CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4599-PO

Heard in Montreal, December 12, 2017

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

There appeared on behalf of the Company:

D. S. Fisher	– Senior Director Labour Relations and Strategy, Montreal
L. Williams	– Labour Relations Manager, Toronto
V. Paquet	– Labour Relations Manager, Toronto
S. Roch	– Labour Relations Manager, Montreal
O. Lavoie	– Labour Relations Manager, Montreal
M. Boyer	– Senior Manager Labour Relations, Montreal

And on behalf of the Union:

M. A. Church	– Counsel, Caley Wray, Toronto
J. Robbins	– General Chairman, Sarnia
J. Lennie	– Local Chairman, Port Robinson
R. Caldwell	– Retired General Chairman, Bancroft
M. Kernaghan	– Vice General Chairman, Belleville
C. Wright	– Senior Vice General Chairman, Toronto

DECISION ON PRELIMINARY OBJECTION

Nature of the Case

1. CN contests the arbitrability of a TCRC grievance filed on behalf of Mr. Joshua Stride. In its view, TCRC withdrew the grievance and is estopped from resurrecting it. As a result, CN argues the arbitrator had no jurisdiction to hear the case on the merits.

2. For the reasons which follow, the arbitrator concludes that the TCRC did not lose its right to pursue Mr. Stride's grievance. The parties were debating the legal implications of a withdrawal, at which time the TCRC decided to continue with the matter.

Facts

3. The CROA Office administratively scheduled the Stride grievance for July 11, 2017. In a June 23, 2017 letter, TCRC asked for the removal of the Stride grievance and suggested, based on other cases, that res judicata applied to the issue in dispute:

> **The Union would like the CROA Office to remove the following case** from the July docket CNR – 41 – J. Stride **on a without precedent or prejudice basis.**
>
> **The Union considers this issue to be Res Judicata by way of the decision of Arbitrator Flynn in CROA 4469**. The Union considers the circumstances analogous to those in the Vander Wey case (CROA 4469) where the Union arbitrated the issue and received an award.
>
> Please let this Office know when the case is removed and please send over an updated Schedule.
>
> (Emphasis added)

4. Not surprisingly, given that the TCRC's letter included a legal conclusion (res judicata), CN countered with a June 30, 2017 email setting out its legal position for future disputes:

> We are not objecting to the Union's right to withdraw the case from the docket or the Union's position that it may be free, at this stage, to withdraw its grievance and have it removed from the docket. Where we differ, is with regards to the impact of that action on similar disputes in the future. **We do not agree that the withdrawal of the grievance is "without prejudice" and we believe it establishes a binding precedent. We confirm that the Company reserves all rights to argue that this withdrawal is, in fact and in law, prejudicial to the**

> **union's interpretation of the collective agreement should a similar dispute be progressed at some time in the future.**
>
> (Emphasis added)

5. CN's legal position, again not surprisingly, elicited this August 14, 2017 response from the TCRC requesting that the Stride grievance be rescheduled:

> This is in regard to CN's position of June 30, 2017 emailed to CROA and copied to the undersigned with respect to the TCRC-CTY's request to remove the above noted Stride case from the CROA&DR docket.
>
> The Company, in their letter sated in part that "We do not agree that the withdrawal of this grievance is "without prejudice" and we believe it establishes a binding precedent".
>
> **Based on the company's position in this matter we would request that the Stride case be rescheduled for hearing**. Thank you.
>
> (Emphasis added)

6. The CROA Office placed the matter on the docket for the December 2017 session. At that hearing, the sole issue examined concerned the arbitrability of the Stride grievance.

Analysis and Decision

7. CN suggests that TCRC legally abandoned its claim and was estopped from resurrecting it without its specific consent, as summarized at page 4 of its Brief (E-1):

> iii. There are no powers granted to the Arbitrator, by the terms of the collective agreement, the rules governing the CROA&DR or provided by the Canada Labour Code that would allow him hear (sic) a case that had been abandoned by the claimant party. To allow for such to occur would, respectfully, go beyond the jurisdiction of the arbitrator, would require ignoring and/or amending the clear terms of the collective agreement, and would be in stark, diametric opposition to the notions of prompt, efficient, and peaceful, final, and binding resolution of

> workplace disputes, espoused by the legislator when creating Canada's rights arbitration processes. To do so would run afoul of the Preamble to the Canada Labour Code, the collective agreement and Memorandum establishing the CROA&DR.

8. The TCRC characterized the fact situation differently, as set out at paragraph 36 of its Brief (U-1):

> …The Union submits that given the Company's opposition to the terms of the Union's proposed withdrawal of the grievance from the CROA docket, the Union is free to request CROA to relist the grievance. This is all the Union has done in this case. It has not attempted to prejudice the Company's position in any way.

9. A bit of background on CROA provides the context in which this dispute arose. For over 50 years, CROA members have agreed to use an expedited arbitration system to resolve their labour relations disputes: Memorandum of Agreement Establishing the CROA&DR. CROA members jointly set up this Office which schedules 21 cases per month for 11 months in every year. The parties routinely settle a fair number of their scheduled arbitration cases which reduces the number of formal awards arbitrators must render each month.

10. Unlike a labour relations tribunal, CROA does not have arbitrators on staff who can deal with procedural issues as they arise. Unlike private arbitrations before a consensually appointed arbitrator, the current CROA practice has no one overseeing legal issues which arise during the scheduling phase. But any federal arbitrator, including CROA arbitrators, has this pre-hearing jurisdiction pursuant to sections 16 and 60 of the Canada Labour Code.

11. CROA retains private sector arbitrators to hear and determine cases at each monthly session. The parties, legal counsel and private sector labour arbitrators reserve CROA hearing dates several years in advance to ensure availability. The arbitrators know nothing in advance about each case, except for a brief statement of issue, until the parties start presenting their case at the hearing. This differs from the procedural oversight a labour tribunal could provide if the parties had a dispute, or how a consensually appointed private arbitrator would handle pre-hearing matters.

12. This case differs from a standard request to withdraw a case. CROA&DR 4359 examined whether the TCRC could unilaterally withdraw a matter. The difference between a withdrawal, as opposed to a dismissal, is a matter which regularly arises during settlement discussions in labour and employment matters. Evidently, the party paying compensation pursuant to a settlement agreement wants to make sure that the matter is dismissed to prevent it from being raised again in the future. A unilateral withdrawal of a grievance raises concerns about its legal impact; there are myriad labour arbitration awards examining the legal effect of a withdrawal, some of which the parties filed at the hearing.

13. This case examines what happens when the TCRC seeks to “remove” a case from the docket, but also includes its legal position on the impact and consequences of a completely different CROA decision (CROA&DR 4469). The arbitrator will assume, for argument purposes only, that a request to “remove’ is comparable to a request to

withdraw a grievance. Changes to a specific month's schedule is done administratively by the CROA Office without the involvement of the arbitrator.

14. The reference to res judicata in the TCRC's letter effectively forced CN to respond and provide its differing view of the applicable legal consequences.

15. The character of this case then changed from that found in the case law the parties filed regarding withdrawals. TCRC did not seek to debate further the consequences of its request to remove the case. Rather, it simply said that, given CN's position, it would proceed with the case. Essentially, it withdrew its withdrawal request.

16. This back and forth between the parties is comparable to a union seeking to withdraw its case before, or at the start of, an arbitration hearing. When met with an employer's position on the legal consequences of doing that, it then reconsiders and decides to proceed on the merits after all. This differs from the debate about the impact of a union's request to withdraw a grievance when it has no intention of proceeding.

17. Given the CROA context as explained above, and unlike the usual situation for handling procedural matters in regular labour arbitrations, there was no arbitrator available to deal with this issue as it developed. The arbitrator dismisses the argument that the CROA process somehow eliminates an arbitrator's jurisdiction over procedural matters which divide the parties. Arbitrators are not involved with how this Office

schedules cases. But only the appointed arbitrators can resolve legal disputes, including those regarding arbitrability.

18. CN clearly disputed the TCRC's suggestion that it was able to remove a grievance "without prejudice" and that res judicata applied. CN said the withdrawal was "with prejudice" and would be used against the TCRC in future comparable cases. That raised a legal issue that only the appointed arbitrator could resolve. It also provided an opportunity for the TCRC to decide not to withdraw the matter and instead to proceed on the merits.

19. The arbitrator emphasizes that this does not mean that a trade union can resile from an earlier withdrawal at any time. The chronology raises legal issues which a labour arbitrator would normally have dealt with. The CROA process is different as described above.

20. For straight forward withdrawals, or if sufficient time has passed, the ability to revoke a withdrawal becomes far more problematic. The case law the parties filed governs those situations.

21. This case appears novel for CROA, since the TCRC, which asked to remove a grievance from the docket, then decided to continue with the matter on the merits when faced with CN's legal response. No CROA cases appear to have dealt with this situation. CROA&DR 259 dealt with a different fact situation where one grievance had been

withdrawn and then shortly afterward the trade union filed a new grievance about that same situation:

> There can, however, be no doubt that the grievance in the instant case is precisely that which was brought to the Office of Arbitration in September, 1970, even though it may then have been couched in slightly different terms. The grievance was then withdrawn, and the question to be decided is whether it can be brought again.

22. The current dispute would not be novel in regular arbitrations. But private arbitrators faced with these facts would not need to write reasons, since the matter would resolve itself when a trade union contemporaneously withdrew its request and decided to proceed on the merits after all. That is what happened here.

23. For these reasons, and in this specific situation, the preliminary objection to the arbitrability of the Stride grievance is dismissed.

December 19, 2017

GRAHAM J. CLARKE
ARBITRATOR