse effects on employees." As the Company's decision to

relocate this Northern Ontario District work was an "operational and organization" change as contemplated by Article 8.4 of the ESIMA, the parties entered into negotiations regarding RTC employees impacted by the move.

[14] However, it was not just the Northern Ontario District that was negotiated by the parties through this process, but rather a move of all RTC work based in Montreal: the Southern Ontario District, Metrolinx, Kingston, East Coast/Eastern Quebec/Montreal Area and "Remaining Territory".

[15] On February 20, 2020, the Company provided to the Union a form of letter agreement summarizing what had been negotiated between them, "in accordance with Article 8.4 of the….ESIMA". The Union executed the letter, indicating agreement to those terms (the "February Agreement"). This was a detailed agreement regarding benefit and bonus entitlement.

[16] On February 24, 2020 the Company sent another notice to the Union that it intended to "centralize the work performed by the Montreal RTC Center to the RTC Center in Edmonton, which would "result in the abolishment of the jobs in Montreal and the centralization of rail traffic control activities in Edmonton". A list of employees impacted was appended to this second notice letter. The Grievor was on this list.

[17] This second letter noted the centralization would be staged to ensure there was no interruption in service and provided the same dates for the changes as contained in the February Agreement. The letter indicated the Company would be "prepared to meet in accordance with Article 8, paragraph 8.4 of the ESIMA…". However, this Arbitrator was not provided with evidence of any other negotiations under Article 8.4 beyond the February Agreement executed prior to this notice. It is the February Agreement upon which the parties relied.

Additional Facts

[18] The Grievor qualified as an RTC in February of 2016. Shortly after doing so, he left the RTC role and began to work in a new role, under the USW Agreement 10.8, in the position of Track Maintainer Flagman.

[19] The Grievor worked in this position for seven months and exercised his seniority back to an RTC role in September of 2016, where he remained until the Union was given notice of the Company's intentions to move the RTC work. As an RTC employed on February 20, 2020, the Grievor was entitled to elect to relocate to Edmonton to remain as an RTC.

[20] The Grievor chose not to remain as an RTC upon receiving that notice, and instead returned to the Track Maintainer Flagman role on April 17, 2020. In August of 2020, the Grievor requested a return to the RTC position under Article 5.7. The Company denied this request.

[21] On September 9, 2020, the Grievor resigned his employment with the Company.

Applicable Provisions

[22] The following are the relevant articles of the Collective Agreement, the ESIMA and the February Agreement.

The ESIMA

Article 8.1

(a) [notice provisions for any "Technological, Operational or Organizational change of a permanent nature which will have adverse effects on employees holding permanent positions"]

(b) [notice provisions for "any other permanent change of a known duration]

(c) In situations where supervisors or employees holding excepted or excluded positions, return to the bargaining unit and displace a scheduled employee occupying a permanent position, the employee so displaced will be entitled, if eligible, to the same benefits as employees affected in (a) and (b) above.

Article 8.4

> Upon request the parties shall negotiate on items, other than those specifically dealt with in The Plan, with a view to further minimizing the adverse effects on employees. Such measures, for example, may be related to exercise of seniority rights, or such other matters as may be appropriate in the circumstances, but shall not include any item already provided for in The Plan.

Article 13.3

> In cases of permanent staff reductions, employees who have two years or more of continuous employment relationship at the beginning of the calendar year in which the permanent reduction occurs may, upon submission of formal resignation from the Company's service, claim a severance payment as set forth above …

The February Agreement

Article 2(g)

> Those employees transferring to Edmonton will establish a dovetailed seniority on the Edmonton seniority list, as provided by collective agreement 7.1….

Article 2(k)

> Employees who choose to relocate, under the provisions of this agreement, must sign an irrevocable declaration of their intent to relocate no later than April 3, 2020.

Article 3

> Employees who choose to relocate, under this provisions of this agreement, must sign an irrevocable declaration of their intent to relocate no later than April 3, 2020

Article 6

> Except as otherwise addressed in this letter, the provisions of the ESIMA will apply insofar as all other benefit provisions are concerned.

Article 7

> This letter of agreement constitutes full and final settlement pursuant to

Article 8.4 of the ESIMA with respect to the Company's Article 8 Notice dated February 24, 2020 to transfer the remaining work from Montreal RTC Center to the RTC Center in Edmonton

The Collective Agreement

Article 5.7

Employees who, while work is available to them under this Agreement, transfer to a position within the Railway under another Agreement, shall continue to accumulate seniority under this Agreement for a period of two (2) years from the date of transfer. Employees who transfer under this Article must return to the permanent unassigned board which covers their former location before being allowed to bid on a position or exercise seniority under this Agreement and will be considered to have vacated their assignments.

Article 35.1

Subject to the provisions of clause (b) of Article 26.1 and (a) of Article 35.1, the name of employees who have been or are promoted from a position covered by this agreement to an official or any other position with the company not covered by a Collective Agreement or who become a representative of the employees, shall be continued on the seniority list and shall continue to retain and accumulate seniority while so employe.

(a) Employees promoted to a permanent non-scheduled, official or excluded position with the Company subsequent to July 1, 1978, shall continue to accumulate seniority on the seniority list from which promoted for a period two (2) consecutive years…

Article 35.2

In the event of either being released (except by dismissal) from a position referred to in Article 35.1 **or in the case of employees desiring voluntarily to demote themselves to a position covered by this Collective Agreement, such employees must exercise seniority on the Manager RTCC's Territory from which promoted** and seniority being sufficient, displace the junior regularly assigned RTC in the highest seniority group in which they hold seniority, **provided they do so and commence work within thirty (30) days from date of such release, unless prevented by illness or other cause for which leave of absence is granted…** (emphasis added)

Article 35.4

> Employees who have become physically or mentally unfit to perform the duties to which assigned may, with the concurrence of the proper officer of the Company and the General Chairperson, exchange positions with another employee on the same Seniority and Promotion District holding a position which the disabled employee **is qualified for and able to perform.** Disabled employees placed on a position shall not be displaced by other able bodied employees so long as they remain on that position except when senior employees are otherwise unable to hold a position within their seniority group (emphasis added).

Arguments

[23] The Union argued that Mr. Ragallet was in a management position and was entitled to exercise his seniority rights pursuant to Article 35, as in the Grievance relating to Mr. Lefebvre. However, I am satisfied the Grievor was employed as a Track Maintainer Flagman as of April 2020, under the USW Agreement 10.8 and was not in a management position.

[24] The Union raised the same brief arguments as those considered in *G. Lefebvre Grievance*, including that the Company could not impact an exercise of seniority rights by its decision to relocate this work.

[25] As in *G. Lefebvre Grievance*, the Company argued that all RTC positions were abolished in Montreal and that the Grievor chose not to accept the offer to relocate to Edmonton, with the benefits associated with that choice. It argued that choice limited the Grievor's ability to continue to work for the Company as an RTC. It argued the Grievor could not meet the requirements of Article 5.7 to return to the RTC position, as there were no "permanent unassigned board" positions "covering his former location" for him to exercise his seniority into.

Analysis and Decision

[26] This is a very similar Grievance to that considered in *CN v. TCRC (G. Lefebvre Grievance)*. The only difference in this case, is this Grievance involves the

application of Article 5.7 of the Collective Agreement, rather than Article 35, since the Grievor moved out of his RTC role, to work under "another Agreement".

[27] Like Article 35, Article 5.7 does not provide a "blanket" or unlimited right to exercise seniority rights. It also establishes certain conditions, which are more restrictive than those in Article 35: the Grievor must be able to "return to the permanent unassigned board which covers their former location" before they can "bid on a position or exercise any seniority under this Agreement". To "demote" to such a "permanent unassigned board", there must be such a board in that former location.

[28] Like in the *Lefebvre Grievance,* the Union's supplemental question impliedly raises an issue of the timing of the abolish of RTC positions in other than Edmonton.

[29] Like in the *Lefebvre Grievance,* the Union has raised a supplemental question, which it argued also applied to this Grievance. The following was noted in the *Lefebvre Grievance* and is also relevant to the conclusion in this Grievance:

a. "In the initial Award, this Arbitrator referred to the fact that "When the Grievor changed his mind in August of 2020, there was no opportunity to "return to the permanent unassigned board" at the Grievor's "former location" as there were no jobs at the former location". In what I will call its "supplementary question", the Union questioned this conclusion, as it noted there were still "active desks" in Montreal and "work available there" and that "the last desk did not move to Edmonton until August 30th" - after the Grievor sought to exercise his seniority rights.

b. In the Union's view, this meant there were "jobs" in Montreal.

c. Part of the Union's confusion stems from the Arbitrator's use of the word "jobs". The Union has equated "jobs" with the "transitional work" which was being performed under the February Agreement. However, the Arbitrator was not making a reference to that transitional work with the word "jobs". The Arbitrator should have used the word "position". The

Arbitrator's decision was that there were no "positions" remaining at the former location.

d. That said, the Union's question impliedly raises the issue of the *timing* of the position abolishment, by equating the "transitional work" being performed in Montreal with the existence of "positions" in Montreal at that point in time. It would have been most helpful had this position been expressed and argued in the hearing and/or materials.

e. In my view, the ESIMA and the February Agreement address the Union's arguments regarding timing of the position abolishment.

f. By Article 8.1 of the ESIMA, the Company was required to give the Union notice of any "operational change". There is no dispute the abolishment of the positions listed in the February Agreement and the move of this work to Edmonton was the "operational change" which triggered that notice.

g. By Article 8.4 of the ESIMA, once the Company provided that notice of an "operational change" to the Union – in this case the abolishment of RTC positions - the parties were then required to "negotiate the terms" of that operational change, which "*may include exercise of seniority rights*". Article 8 also sets out a process for how those benefits are to be determined, if the parties cannot agree.

h. This negotiation is to be "…with a view to further minimizing the adverse effects on employees". In this case, that negotiation resulted in the February Agreement.

i. I am satisfied that the Company was *required* to reach the February Agreement with the Union under Article 8.4 before it was entitled to abolish the RTC positions. As noted in Article 7 of the February Agreement, that Agreement was intended to satisfy its Article 8 obligations. It is the February Agreement between the parties – and not the Collective

Agreement - that sets out the schedule for the transition of the work to Edmonton, to allow for coverage of work during that transition. I am further satisfied this schedule was developed due to the need for continuing coverage, given the 24/7 nature of the Company's business.

j. In terms of the *timing* of position abolishment, I am satisfied that at least by the time the parties had acted in compliance with Article 8.4 of the ESIMA by reaching the February Agreement, the positions were abolished for the purpose of determining benefit entitlement under the ESIMA. The parties had agreed that employees in those RTC roles at that time, who chose to move to Edmonton with those positions, were provided enhanced benefits, which were outlined in the February Agreement, and the transition schedule set out in that Agreement proceeded.

k. What this practically meant was that if an employee was <u>not</u> in an RTC role when the Company gave its notice, but had an ability to exercise seniority rights to return to a RTC role, he or she could have exercised those rights and made that choice *after* the notice had been given, but before the February Agreement was entered into. Once the notice is given, employees are given the opportunity to choose to return, to gain the opportunities which may be negotiated under Article 8.4, if they want to be considered for those benefits. That type of movement is in fact anticipated by Article 8.1(c).

l. This interpretation makes practical and labour relations sense. It would be reasonable for the Company to understand how many employees could be subject to the benefits when it negotiated the February Agreement. The fact those employees were not in those roles when the notice was *initially* given does not impact the ability of those individuals who transferred in between the original notice and the execution of the February Agreement benefits, as noted in Article 8.1(c). However, at the point when the February Agreement was executed by the parties in compliance with Article

8.4 of the ESIMA, I am satisfied that Agreement fulfilled the Company's obligations to be able to action its "operational change" – and abolish positions not based in Edmonton and that this was acknowledged by the parties in Article 7 of the February Agreement. The window to voluntarily demote back to an RTC "position" then closed, as those positions were abolished and the transition schedule as agreed was carried out.

m. While I note that "transition work" was being performed in August of 2020- under the terms of the February Agreement - I cannot agree that equates with a "position" still being available in Montreal for the Grievor to return to. It cannot, since well before August of 2020, the parties had *already* agreed to the benefits which were to be provided to the RTC employees impacted by that "operational change" - *which benefits had depended upon the abolishment of the RTC positions* – and a deadline had been set by the parties – and had well passed – for employees to advise the Company of their intention to move with that work, in order to access certain enhanced benefits: s. 3. Further, that transition of the work under the terms of that Agreement was in motion.

n. If an employee *were* allowed to demote back to an RTC *after* that Agreement had been executed – which is the position of the Union - that employee would be well out of time to express any interest in moving to obtain enhanced benefits, as the deadline set by the parties to express that intent had passed. While the Grievor himself did not have an interest in moving to follow the work, the interpretation urged by the Union would not just apply to the Grievor and must make sense when taken to its logical conclusion. The Union's interpretation does not. The negotiation by the parties of a particular deadline for an RTC employee to express intention to move and access enhanced benefits supports an interpretation that individuals must be in RTC roles *by the time the February Agreement is*

executed to access ESIMA benefits which may occur upon the abolishment of that RTC position.

[30] When the Grievor changed his mind, there was no opportunity to "return to the permanent unassigned board" at his "former location", as there were no positions left at the former location so no "permanent unassigned board" could exist to support those positions. Neither could he be placed on the "permanent unassigned board" in Edmonton, because he had no desire or intention to move to Edmonton to follow this work.

Conclusion

[31] The Grievance is dismissed.

[32] Without a "position" in Montreal, the Grievor is unable to meet the requirements of Article 5.7. I am satisfied it was:

a. The Grievor's choice to stay in Montreal;

b. The late timing of his choice to try to revert back to an RTC position; and

c. The wording of Article 5.7

that led to this result, rather than the Company's decision to move the work

I retain jurisdiction to address any issues with the implementation of this Award and to correct any errors or omissions to give it the intended effect. My appreciation is offered to the parties for their patience.

DATED AND ISSUED this 30th day of January 2024; errata incorporated March 5, 2024

Cheryl Yingst Bartel
Arbitrator