IN THE MATTER OF AN ARBITRATION

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
(SYSTEM COUNCIL NO. 11)

("Union")

and

CANADIAN NATIONAL RAILWAY

("Company")

Re: Removal of Stand-by Pay on Paid PLD/Sick Days (Grievance No. 2050-004)

Arbitrator: Cheryl Yingst Bartel
Hearing Date: May 29, 2024
Decision Date: September 16, 2024

Appearances:

For the Union:
Denis Ellickson, Counsel
Daniel Blakeney, Western Regional Chairman
Gurpal Badesha, General Chairman
Steve Martin, International Representative

For the Company:
Jeff Landmann, Counsel
Saveria Poletto, Co-Counsel
Hannah Buckley, Co-Counsel
Maud Boyer, Sr. Manager, Labour Relations

AWARD OF THE ARBITRATOR

Background, Issue & Summary

[1] The parties have consented to my appointment and agree I have jurisdiction to hear and determine the matters at issue in this Grievance.

[2] This is one of two contract and legislative interpretation Grievances between these parties, which were heard on the same day. Both Grievances arise under Collective Agreement No. 11.1[1] ("the Agreement").

[3] This hearing was conducted according to an agreement of the parties to follow an expedited process similar to that used in this industry by the CROA&DR[2]. Written arguments, including replies, were filed and reviewed by this Arbitrator, prior to the Arbitration hearing. The parties did not file a Joint Statement of Issue, but each filed *ex parte* Statements of Issue, which are appended to this Award. The Grievance was heard in one hour. No oral evidence was presented.

[4] The matter placed in issue was whether Union members in the Signals and Communications Department ("S&C") were entitled to be paid for a Stand-By Allowance (the "Allowance") on those days they took paid personal leave days and/or medical leave days ("PLD", "MLD" or "Leave Day(s)"), under the *Code.* The entitlement to these Leave Days does not appear in the Agreement, but rather is a recent addition to the *Code.*

[5] At issue is the interpretation to be given to Article 4 of the Agreement and ss. 166, 206.6(2) and 239(1.3) of the *Canada Labour Code*[3].

[6] For the reasons which follow, the Grievance is dismissed.

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[1] Effective January 1, 2022 to December 31, 2024; outstanding issues of term, wages, and one issue relating to benefits was resolved by Interest Arbitration Award (Kaplan) dated October 7, 2022, following a short labour dispute.

[2] Canadian Railway Office of Arbitration, & Dispute Resolution; established by Memorandum of Settlement ("CROA Agreement"); as amended.

[3] R.S.C. 1985, c. L-2

Relevant Provisions and Legislation

[7] The provisions placed into issue are Articles 4.1, 6.1, and 18.2 of the Agreement, and ss. 166, 206.6(2) and 239(1.3) of the *Canada Labour Code*[4] (the "*Code"*). Several other Articles are also reproduced below, for context.

Agreement 11.1

Article 4 Stand-By Allowance

4.1 In view of the intermittent character of the work of certain S & C Coordinators, S & C Technicians, S & C Leading Maintainers, S & C Leading Mechanics, S & C Maintainers, S & C Mechanics, S & C Assistants, S & C Apprentices and S & C Helpers, they will be paid in addition to their regular earnings for time actually worked, a stand-by allowance of 7.5 straight time hours per week at the applicable hourly rate of the job they occupy effective January 1, 2001. The provisions of Article 4.2 to 4.16 inclusive, will apply to employees referred to in this Article.

4.2 Employees will be paid in accordance with Article 6 for work performed outside of regular hours on regular work days, on call days and on rest days.

…

4.5 On call days and outside of regular hours, employees will protect calls on their own territory. They will be available for calls unless they make suitable arrangements with the S & C Supervisor for the protection of their territory without involving additional expense to the Company and so advise they proper authority…

.

4.9 When a general holiday falls on a regular work day or on a call day and the employee is not subject to call and does not work on that day, such employee will be paid 8 straight time hours for the general holiday not worked, in accordance with Article 19.5(a).

…

4.1 (a) When a general holiday falls on a regular work day or on a call day and the employee is subject to call, such employee will be allowed 8 straight time hours, in addition to the general holiday pay provided in Article 19.5(a).

…

4.11 When a general holiday falls on a regular work day and the employee works his regular hours on that day, such employee will be paid in accordance with Article

[4] R.S.C. 1984, c. L-2, as amended.

19.6. In addition, such employee will be allowed 8 straight time hours for being available on that day as provided in Article 4.10.

4.12 When a general holiday falls on a regular work day or on a call day, and the employee is on stand-by, if he is called to work on that day, such employee will be paid for actual time worked in accordance with Article 19.6 in addition to the 8 straight time hours for being available on that day as provided in Article 4.10.

…

Broken Time for Employees on Stand-By Conditions

4.15 Effective January 1, 2001, broken time for employees, compensated on the basis of this Article 4 shall be based on 4.75 straight time hours per week. In the event an employee is off duty without pay, he shall have deducted from his wages 8.5 straight time hours for regular work day off-duty and 5 straight time hours for each call day off-duty.

4.16 Notwithstanding any other provision(s) of the collective agreement, commencing with the last day at work, employees on pre-retirement vacation will not be paid standby allowance.

Article 6 Overtime and Calls

6.1 Except as otherwise provided, time worked in excess of eight hours, exclusive of meal period, shall be considered overtime and paid on the actual minute basis at the rate of time and one-half

Article 18 Vacation

…

18.2 An employee will be compensated for vacation at the rate of pay he would have earned had he been working during the vacation period or the percentage of the gross wages (whichever is higher) as reported on T-4 earnings as "Total Earnings Before Deductions Less Taxable Allowances and Benefits".[5]

[5] Emphasis Added.

Canada Labour Code

Part III

Definitions

Section 166

…

"wages" includes every form of remuneration for work performed but does not include tips and other gratuities; (salaire).

…

Section 168 (1)

This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

Section 206.6

(1) Every employee is entitled to and shall be granted a leave of absence from employment of up to five days in every calendar year for… [enumerated grounds]

(2) If the employee has completed three consecutive months of continuous employment with the employer, the employee is entitled to the first three days of the leave with pay ***at their regular rate of wages for their normal hours of work, and such pay shall for all purposes be considered to be wages.***[6]

Leave with pay

239

…

(1.3) If the employee has completed three consecutive months of continuous employment with the employer, the employee is entitled to the first three days of the leave with pay ***at their regular rate of wages for their normal hours of work,*** *and such pay shall for all purposes be considered to be wages*[7].

[6] Emphasis Added.

[7] Emphasis Added.

Canada Labour Standards Regulations[8]

> *17 For the purposes of subsections 206.6(2), 206.7(2.1), 210(32) and 239(1.3) of the Act, the regular rate of wages of an employee whose hours of work differ from day to day or who is paid on a basis other than time shall be…*

Interpretation Act[9]

> *Section 12*
>
> *Every Act is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.*

Facts

Background

[8] Employees who are eligible for the Allowance under Article 4.1 work one of several shifts. It is not disputed their hours of work are consistent on those shifts. The schedule is based on a two week period with alternating weekends where stand-by work is required.

[9] During a typical week, employees work Monday to Friday, and also are available on stand-by in the evenings. On an "A" weekend, employees are available for stand-by. "B" weekends are rest weekends and employees are not available for stand-by work.

[10] Employees are paid for 40 hours of work (8 hours per day). The Allowance is paid at 7.5 hours per week. The Company considers that 0.5 hours of the Allowance is earned each weekday of Monday to Friday, while 5 hours is paid for the weekend that an employee is required to be on call. In a typical two week period, therefore, employees will earn 15 hours of Allowance.

[11] The Allowance is paid to employees in this manner, whether or not employees are called for stand-by work. If they are so-called, they are entitled to further payment for that work.

[12] Employees in the S&C Department are subject to the "honour system" of payroll, whereby they enter their time, and it is automatically approved and paid out. Random

[8] CRC, c. 986; (the "*Regulations*") .
[9] R.S.C. 1985, c. I-21

audits are completed, but there is no pre-authorization required before time claims are paid out.

[13] The parties were collectively bargaining a renewal of their Agreement in 2021. A short legal work stoppage occurred, with the Union's strike ending on July 5, 2022. The few outstanding issues between the parties were referred to interest arbitration and determined in October, 2022, in a short Award. No changes were either negotiated by the parties - or awarded by the Arbitrator – relating to the eligibility for the Allowance, during this round of bargaining.

Code Amendments

[14] On September 1, 2019, amendments to the *Code* came into effect. Those amendments provided for five PLD's per year, three of which are to be paid: Section 206.6(2).

[15] Further amendments to the *Code* came into effect in December of 2022. Those amendments provided a maximum of 10 MLD's, with pay, per year: Section 239(1.3).

[16] An issue arose between the parties regarding whether employees should be paid for the Allowance when they took a Leave Day under the *Code.*

[17] On July 28, 2022, prior to the Interest Arbitration Award settling the Agreement, an S & C Technician was told by a Company official to remove the 0.5 hour of the Allowance from his request to be paid a PLD day. In February of 2023, Union members were told not to include or input the Allowance for days on which they used either an MLD or a PLD.

[18] On March 20, 2023, the Union filed this Policy Grievance, alleging violation of both the Agreement and the *Code*, for failure of the Company to include the Allowance in its payment for a Leave Day.

Arguments

The Union

[19] The Union argued it was not the legislative intention of Parliament that Union members would be financially disadvantaged by receiving less than the amount they

would have received, had they worked the Leave Day. It was the Union's position that the definition of "wages" in section 166 includes "every form of remuneration" and that Parliament only excluded "tips" and "gratuities" in its definition, and not "premiums" or "allowances".

[20] Since the Allowance compensated an employee for their "willingness and availability to perform work", it argued this brought the Allowance into the purview of "wages" under the definition used in the *Code*.

[21] It further argued an employer is not entitled to "contract out" of the protections offered in the *Code*, as they are minimum entitlements.

[22] It was also the Union's position that effect must be given to the use of the word "regular" in the legislation. It argued this word implied a sense of regularity, repetition or frequency, and that the phrase "regular rate of wages" as used in ss. 206.6(2) and 239(1.3) contemplated something *more* than a basic, minimum entitlement: **CROA 4816**.

[23] The Union pointed out the Company required its employees to divide the Allowance into 0.5 hours per weekday and five (5) hours per call day, supporting that it was "regularly" paid.

[24] The Union also argued there was no language which limited pay to only those times an employee was physically *available* to the employer. It pointed out that the Allowance is to be paid to employees on vacation – at a time when employees are not physically "available" to the Company: Article 18.2.

[25] The Union argued that there are only two exceptions - agreed to by the parties - where the Allowance is not paid: a) when an employee is off "without pay": Article 4.15; and b) when pre-retirement vacation is taken: Article 4.16.

[26] The Union maintained the Company was in breach of the Agreement - and in violation of the *Code* - when it did not pay to employees, taking Leave Days, their Allowance as part of their wages for those days.

[27] The Union relied on *CN Rail and IBEW* (Kaplan Interest Arbitration Award); *Debates of the Senate, December 4, 2018****;*** **CROA 4816**; *CN Rail v. Teamsters Canada Rail Conference and Michelle Flaherty* 2023 ONSC 3365; *British Columbia Maritime*

Employers' Association v. International Longshore and Warehouse Union – Canada, Local 502 2021 CanLII 72620 (BC LA); *Moday v. Bell Mobility Inc.* 2013 CarswellNat 393.

The Company

[28] The Company's position was that it had acted consistently with the Agreement and with the *Code* when it did not include the Allowance when it paid wages owing for Leave Days.

[29] The Company pointed out that when Article 4.1 was negotiated into the Agreement effective January 1, 2001, there were no Leave Days then existing in the *Code*. It argued this is part of the factual matrix that is relevant to this interpretive task and must stand at the forefront of this analysis.

[30] The Company argued the over-arching intention of the Allowance is to provide a premium for employees who are "available" to the Company to be called in to work. The Company's position was the wording of Article 4.1 is that the Allowance is to be paid "in addition to" an employee's regular earnings - to compensate employees for their "availability" to work, and to recognize the intermittent character of such work. It argued that the words of "in addition to" had to be given meaning. It pointed out that those employees taking Leave Days were "unavailable" for stand-by coverage as they would be off for those days. It argued the parties never intended the Allowance to be paid on such days, as the Allowance is only to be paid when employees are "actively working", which they are not doing on Leave Days. It argued the Company never guaranteed the Allowance for Leave Days. It argued the Union's position of payment for stand-by services when an employee is *not* available for work "flies in the face of logic".[10]

[31] It argued that the Union is essentially seeking an extension of the Allowance to a situation that was not contemplated by the parties. The Company also argued there was no exception for the payment of the Allowance for Leave Days in the Agreement. This is in contrast to vacation, where payment of the Allowance was specifically carved out by the parties when an employee was not working.

[10] At para. 33

[32] Its position was also that the *Code* does not intend or allow for payment of the Allowance, given its phrasing of the term "regular rate of wages"; and that employees do not suffer a loss by being paid their "regular rate" for those days, since they are not available for stand-by work.

Rebuttal Arguments

[33] In Rebuttal, the Union argued that "Self Directed Units" were established by Appendix "T", whereby members work together to provide stand by hours for one another. In such circumstances, employees who do not work the assigned shift continue to receive the Allowance. It argued there are no provisions in Appendix "T" to provide for the deduction of the Allowance. It argued this should inform this Arbitrator's analysis, as Appendix "T" is stated to "supersede any articles of the collective agreement that might be in conflict with its content".

[34] The Union also disputed the Company's assertion of any shared understanding for deduction of the Allowance, and the suggestion that "regular earnings" are as set out in Article 3 of the Agreement. It argued those wage grids set out base hourly rates and not what an employee "regularly earns". It argued that neither "wages" nor "earnings" are a base level of compensation and that "earnings" meant "remuneration, salary, income or money received for a service or work": *Cité de la santé de Laval v. Canada (Minister of Revenue)*[11]. It also pointed to the definition of "wages" under s. 166 of the *Code* includes "every form of remuneration for work performed….". It argued the Company's reliance on **AH666** was misplaced, as that case related to "pre-retirement vacation", which was an explicit situation of disentitlement to the Allowance. It argued the *Code* was to be interpreted in a broad and liberal manner, to give effect to its purposes.

[35] In its Rebuttal, the Company argued the issue of whether the Allowance was to be paid on Leave Days was not in dispute during the 2021 collective bargaining round, nor in the 2022 arbitration. It argued if the Union was arguing past practice, such evidence cannot be considered in this case, as there is clear and unambiguous wording.

[11] 2004 FCA 119

[36] The Company argued there are not only two "exceptions" to the deduction of the Allowance, as argued by the Union. It further argued that employees are not penalized or financially disadvantaged by not receiving the Allowance and that the Union is seeking a greater benefit than what is contemplated in the Agreement and under the *Code.*

[37] The Company also focused on the limiting words of "regular rate of…" before the term "wages", for demonstrating the intention of the legislature to limit the scope of the definition of "wages". It further noted that the remuneration is to be paid "for work performed" and that no work is being performed when employees are not available for stand-by on a Leave Day. Rather, the Allowance, compensates employees for their willingness to be *available* to perform work. It argued **CROA 4816** was easily distinguishable.

[38] The Company relied on *IFP Technologies Canada Inc. v. Encana Midstream and Marketing* 2017 ABCA 157; *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53; **CROA 4881; CROA 4884;** *AUPE v. AHS* 2020 ABCA 4; AH656; *CP v. IBEW, Council No. 11 (Schmidt, 2016);* **AH600**; *Re Fortis BC Inc. and IBEW, Local 213;* 2015 CarswellBC 37; *Re Unifor, Local 2411 and St. Lawrence Seaway Management Corp. (Pensionable Time);* 2023 CarswellOnt 812; **AH666**; **CROA 2141**; **CROA 97**; **CROA 75;** *Wolverton Pacific Partnership v. Triple F Investments Ltd.* 2022 CarswellBC 1698; *CUPE v. Air Canada* SOQUIJ 2024; *Re Brookfield Foods Ltd. and Bakery, Confectionary & Tobacco Workers' International Union, Local 446* 1987 CarswellNS 600 (NS LA).

Analysis and Decision

[39] The Agreement does not provide any entitlement to take paid PLD's or MLD's. It is not disputed that these Leave Days were not entitlements even provided under the *Code* when Article 4.1 was *first* negotiated in 2001. However, PLD's under s. 206.6(2) were in place *prior to* bargaining for the *renewal* of the current Agreement. MLD's provided by section 239(1.3) – which mirror PLD's in language of entitlement - were added *after* that bargaining was completed.[12]

[12] By interest arbitration.

[40] While the parties presented various arguments of what the parties objective intentions were under the Agreement relating to the Allowance – and how those intentions may or may not be extrapolated to payment of the Allowance for a Leave Day – these types of leave only exist in the *Code.* Therefore*,* the answer to the issue raised by this Grievance depends on whether the Stand-By Allowance is properly considered as payable under the *Code*. The *features* of the Allowance are relevant, but only for determining the nature of the Allowance, so it can be applied to those *Code* requirements.

[41] This is therefore both a contract interpretation Grievance regarding the nature of the Allowance, and a legislative interpretation Grievance regarding whether it is payable in *this* situation.

[42] The underlying interpretive principle is the same for the interpretation of both contracts and legislation, and is known as the "modern principle" of interpretation[13]. That principle states that the words of the Act must be "…read in their entire context and in their grammatical and ordinary sense [also referred to as their 'plain and ordinary meaning'] harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament".[14]

[43] According to Professor Driedger – who is the author of the modern principle – the "scheme" of the Act is the provisions as a whole; the "object" of the Act is the ends sought to be achieved and the "intention" of Parliament is the words used.[15]

[44] This principle was recently discussed by this Arbitrator in **CROA 4884**, which was relied upon by the Company**.** That analysis included a more detailed review of the recent Alberta Appellate level direction in *AUPE v. AHS*[16] and is adopted – although not repeated – here. To summarize, in interpreting legislation, the Arbitrator must consider the "ends to be achieved" by the legislation. For a contract interpretation task, an Arbitrator is not to

[13] In *Re Rizzo & Rizzo Shoes Ltd*. [1998] S.C.R. 27 the Supreme Court adopted Professor Driedger's "modern principle" of interpretation for statutory interpretation. That principle is also applicable to contractual interpretation. The Court revisited these principles in *Sattva Capital Corp v. Creston Moly Corp* 2014 SCC 53 and considered the impact of "surrounding circumstances" known by the parties at the time the contract was made. In *AUPE v. AHS* 2020 ABCA 4, the Alberta Court of Appeal then considered these principles and the impact of *Sattva* on labour arbitrators' interpretation of collective agreements.

[14] *Rizzo and Rizzo Shoes Ltd,* at p. 41.

[15] E. Driedger, *Construction of Statutes,* p. 150.

[16] See note 13.

determine what the parties *subjectively* intended, but rather must determine their mutual and *objective* intention, by giving primacy to the "plain and ordinary" meaning of the words used to record their deal, in the context of the factual matrix which existed at the time the contract was made, and giving any specialized meaning to the words and/or phrases used. That matrix is relevant as "surrounding circumstances", whether or not a contract is ambiguous.[17]

[45] There are several other principles that are applied to assist the interpretive task, including that contract/legislation must be interpreted in a manner that is internally harmonious, so that the provisions are able to work together as a whole (also sometimes referred to as "context" of the agreement); that an interpretation of one provision is not to be preferred if it renders another meaningless; that an interpretation which leads to an absurdity is to be avoided; and that every word is also to be given meaning, as parties – and the legislature - are not to be assumed to have used which are superfluous.

[46] To determine the "plain and ordinary meaning", it must be determined if there is any specialized meaning evident, whether developed by the parties or existing in the particular industry. If not, dictionary definitions can be helpful, considered of course within the context of the agreement or legislation as a whole.

[47] In **AH656**, the arbitrator was also deciding an issue between these same parties, and also relating to the Allowance. In that case, the issue was whether employees were entitled to claim an Allowance under Article 4.1 for ***each*** territory when covering more than one territory. In determining that issue, the arbitrator described the background of the S&C work as follows, which background is also applicable to this case:

> The S&C Department is responsible for the operation and maintenance of electronic systems and equipment that govern the movement of trains. Each S&C employee is assigned a specific territory for which he/she is responsible. *In addition, because of the critical nature of their work to the safe and efficient operation of the railway, S&C employees are required to provide 24/7 call coverage in order to respond to emergencies which may arise. This call coverage is referred to as "Standby*[18]*.*

[17] *AUPE v. AHS* at para. 43; there are limitations to what constitutes a surrounding circumstance, including timing considerations.
[18] At p. 2.

[48] **CROA 4816** is a decision between these same parties relating to the personal leave day provisions, although in that case, the employee was a locomotive engineer, whose compensation was based on what the arbitrator described as a "complex set of rules". That compensation could vary from one shift to another. The issue in that grievance was payment owed when a leave day was taken. The arbitrator determined that s. 17 of the *Regulations* applied to locomotive engineers. That section sets out a specific formula to be used in such cases.

[49] That decision was upheld by the Federal Court on judicial review: *CN v. TCRC and Michelle Flaherty.*[19] What the arbitrator in **CROA 4816** determined – and what was upheld on judicial review – was that the phrase "regular wages" "suggests something other than a basic, minimum entitlement" such as the "basic day" of wages which had been agreed upon by the parties in their agreement, which was what the Company argued should be paid.

[50] Before turning to interpreting the clauses at issue, it must be noted that s. 17 of the *Regulations* is not applicable to these facts, as this is not a situation where the employees are those whose "…*hours of work differ from day to day or who is paid on a basis other than time…* . In *this* case, employees *are* assigned a period of time they *are* expected to be at work each day when working a particular schedule, and are paid for that schedule. These employees therefore do not meet the conditions for the application of section 17 of the *Regulations.*

[51] In its review of **CROA 4816**, the Court noted the "purpose" of section 206.6(2) was:

> …[T]o ensure that employees who must miss work because of personal reasons do not suffer a wage loss. The legislative intent underlying s. 206.6(2) therefore is to ensure that federally regulated workers, such as the grievor, have access to fair leave in such circumstances and will receive fair compensation.[20]

[52] The Union argued the relevance of this decision to a purposive interpretive analysis. It argued the legislature did not intend there to be a "financial disadvantage"

[19] 2023 ONSC 3365
[20] At para. 32.

from taking a Leave Day, or that employees should suffer a "loss" of compensation when doing so.

[53] In essence, the Union's argument was that employees should be paid *the same monies for a Leave Day as they would have received had they been at work for that same day.* In this case, that amount includes payment of 0.5 hours for the Allowance. With respect to the Union's argument, the Court reviewing **CROA 4816** did not define what was included in the phrase "wage loss" in the above-referenced quotation. That Court did not add further guidance for the meaning of what is included in the term "*wage loss*" in its decision. I therefore cannot agree that decision supports the Union's argument that the purpose of the *Code* provisions are to limit any "financial disadvantage". "as if" the employee had actually worked the day. The Court was not that specific.

[54] What is "wage loss"; "fair leave" and "fair compensation" remain subject to interpretation.

[55] As was done by the union in *B.C. Maritime Employers' Association v. International Longshore and Warehouse Union – Canada*[21]*,* the Union in this case also provided the *Hansard* debates to support its argument as to the *Code's* objectives. The *Hansard* debates are of limited help, given the broad language which is used, which does not add a great deal to this analysis[22]. As noted in that case, the "primary resource for interpretation remains the language of the statute".[23]

[56] Another decision between these parties is **AH666**, from 2018. The issue in that case was whether the Grievor was on pre-retirement vacation and the impact on the Allowance. That issue is distinct from the issue before me.

[57] Turning to the *Code* provisions, it is well-established that the *Code* represents a *minimal* level of entitlement: s. 168. Parties cannot contract out of those entitlements. It is also well-established that a broad and liberal interpretation is owed to legislation which has a remedial impact, such as the *Code*: *Interpretation Act, s.* 12.

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[21] 2021 CanLII72620

[22] Such as the objective of a "robust and modern set of labour standards that reflect today's realities and sets the stage for good quality jobs" … with the objective of "improve work-life balance".

[23] At para. 100.

[58] As noted by the parties, there is a very little jurisprudence for determining what is to be included in the phrase "*regular rate of wages for their normal hours of work*", as used in ss. 206.6(2) and 239(1.3) of the *Code.*

[59] For its part, the Company also argued from the purpose of the Allowance, with an emphasis on the requirement to be "available". The Company relied on *CP v. IBEW, Council 11* (Schmidt; 2016), which dealt with the re-organization of the S&C Department and the interpretation of an Income Security Agreement between these parties. It was noted that prior to this reorganization, the S&C Department worked 5/2 shifts schedules with standby or rotating standby. In that case, the Arbitrator described the Standby Allowance as a :

> **…**premium payment provided to employees whose positions require them to be available during off-duty hours to attend to service outages or emergencies referred to as trouble calls.[24]

[60] Turning to the wording used in the legislation, I am satisfied there are three qualifications that must be met, for the Allowance to be paid on a Leave Day:

a. The Allowance must be "**wages**" (as that term is defined by s. 166);
b. The Allowance must be part of the "**regular rate**" of those "wages"; "**for**"
c. **"their normal hours of work**" [25]

(the latter two qualifications arising from Articles 206.6(2) and 239(1.3))

[61] The question of whether the Allowance qualifies as "wages" is central to this dispute as it is a threshold question. If the answer to this question is "no", the analysis does not proceed any further.

[62] How a standby allowance is characterized depends on the nature of that allowance under the particular collective agreement in issue.

[24] At pp. 7-8.
[25] Emphasis Added.

Is the Allowance "Wages"?

[63] The word "wages" is defined in s. 166 of the *Code* as "*every form of remuneration for work performed, but does not include tips and gratuities*".[26] It is that definition that must be applied, in this case.

[64] All words in that definition are presumed to have meaning.

[65] To determine if the Allowance qualifies as "wages", three requirements must be met: the payment must be [a] a "form of remuneration"; [b] "for work performed"; and [c] that is not a "tip and gratuity".

a. Is the Allowance a "Form of Remuneration"?

[66] The word "remuneration" is not defined in the *Code.* Neither is any specialized meaning apparent from the legislation.

[67] Black's Law Dictionary states that "remuneration" is: "Reward; recompense; salary." Its digest notes the word "*remuneration means a quid pro quo. If a man gives his services, whatever consideration he gets for giving his services seems to me a remuneration for them*". I am satisfied that "remuneration" is an expansive word. I am further satisfied that its breadth is further emphasized by the legislative choice of the word "every" which was used to describe that remuneration. This descriptor of "every" must be given meaning. I am satisfied that in using the word 'every', it was the intent of the legislature to include all forms of remuneration which are received from an employer – *all* forms of recompense to an employee - for all services rendered. The only exception is specifically set out as tips and gratuities. Both of those exceptions are irregular payments *which are not paid by an employer, but may be paid to an employee by third parties*.

[68] I am persuaded by the Union's position that as the legislature specifically set out these two exceptions in s. 166, it was obviously alive to the ability to *create* exceptions to the *types* of remuneration that should be included in the term "wages*" for the purposes of entitlements under the Code*.

[26] Emphasis Added.

[69] It did not create any further exceptions beyond those two.

[70] Turning to the nature of the Allowance under the Agreement, Article 4.5 of the Agreement requires the employee to be "available for calls" "outside of regular hours". Employees are not given any choice or determination. Unlike in *Re Fortis and IBEW,* employees do not "choose" or "sign up" for standby and work it on rotation. Standby is obligatory under this collective agreement.

[71] Article 4.1 is the source of the payment employees receive for offering this service, and why it is paid. That Article states that the parties agreed to pay an Allowance regularly for standby *because of the intermittent nature of this work*.

[72] Article 4.1 also states that the Allowance is to be paid to employees "*in addition"* to what are described as their "regular earnings *for time actually worked*".[27]

[73] There is therefore a distinction in Article 4.1 for monies paid for two aspects of an employee's services to the Company: The first is for time 'actually worked' by that employee each day; the second is for an employee's service of being on "stand by" for each day, because of the intermittent nature of the work, which is in "addition" to the "time" they spend working.

[74] The employee is not required to "do" anything further to earn the Allowance. Whether an employee is called back to work or not while on a state of stand-by – or even if they switch their day with someone else - *they are still paid the same Allowance*. The Allowance is paid due to the critical nature of the 24/7 work, which requires that stand-by coverage be provided.

[75] When employees undertake *further work if called back* – which may or may not occur - Article 4.2 stipulates they will be paid *for that work* under Article 6.

[76] To compensate employees for offering this service, the Company has agreed that employees are to be paid 0.5 hours each regular work day - Monday to Friday; and an additional 5 straight time hours to compensate them for the fact that they must provide standby coverage every second weekend.

[27] Emphasis added.

[77] I am satisfied that both types of payments which employees receive – the "time worked" and the monies paid "in addition" to that "time worked" are payable by the Company to S&C employees for the services those employees provide to the Company, and that both *would qualify as a form of remuneration* under the definition in s. 166 of the *Code.*

[78] However, there are two other requirements for the Allowance to be considered as "wages" under s. 166 of the *Code.*

b. Is the Allowance Remuneration "for Work Performed"?

[79] The second phrase used in section 166 requires that the "form of remuneration" must be "*for work performed*". This phrase qualifies the types of remuneration which is payable "as wages" under s. 166.

[80] It is here that the argument of the Union falters. In my view, it is the meaning of the phrase "*for work performed*" that is at the centre of this case. There is no jurisprudence filed by the parties that interprets this phrase.

[81] Considering all of the facts, evidence and jurisprudence that *does* exist, I am persuaded by the Company that the Allowance is not a form of remuneration which is paid "*for work performed*". Rather, it is a form of remuneration which is paid to an employee in return for their *undertaking to remain available to work*, *in case* further work *may* need to be "performed" in future.

[82] While it is a form of service provided to the Company – and is something the Company pays the employee for - it is not "*for work performed*".

[83] Two authorities have been particularly persuasive in reaching this conclusion. While s. 166 of the *Code* was not at issue in either case, both arbitrators considered the distinction between "being available" for work and "performing work"; which is a distinction which I also recognize and which I am satisfied the legislators also recognized in drafting section 166. The reasoning in those cases is compelling.

[84] The first decision is the recent arbitration decision in *Re Unifor, Local 2411 and St. Lawrence Seaway Management Corp*[28]*.* In that case, the arbitrator considered what qualified as "pensionable earnings" *in the context of a collective agreement and pension plan.* In that case, while all employees were required to work standby, employees were assigned to standby "on a rotating basis"[29]. The union in that case made similar arguments to those made in this case, including that standby was a "regular feature" of the employee's work and was regular and continuous.

[85] The key issue in that case was whether standby pay was "*remuneration for the performance of the regular duties*" within the meaning of section 2.08 of the Pension Plan. The Arbitrator held that being on standby was *not* "performing" "regular duties" and so it did not qualify. While the *Code* provisions were not at issue in that case, the arbitrator did consider similar phrasing which has been used in the *Code* and interpreted that phraseology in the context of a standby allowance.

[86] The Arbitrator reasoned, in part:

> *While section 2.08 of the Seaway Pension Plan does not expressly state that "earnings" means remuneration for the performance of work, the phrase "performance of the regular duties",* and particularly the word "performance" **does** suggest that "earnings" means remuneration **for an act of doing something** on a regular basis with the **goal of achieving or accomplishing some objective or making or completing or producing some outcome or thing.** That is the very notion of work – work is the effort one makes or performs in order to produce a result. **Standby, on the other hand, does not require any effort as such. *Standby is not performed*.** *It is simply an undertaking to remain ready and available to perform the tasks of one's job.* Overtime, on the other hand, does require the performance of productive work, which in my view explains why overtime is specifically excluded from the meaning of earnings in Section 2.08, and why standby is not mentioned as an exclusion. [30]

[87] In the case before me, s. 166 *does* specifically refer to *"work performed".*

[88] The second compelling authority is *Re Fortis BC Inc. and IBEW, Local 213*[31]*,* a case which pre-dates both the *Code* provisions and the Federal Court's judicial review of

[28] 2023 CarswellOnt 812
[29] At para. 8, emphasis added.
[30] At para. 26, emphasis added.
[31] 2015 CarswellBC 37

CROA 4816. In *Re Fortis,* the union argued that employees who only worked standby during a labour dispute where "at work" or "working" during that period. Those employees had been assigned to standby on a rotating basis, by the union. The arbitrator in that case determined that the union's position that standby was "work" would not give "standby" its "normal and ordinary meaning". It was held that employees were not being paid for standby "*as if they were actually performing work*", but rather were paid "*a premium which was not equivalent in wages to what they would have earned had they actually being working for the hours they were on standby*". [32]

[89] It was determined that employees only received "wages" if they were called back to work while on a standby status *and were "actually working*"[33] under the express provisions of the agreement at issue.

[90] In the case before me, if the employees are called to return to work when on standby, they are paid according to a different sub-Article, for the work which is then "performed" at that point. Waiting for that work is a service which they provide to the Company – and they are paid for that service as a form of remuneration - but that remuneration is not paid "for work performed" under the *Code*.

[91] The remaining question is whether that interpretation is impacted because of the Federal Court's recent pronouncement in *CN and IBEW and Michelle Flaherty,* which *post-dates* both of these decisions.

[92] In my view, it is not.

[93] While the Federal Court recognized that the *object* of the legislation was to reduce "wage loss", there is no "wage" loss, unless the Allowance is first properly considered "wages" under the definition of that term in s. 166 of the *Code.*

[94] That definition cannot be met, in this case. It is therefore not necessary to address the remaining two qualifications under ss. 206.6(2) and 239(1.3).

[32] Emphasis added.
[33] At para. 46, emphasis added.

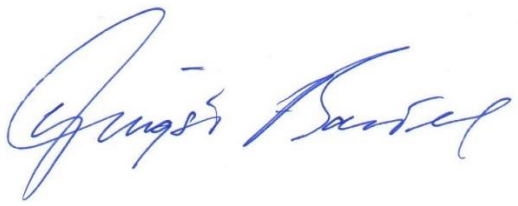
Conclusion

[95] The Allowance is not payable when an employee takes a Leave Day, as the Allowance does not meet the definition of "wages" in s. 166 of the *Code*.

[96] The Grievance is dismissed.

I remain seized with jurisdiction to address any questions relating to the implementation of this Award; and with jurisdiction to correct any errors; and to address any omissions to give this Award its intended effect.

DATED and issued this 16 day of September 2024 at Wheatland County, Alberta.



CHERYL YINGST BARTEL
ARBITRATOR

Appendix A

IN THE MATTER OF AN ARBITRATION

BETWEEN

INTERNATIONAL BROTHERHOD OF ELECTRICAL WORKERS (SYSTEM COUNCIL NO. 11)
(the "Union")

and

CANADIAN NATIONAL RAILWAY COMPANY
(the "Company")

EX PARTE [Union]

DISPUTE:

The alleged violation of the *Canada Labour Code* Section 239 in the application of employees' entitlement to full compensation for lost wages under the provisions of Agreement 11.1 including Article 4 and Appendix T while on approved Personal or Medical Leave days .

***EX PARTE* STATEMENT OF ISSUE:**

All IBEW members covered under the provisions of Article 4 and Appendix T of Agreement 11.1 have a guarantee including 15 hours of standby pay per two week pay period. The Company denies to pay this provision for paid leave days as provided under the *Canada Labour Code*.

UNION POSITION:

It is the Union's position that Personal Leave and all medical leave days are paid, as per the *Canada Labour Code* and Agreement 11.1, and as such employees exercising their rights to these paid leave days are intended to be without any loss in pay. The standby positions are bulletined on a guarantee of 190 hrs over a four-week period. In case of absence of an employee utilising a personal leave day or a sick day, standby is provided by other employees subject to call.

It is the Union's position that the Company's refusal to pay the Standby pay is in violation of the *Canada Labour Code*, including Section 239, as well as Agreement 11.1.

The Union contends that the 15-hour Standby pay entitlement guaranteed under Article 4 and Appendix T which would include all paid leave.

The Union requests the Company discontinue this violation of the *Canada Labour Code*, including Section 239, and the members' rights under Agreement 11.1 including Appendix T and Article 4, and that the Arbitrator order all members be made whole, including an Order directing the it payment of all standby claims that were previously removed and or denied to all employees so affected until resolved.

Appendix B

IN THE MATTER OF AN ARBITRATION BETWEEN
INTERNATIONAL BROTHERHOD OF ELECTRICAL WORKERS (SYSTEM COUNCIL NO. 11)

(the **Union**)

and

CANADIAN NATIONAL RAILWAY COMPANY

(the **Company**)

THE COMPANY'S EX-PARTE STATEMENT OF ISSUE

DISPUTE:

The alleged violation of Section 239 of the *Canada Labour Code* (the **Code**) with respect of employees' claim to entitlement to standby pay under the provisions of Agreement 11.1 (the **Collective Agreement**) including Article 4 and Appendix T while on paid Personal Leave Day (**PLD**) or Medical Leave Day (**MLD**).

EX-PARTE STATEMENT OF ISSUE:

IBEW members to which Article 4 and Appendix T of the Collective Agreement applies are not entitled to or "guaranteed" standby pay on days that they are not working standby but, instead, are taking a paid PLD or MLD as provided under the Code. The Company denies that payment of standby pay on paid PLDs and MLDs are provided for under the Code.

COMPANY POSITION:

The Company denies the Union's allegations and declines the Union's grievance in its entirety. The overarching intention of the standby provisions in the Collective Agreement provides for standby pay to be paid to employees who are available to work. There is no exception for PLDs or MLDs. By an employee taking a PLD or MLD, the employee is making themselves unavailable for said standby coverage. The Company denies that standby pay is a guaranteed entitlement applicable to all paid PLDs and MLDs.

The Company denies any violation of the Canada Labour Code or the Collective Agreement. The Collective Agreement provides for the applicable formula for

calculating rate of pay in the circumstance of the dispute. By ensuring that employees who take their approved paid PLDs and MLDs are paid their regular hours and not a standby premium