IN THE MATTER OF AN AD HOC RAILWAY ARBITRATION

BETWEEN

VIA RAIL CANADA INC.

(The "Company")

AND

UNIFOR NATIONAL COUNCIL- 4000

(The "Union")

2024 CanLII 78163 (CA LA)

Three Grievances Stemming from Notices of Estoppel and Regarding the Interpretation and Application of:

Article 8.4 of Collective Agreement No.2 and payment of the additional day of vacation pay (all On-Board Services Employees);

Articles 4, 10 and Appendix "A" of the Supplemental Agreement of Collective Agreement No.2 governing Employment Security and Income Maintenance; and Article 13.3 of Collective Agreement No.2 (On Board Services Employees in the Western and Atlantic Regions).

Before: **Christine Schmidt, Sole Arbitrator**

Appearances

For the Company: C. Wagner, Counsel, Fasken
K. Houlihan, Counsel, Via Rail
T. Drouin-Shannon, Labour Relations

For the Union: B. Kennedy, National Representative, Unifor
J. Long, Regional Representative
R. Mills, Regional Representative
R. Gautreau, Regional Representative
G. Cox, Interim Regional Representative
D. Kissack, President
L. Hazlitt, Secretary Treasurer

This hearing was held by videoconference on June 3, 2024.

AWARD

1. There are three Grievances before me. Although distinct, all involve disputes stemming from notices of recission of estoppel (I shall refer to these as "estoppel notices") issued by the Company to the Union during collective bargaining; they all involve undisputed and very long-standing past practices between the parties. The grievances involve the interpretation of the applicable Collective Agreement No.2 ("Collective Agreement") and/or the interpretation of the applicable Supplemental Agreement of the Collective Agreement No. 2 governing Employment Security and Income Maintenance ("ESIMA" or "the Supplemental Agreement"). The grievances were heard on June 3, 2024. Arbitration materials, briefs and reply briefs were filed pursuant to the CROA expedited arbitration process in advance of the hearing date. The parties agreed that one decision was to be issued for each of the grievances described herein.

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2. More specifically, the three grievances relate to long-standing practices pertaining to vacation payment during a general holiday under article 8.4 of the Collective Agreement; payment of seasonal employees weekly layoff benefits during the recognized seasonal layoff period pursuant to articles 4 and 10 and Appendix "A" of the ESIMA; and the cessation of the Company's practice of automatic placement of employees onto the spare board prior to layoff if no shift is requested on the spare board (which engages Article 13.3 of the Collective agreement). My intention is to address each of the grievances separately in the order that they are set out in this paragraph.

3. I have carefully read the parties' briefs, their written reply briefs, and the authorities upon which they relied, and reviewed their oral submissions presented at the hearing. This award does not detail every argument or describe/analyze every case presented, only those that are necessary to reach a decision in this matter.

4. I start by reviewing the principle of estoppel. As explained by Arbitrator Surdykowski at paragraphs 85 and 86 in *Bowater Canadian Forest Products Inc. v. United Steelworkers, Local 1-2693* (2007) 175 L.A.C. (4TH) 168, estoppel is an equitable doctrine that aims to prevent the unfairness that may occur when one party to a contract indicates to the other party that it will either not enforce a right or obligation under the contract, or that it will apply the contract in a particular way, and then subsequently seeks

to enforce the particular right or obligation, or to apply the contract differently, after the other party has acted with certitude on the representation to its detriment. The elements that must be proven by the party asserting estoppel are four-fold: (i) a clear and unequivocal representation by the party opposite concerning the interpretation or application of the contract; (ii) an intention by the party opposite to affect the legal relations between the parties, which intention is in fact realized; (iii) reliance by the other party on the representation by taking or foregoing action it would otherwise have taken or foregone; and (iv) detrimental reliance by the party to whom the representation was made.

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5. Once established, an estoppel may be brought to an end with adequate reasonable notice that enables the reliant party an opportunity to negotiate the consequences of the ending of the estoppel: see, for example, *Re Rahey's Supermarket of North Sydney and Retail, Wholesale & Department Store Union, Local 596*, 1987 CanLII 8795 (NS LA) at page 70. It is a question of fairness in all the circumstances. A party that fails to take the opportunity to negotiate in the face of a stated desire by the other party to bring the estoppel to an end does so at its own risk: see paragraph 34 in *Bruyere Continuing Care and CUPE, Local 4540 (Burnett), Re,* 2016 CarswellOnt 21188.

6. I now turn to the grievances.

I. The Grievance regarding Vacation Payment

7. The relevant provision is Article 8.4 of the Collective Agreement, which reads as follows.

> 8.4 A qualified employee whose vacation period coincides with any of the general holidays specified in Article 8.1 shall receive an extra day's vacation with the pay to which the employee is entitled for that general holiday; for regular employees the first day of layover following the vacation period, and for spare employees the first day available but not required to work, shall be recognized as the holiday with pay.

8. The Union argues that the current payment of three days' wages when a general holiday occurs during an employee's vacation, reflective of a very long-standing practice in such circumstances, is consistent with the clear language of Article 8.4 of the Collective Agreement, and that the Company is trying to redefine the method of

payment and the holiday deferral through the guise of ending an estoppel. Further, the Union contends that Article 8.4 reflects the statutory requirement under section 193.1 of the *Canada Labour Code* ("the Code"). In addition, the Union submits that the estoppel notice given by the Company did not define the Company's interpretation of Article 8.4 and therefore does not meet the requirements to establish estoppel. In any event, even if an estoppel was established, in the Union's submission, the Company has previously asserted and withdrawn estoppel notices with respect to the calculation of vacation payment, and therefore cannot bring an end to the estoppel in the 2021-2022 round of bargaining without first having proposed language to reflect its position on the calculation it says is required under Article 8.4. For its part, the Company sought to correct its long-standing error in the application of Article 8.4, seeking to revert to the strict application of Article 8.4.

9. Respectfully, I do not find the Union's argument persuasive. Article 8.4 of the Collective Agreement provides that a qualified employee whose vacation period coincides with any of the general holidays specified in article 8.1 shall receive an extra day's vacation with the pay to which the employee is entitled for that general holiday. Article 9.6(b) of the Collective Agreement specifies that employees will be credited with 40 hours vacation for each consecutive seven calendar days of vacation and 5.71 hours per calendar day for periods of less than seven days. The language and the parties' intent in these articles is clear. When an employee is on vacation during a period when a general holiday occurs, that employee is entitled to one additional paid day to reflect the employee's entitlement to the paid general holiday. This puts the vacationing employee on an equal footing with an employee who is not on vacation at the time the general holiday occurs. The same purpose was found by the arbitrator to be served in *Fanshawe College of Applied Arts and Technology and Technology and Ontario Public Service Employees Union*, 1978 CanLII 3354 (ON LA), where the trade union unsuccessfully argued that the vacationing employee was entitled not only to a paid day in lieu of the holiday falling within the vacation period, but an additional day as well. The arbitrator concluded that the *purpose* of the applicable language in that collective agreement (though different from the language in Article 8.4) was to ensure that vacationing employees did not lose the benefit of a paid holiday simply because they were enjoying the benefit of a vacation to which they were also entitled.

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10. It is clear that the Company has engaged in a long practice that provides vacationing employees more than what they are entitled to under Article 8.4. Moreover, it exceeds what vacationing employees are entitled to under the Code. The Union's argument that the Code backs its position on Article 8.4 is simply without merit, considering the interplay of subsections 193(1) and 196(1) of the Code, which read:

> **193 (1)** Except as otherwise provided by this Division and subject to subsection (2), when a general holiday falls on a day that is a non-working day for an employee, the employee is entitled to and shall be granted a holiday with pay at some other time, which may be by way of addition to his annual vacation or granted as a holiday with pay at a time convenient to both the employee and the employer.
>
> […]
>
> **196 (1)** Subject to subsections (2) and (4), an employer shall, for each general holiday, pay an employee holiday pay equal to at least one twentieth of the wages, excluding overtime pay, that the employee earned with the employer in the four-week period immediately preceding the week in which the general holiday occurs.

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11. The provisions of the Code above serve a similar purpose to the language of Article 8.4 as properly interpreted. The Code provisions protect the vacationing employee's entitlement to a paid holiday when it occurs during the employee's vacation period. The Code's provisions do not support the Union's view that an employee is entitled to more than that.

12. Further, I do not accept the Union's argument that the Company's notice of its intent to end the estoppel fails to define the Company's interpretation of Article 8.4. To the contrary, the notice provides an example of how the Company intends to apply Article 8.4 following the expiry of the estoppel.

13. Finally, the fact that the Company has previously asserted its intention to revert to the correct interpretation of Article 8.4 only to subsequently withdraw its estoppel notice, does not serve to bar the Company from providing a new notice to the same effect so long as the new notice is reasonable and equitable. The Company's prior notice gave no indication that it agreed to the continuation of the estoppel for any particular period of time or that it considered the estoppel permanent. In the

circumstances, the current notice of the estoppel's expiry was not unfair to the Union. The Union had the opportunity to propose and negotiate the status quo concerning the Company's application of Article 8.4. It was not up to the Company, as the Union suggests, to propose a modification of Article 8.4 in circumstances where the Company's (correct) view was that Article 8.4 meant what it said, and that the Company intended to apply it as written.

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14. For these reasons, I find that the vacation pay grievance has no merit, and is therefore dismissed.

II. The Grievance Regarding Seasonal Employees

15. There is no dispute that the Company has for at least the last ten years (and, according to the Union, at least since the ESIMA came into effect with the then Crown Corporation - VIA Rail - by 1985, and even before then) paid "seasonal employees" in the bargaining unit weekly layoff benefits under the ESIMA at the time of their layoff, regardless of when the layoff occurred. It is unnecessary to describe the specifics of weekly layoff benefits and how they are calculated as those issues are not what is in dispute in this grievance. Suffice it to say, weekly layoff benefits are a kind of top-up payment paid by the Company to supplement the employee's Employment Insurance benefits (see Article 4.3 of ESIMA, in part below). The Company put the Union on notice during the 2019-2020 negotiations that it was seeking to revert to what it argues is the strict application of Article 10 of the ESIMA, whereby seasonal employees may not claim weekly layoff benefits during the "recognized seasonal lay-off period."

16. Article 10 states:

ARTICLE 10 SEASONAL EMPLOYEES

10.1 Seasonal employees are defined as those who are employed regularly by the Corporation but who normally only work for the Corporation during certain seasons of the year. Articles 4 and 8 of this Agreement shall apply to these employees except that payment may not be claimed by any seasonal employee during or in respect of any period or part of a period of layoff falling within the recognized seasonal layoff period for such group.

In respect of seasonal employees laid off during the recognized seasonal working period, the seven and thirty-day waiting periods provided for in Clause 1, paragraphs (b) and (c) respectively of Appendix "A" will apply, except that in the case of a seasonal employee who is not recalled to work at the commencement of the recognized seasonal working period, the seven or thirty-day waiting period, as the case may be, will begin on the commencement date of the recognized seasonal working period. Seasonal employees and recognized seasonal working periods shall be as defined in Memoranda of Agreement signed between the Corporation and the Union.

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17. Weekly Layoff Benefits (and Severance Payments) are provided for in Article 4 of the ESIMA, which states:

4.1 An eligible employee, as defined in Appendix "A", may, at the expiration of the seven-day waiting period specified in paragraph (b) of Clause 1 of said Appendix "A", make application to a designated officer in the form and manner prescribed by the Administrative Committee, for a weekly layoff benefit in accordance with Article 4.3(a), (b) or (c), such application to be made at the conclusion of the first week for which a claim is being made, subject to Article 4.3(d).

18. Articles 4.3 (a), (b), (c) and (d) as mentioned in Article 4.1 of the ESIMA, state:

4.3 An eligible employee may claim weekly layoff benefits as follows:

(a) Employees with TWO or more years of continuous employment relationship and LESS THAN FIFTEEN YEARS of cumulative compensated service:

(i) A weekly layoff benefit for each complete week of seven calendar days laid off following the seven-day waiting period referred to in Article 4.1 of an amount that, when added to unemployment insurance benefits and/or outside earnings in excess of those allowable under unemployment insurance for such week, will result in the employee receiving 80 per cent of his basic weekly rate at time of layoff (hourly-rated employees 40 hours x the basic hourly rate; seasonal and spare employees, 80 per cent of average weekly earnings over the eight weeks preceding layoff.

[…]

(b) Employees with FIFTEEN OR MORE YEARS of cumulative compensated service:

(i) A weekly layoff benefit for each complete week of seven calendar days laid off following the seven-day waiting period referred to in Article 4.1 of an amount that, when added to unemployment insurance benefits and/or outside earnings in excess of those allowable under unemployment insurance for such

week, will result in the employee receiving 80 per cent of his basic weekly rate at time of layoff (hourly-rated employees 40 x the basic hourly rate; seasonal and spare employees, 80 per cent of average weekly earnings over the eight weeks preceding layoff).

[…]

(c) Subject to the provisions of Article 10 and Appendix “A”, employees who at the time of layoff have fifteen or more years of cumulative compensated service are entitled to, for each period of layoff, weekly benefits as calculated in Article 4.3(b), for the following maximum periods:

Years of Cumulative Compensated Service	Maximum Period for which Weekly Benefits Payable for each Period of Layoff
15 years or more but less than 20 years	3 years
20 years or more but less than 25 years	4 years
25 years or more	5 years

(d) It shall be the responsibility of the employee to report for each week for which he is claiming a weekly layoff benefit under this Agreement any amounts received in unemployment insurance benefits in respect of such week, as well as any wages earned during such week while employed outside of the Railway. … .

19. Article 4.1 of the ESIMA also refers to Appendix ”A” of the Supplemental Agreement, which refers to an employee’s eligibility for Weekly Layoff Benefits provided in Article 4:

APPENDIX “A”

ELIGIBILITY FOR BENEFITS AS PROVIDED IN ARTICLE 4, CLAUSES 4.1, 4.2, 4.3 AND 4.4 OF THIS SUPPLEMENTAL AGREEMENT

1. An employee who is not disqualified under Clause 4 hereof, shall be eligible for a benefit payment in respect of each full week of seven consecutive calendar days of layoff (herein called "a claim week") or to a severance payment provided he meets all of the following requirements.

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a. He has two years or more of continuous employment relationship at the beginning of the calendar year in which the period of continuous layoff in which the claim week occurs began (calendar year shall be deemed to run from January 1st to December 31st);

b. For weekly layoff benefit payment, a continuous waiting period of seven days in the period of layoff has expired. Each period of layoff will require a new seven-day waiting period in order to establish eligibility for weekly layoff benefits, except that once an employee has been on layoff for more than seven days, and is recalled to work for a period of less than ninety calendar days, such employee will immediately become eligible for weekly layoff benefits upon layoff within such ninety days.

c. For severance payment, an application is submitted within seven (7) calendar days of being laid off.

d. He has made application for benefits in the prescribed form and in accordance with the procedures prescribed by the Administrative Committee;

e. He has exercised full seniority rights on his basic seniority territory as provided for in the relevant collective agreement, except as otherwise expressly provided in Clause 4, paragraphs (b) and (c) of this Appendix "A".

[…]

4. Notwithstanding anything to the contrary in this Appendix, an employee shall not be regarded as laid off:

(a) during any day or period in which his employment is interrupted by leave of absence for any reason, sickness, injury, disciplinary action (including time held out of service pending investigation) failure to exercise seniority (except as otherwise expressly provided for in Clause 4(b) of this Appendix "A"), retirement, Act of God, including but not limited to fire, flood, tempest or earthquake or a reduction or cessation of work due to strikes by employees of the Railway;

(b) during any interval between the time that he is recalled to the service of the Corporation after a period of layoff, and the time at which he actually resumes work during any waiting period provided for in the relevant collective agreement; except that an employee who does not, as a consequence of the foregoing, return to service on the day work is available shall be governed by the provisions of Article 4.5 of this Agreement, on the same basis as if he had returned to work on the date such work became available;

(c) if he declines, for any reason, other than as expressly provided for in Clause 4(b) of this Appendix "A", recall to work on his basic seniority territory in accordance with the seniority provisions of the relevant collective agreement;

(d) in respect of any period in which he is receiving other payments of any kind or nature directly from the Corporation, except as otherwise expressly provided in Article 4.5.

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(e) during any recognized period of seasonal layoff as defined in Article 10 hereof;

(f) after his dismissal from the service of the Corporation.

20. The issue in this grievance is not, in my view, a clear case of an employer wishing to return to the correct interpretation of a provision that is, on its face, clear and unambiguous. Article 10 governing seasonal employees is far from clear, and that is owing, at least in part, to the fact that it purports at the outset of Article 10.1 to define seasonal employees, but in the concluding sentence of the Article states that the definition of seasonal employees and recognized seasonal working periods shall be defined in signed Memoranda of Agreement ("MOA") which, as of the date of the hearing in this matter – and this language in the ESIMA has been in existence for a very long time - does not exist. No MOA has ever been negotiated, and the practice of paying undefined seasonal employees weekly layoff benefits during any undefined period of seasonal layoff has been ongoing. The Company is not in the position it enjoys relative to the vacation pay issue in Article 8.4 where it is abundantly clear that the Company has been paying employees more than what the Article clearly requires.

21. The Company submits that "the recognized seasonal period is from November 1 to April 1" and that "the recognized seasonal layoff period between the parties is from November 1st to April 1st". These do not appear to be facts that, from a reading of the briefs of both parties, or from the submissions made, are agreed, and the evidence does not establish such facts. And I note that Article 10.1 refers to "certain seasons" in which seasonal employees normally work, which would seem to call into question the Company's assertion that there is one extended seasonal period from November 1 to April 1 each year. Furthermore, Article 10.1 refers to "any period or part of a period of layoff falling within the recognized seasonal layoff period for such group." Quite apart from the fact that nowhere in the ESIMA is there any definition of "recognized seasonal layoff period" (nor, for that matter, of a "recognized seasonal working period"), the language here could be interpreted to suggest that there are different seasonal layoff periods for various groups of seasonal employees, just as the concluding sentence suggests that there are various (at least two) seasonal working periods. This calls into

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question whether there is, as the Company states, a single recognized seasonal layoff period from November 1 to April 1 each year that informs the application of Article 10.1 and the exclusion of seasonal employees from the payment of layoff benefits.

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22. All of this to say, Article 10.1 of the ESIMA is not a model of clarity (and that is not meant as a criticism). However, the Company's practice, perhaps for as long as the original ESIMA came into existence (in the context of the inception and history of employment security agreements in the railway sector) has been to grant seasonal employees layoff benefits regardless of when their layoffs commenced. That much is clear and certain. The Company submits that a past practice cannot be a source of rights. That is so in the absence of any ambiguity of language. In my view, Article 10.1 is arguably ambiguous. At the very least, it contemplates further negotiation on the part of the parties – the defining of seasonal employees and recognized seasonal working periods via signed Memoranda of Agreement – that has yet to be undertaken, and which could have an impact on clarifying the circumstances under which seasonal employees may be disentitled to claim payment of layoff benefits. These are circumstances in which past practice may be the source of rights. As Arbitrator Picher noted in **CROA 1930**, "when a given interpretation of a collective agreement has been knowingly applied between the parties, without objection or grievance over a substantial number of years, spanning the negotiation and renewal of the Collective Agreement in unchanged terms, the parties are taken to accept the established interpretation as part of their agreement…" The fact that the Company previously withdrew its notice of estoppel pertaining to Article 10 concerning seasonal employees in no way detracts from this analysis.

23. For these reasons, the Company was not entitled to give the Union notice of the expiry of an estoppel in relation to Article 10.1 and the entitlement of seasonal employees to payment of layoff benefits. It is uncertain that Article 10.1 operates in the manner submitted by the Company. It may well be that the established past practice constitutes the parties' given interpretation of Article 10.1, in which case, any change to that practice must be the subject of bargaining.

24. Accordingly, the grievance regarding seasonal employees' entitlement to layoff benefits is upheld.

III. The Grievance Regarding Automatic Placement on Spare Board

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25. In its brief, the Company states that Article 4.3 of the ESIMA provides for different calculation methods for weekly layoff benefits, depending on whether the employee has been on the spare board or not. Employees who go directly from assignment to layoff will receive a percentage of their basic weekly rate at the time of layoff as job security. This excludes any overtime in the calculation. By contrast, employees who go directly from assignment to the spare board and then proceed to layoff will receive a percentage of their average weekly earnings over the eight weeks preceding the layoff which includes any premiums or overtime.

26. The Company submits that its practice of the last twenty years was to unilaterally place assigned employees on the spare board prior to layoff and prior to payment of layoff benefits. With the onset of the COVID-19 pandemic, during which there was little if any available work including spare board work, the Company asserts that the Union took issue with this practice and informed the Company that the practice was contrary to the Collective Agreement. After considering the matter, the Company agreed and simply laid off assigned employees and commenced paying them layoff benefits. This, the Company says, was advantageous under the circumstances to the laid off employees whose layoff benefits were calculated on average weekly earnings. Such employees were otherwise at risk of an erosion of their average weekly earnings if placed on the spare board, with no available work, prior to layoff. The Company says that its decision to accept the Union's interpretation of the Collective Agreement and end its practice of automatically placing assigned workers on the spare board is captured in an email dated October 6, 2020 from a Company representative, Ms. Karine Chapados, to several Union representatives, including Ms. Jennifer Murray and Ms. Laura Hazlitt, in which Ms. Chapados set out two examples of calculations of weekly job security payments, and stated, among other things, that "[p]eople will not automatically be placed on the spare board, as we seem to do before." Ms. Chapados then concluded

her email by saying, “I hope it is clear and consistent, and reflect your demand, Jen and Laura.”

27. In its reply submissions, the Union says that the Company’s reliance upon the Chapados email is misleading in that it is taken out of context (although in my respectful view, the Union does not clearly explain how this is so). If I understand the Union’s submissions concerning the Company’s explanation as described in the preceding paragraph, at best the Union concedes it agreed to depart from some of the terms and conditions of the Collective Agreement on a without prejudice basis during the COVID-19 pandemic. It appears that the Union does not accept the Company’s allegation that the Union informed the Company that its long-standing practice of automatically placing employees on the spare board was contrary to the terms and conditions of the Collective Agreement.

28. The Company notified the Union during the 2019-2020 negotiations (on December 4, 2020, the day after its notice concerning seasonal employees) that it was seeking to revert to what it argues is the strict application of Article 10 that it intended to end its practice of calculating weekly lay-off benefits based on more than an employee’s basic weekly rate, i.e., the Company intended to stop taking into account additional earnings such as overtime in the calculation of an employee’s weekly layoff benefits. In addition, the Company stated to the Union that it would end the practice of automatically placing regularly assigned employees on the spare board prior to layoff if no shift was being offered on the spare board. (As indicated above, the Company says that it had already stopped that practice in around October 2020 upon being notified by the Union that the practice contravened the Collective Agreement.) The Union’s grievance challenged the Company’s attempt to issue a notice to rescind what the Company claimed to be an estoppel.

29. The Union’s grievance on this issue, its brief and its submissions in reply to the Company’s brief, is that what is in dispute is not the Company’s intention to calculate weekly layoff benefits based strictly on an employee’s basic weekly rate, exclusive of overtime and other additional earnings. Rather, what is in dispute is the Company’s

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stated intention in its estoppel notice to cease its practice of automatically placing assigned employees facing layoff on the spare board. The Union contends that this circumvents employees' exercise of seniority rights and the protection of their entitlement to job security benefits. The Union submits that, pursuant to Clause 1(e) of Appendix "A" of the ESIMA, an employee's entitlement to job security benefits is premised upon having exercised full seniority rights. The Union contends that the exercise of full seniority rights includes "exercising seniority to the spare board if you can hold it."

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30. In its brief, the Union cites the 1993 case of **CROA 2398** in support of its position on seniority rights in relation to the spare board. The dispute and the facts set out in that award were different than here. However, the language of Article 13.3 (supplemented by Article 13.4 which remains unchanged to this day), as it then read was central to the Arbitrator's decision, and the substance of that language remains in Article 13.3 under the current Collective Agreement (although the current Article 13.3 has been augmented with an additional sentence). In 1993, Article 13.3 read as follows:

> 13.3 Employees whose positions are abolished or who are displaced may exercise their seniority up to cut-off time displacing junior employees from any regular assignment or elect to operate on the spare board providing they have the required qualifications.

31. The language of Article 13.3 and Article 13.4 (the latter being the same today as it was in 1993) from the current Collective Agreement reads:

Article 13
Staff Reduction, Displacement and Recall to Service

> 13.3 Regularly assigned employees whose permanent positions are abolished or who are displaced may exercise their seniority up to cut-off time displacing junior employees from any regular assignment or elect to operate on the spare board providing they have the required qualifications. If they do not have sufficient seniority to hold a regular assignment, they may elect to displace a junior employee on a temporary assignment prior to reverting to the spare board.
>
> 13.4 Employees who exercise their seniority as provided in Article 13.3 shall submit their choice in writing within 5 calendar days of the date of

> displacement and must commence work on the position of their choice within 10 calendar days of that date unless prevented by bona fide illness or other cause for which leave of absence has been granted and failing to do so will forfeit their seniority.
>
> Employees who fail to make their choice within 5 days will, provided they have sufficient seniority, be required to operate from the spare board.

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32. The Arbitrator in CROA 2398 made the following observations about Article 13.3 as it then stood:

> …That provision makes a clear distinction between two concepts: firstly, the exercise of an employee's seniority, which on the face of the article is said to involve "displacing junior employees from any regular assignment" and, secondly, the separate concept of electing to operate on the spareboard. … .
>
> The above reading is reinforced by the language of article 13.4 of the collective agreement. That provision speaks directly to the manner in which employees must exercise their seniority to displace into a regular assignment. As the last sentence of the article indicates, employees who fail to exercise their seniority rights are required, by their default, to operate from the spareboard. In that context, **access to the spareboard is plainly not through the exercise of seniority rights, but rather through the failure to exercise them**… .
>
> (emphasis added)

33. The above excerpt from CROA 2398 does not support the Union's position concerning its interpretation of Article 13.3. In fact, it contradicts that position. The analysis in CROA 2398 rejects the notion, argued by the Union, that the exercise of full seniority rights includes "exercising seniority to the spare board if you can hold it."

34. On the other hand, the analysis in CROA 2398 also somewhat undercuts the Company's position. If the analysis in CROA 2398 is sound – and, despite additional language that has been added to Article 13.3 since 1993, it seems to me that the analysis still *is* sound – then a regularly assigned employee has two options with which the Company may not interfere. The first option is to exercise seniority to displace a junior employee from any regular assignment. The second option is not to exercise such seniority but rather to elect to operate on the spare board. Of course, an election to operate on the spare board is, as the Company submits, conditional upon having the required qualifications. An employee without the required qualifications for an available

spare board classification cannot expect to be assigned spare board work. But the assessment of qualifications by the Company is the step that takes place *after* the employee has made the election. That is implicit in the language of Article 7.3 of the Collective Agreement, which reads:

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Article 7

Spare Board

> 7.1 Spare boards for employees covered by this Agreement will be maintained at Halifax, Moncton, Montreal, Toronto, Winnipeg, Vancouver, and other points as may be agreed upon and classification lists shall be set up in accordance with local requirements.
>
> […]
>
> 7.3 Employees who have elected to operate from the spare board, and who are qualified to work in more than one position, will be required to declare in writing the specific positions in which they will be listed for spare board call.

35. To the extent that the Company's notice of estoppel purports to interfere in the election by a regularly assigned employee to operate on the spare board, such interference runs contrary to Article 13.3. The election under Article 13.3 is the employees to make. The employee must be placed on the spare board, subject only to an assessment of whether the employee possesses the required qualifications for one or more of the spare board classifications that have been established by mutual agreement of the Local Chairperson and a designated corporate officer of the Company, pursuant to Article 7.2.

36. I decline at this point to reach a definitive conclusion with respect to whether the grievance regarding the spare board should be dismissed, granted or partially granted, in light of the fact that it is not clear from a careful reading of the briefs, replies and the parties' oral submissions whether the Company's refusal to automatically place employees who have made the appropriate election on the spare board is in essence a refusal to acknowledge the election or is, rather, a refusal to deploy the employee to

work in a spare board classification because the employee does not possess the required qualifications for that classification.

37. The parties are invited to make further written submissions concerning my comments in paragraphs 25 through 36 above. In light of my comments, it may be that the parties may come to a resolution on this third grievance. In the event that this is not possible, I direct the parties to communicate to set the due dates for the written submissions herein ordered, and a further date for reply submissions. Failing agreement between the parties, I will set the dates for the written submissions.

38. The issue of remedy concerning the allowance of the grievance regarding seasonal employees is remitted back to the parties. If they are unable to reach agreement concerning the remedial relief, I remain seized to deal with that issue, as well as the submissions directed in paragraph 37 above.

Dated at Toronto, Ontario this 1st day of August 2024.

Christine Schmidt, Arbitrator

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