CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4630

PRELIMINARY MOTION

Heard in April 3, 2018 *via* Conference Call

Concerning

CANADIAN PACIFIC

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Dispute between the parties to have the CROA hearing schedule changed.

There appeared on behalf of the Company:

M. Becker	– Assistant Vice President Labour Relations
D. Guerin	– Senior Director Labour Relations
N. Hasham	– Counsel

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray
D. Finnson	– President, TCRC
R. Hackl	– Vice President, TCRC
W. Apsey	– General Chairman, CTY East
G. Edwards	– General Chairman, LE West
D. Edward	– Vice General Chairman, CTY West

AWARD OF THE ARBITRATOR

Background

1. The TCRC requested the CROA office to schedule an urgent teleconference with the arbitrator assigned for CROA's April session which will take place on April 10-12,

2018. The arbitrator held the teleconference on April 3, 2018 and issued these expedited reasons on the same date.

2. The TCRC made two arguments. First, it argued that a CROA arbitrator had the jurisdiction to order that grievances scheduled for a Thursday be moved to either Tuesday or Wednesday to replace cases which had settled. Second, the TCRC argued that the arbitrator should make this type of order for some of its cases currently scheduled for Thursday April 12, 2018.

3. CP contested the arbitrator's jurisdiction to change the dates that the CROA office had already scheduled for the hearing of its grievances. It further noted that the cases had been scheduled almost two months earlier and that the TCRC's request was exceedingly late in the process[1]. The TCRC countered that it only learns of settlements closer to each session's starting date.

4. For the reasons which follow, the arbitrator concludes that an order could be made, in appropriate circumstances, to move a scheduled arbitration to an earlier date. But such an order should not be made lightly, especially since CROA's scheduling challenges go far beyond the monthly schedule.

[1] CROA&DR 4548 describes the CROA expedited arbitration system in greater detail.

Can a CROA arbitrator change the day on which a scheduled case will be heard?

5. CP argued that the parties had agreed explicitly that any changes to the schedule required mutual agreement. The key document governing CROA is the Memorandum of Agreement Establishing the CROA&DR (MOA). CP pointed to Appendix "C" (Policies and Guidelines) in the MOA.

6. The arbitrator notes that Appendix "C" does not interpret the MOA and, more importantly, does not remove an arbitrator's discretion:

> The following is a statement of the policies and guidelines of the Canadian Railway Office of Arbitration & Dispute Resolution (CROA&DR) concerning the filing and scheduling of disputes for arbitration and certain hearing procedures. **It is not intended as an interpretation of the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration & Dispute Resolution nor any other agreement between the parties. These guidelines are intended for the assistance of the parties and may be subject to the discretion of the arbitrator in any given case.**
>
> (emphasis added)

7. Appendix "C" contains this specific language regarding scheduling:

> As a general principle, all disputes filed with the Office of Arbitration are scheduled on a "first-in first-out" basis. An exception to this are disputes involving termination of employment which have a priority in scheduling. As well, given the number of cases which can be on file with the CROA&DR at any given time, the scheduling of cases is also done on the basis of equitable distribution among the member organizations, and also among the various parts of each organization.
>
> **The parties to a dispute can mutually agree to request that the order of scheduling of their cases be other than the order in which they were submitted. They can also mutually request the substitution of already scheduled cases with other cases.** Approval of such substitution will be dependent on available hearing

> time as the current method of scheduling involves a certain amount of "double booking" of time slots due to the present high level of "no shows".

8. CP did not convince the arbitrator that this language removed a CROA arbitrator's discretion regarding the hearing of cases. The requirement for mutual agreement applies in two specific situations: i) to change cases' scheduled order away from "first-in first-out" and ii) substituting new cases for ones previously scheduled.

9. The TCRC persuaded the arbitrator that their request was not to change the order of the cases. Rather, the TCRC simply wanted to have some of its cases scheduled for Thursday moved to earlier in the week due to some of the original 21 cases for April 2018 being settled.

10. The TCRC satisfied the arbitrator that CROA arbitrators remain in charge of the hearing process, including for pre-hearing issues. Not only does the Canada Labour Code (*Code*) confer this power[2], but so does the MOA.

11. For example, s. 60(1)(a.4) of the *Code* reads:

> 60 (1) An arbitrator or arbitration board has:
>
> …
>
> (a.4) the power to expedite proceedings and to prevent abuse of the arbitration process by making the orders or giving the directions that the arbitrator or arbitration board considers appropriate for those purposes…

[2] See sections 60 and 61 of the *Code*.

12. The 2004 MOA does not reflect all current CROA practices. For example, it refers to a Chief Arbitrator and foresees the use of three arbitrators. Currently, CROA uses 5 arbitrators. Similarly, article 10 foresees that no *ex parte* statement of issue will be filed without a CROA arbitrator granting consent:

> 10. The joint statement of issue referred to in clause 7 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated. **In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours notice in writing to the other may apply to the Office of Arbitration for permission to submit a separate statement and proceed to a hearing. The scheduled arbitrator shall have the sole authority to grant or refuse such application.**
>
> (Emphasis added)

13. Ex parte statements appear now to be the rule and their filing has seemingly never involved CROA arbitrators.

14. Despite the existence of some practices which may differ from the strict wording in the MOA, the arbitrator is unaware of any exception to the fundamental underlying principle found in Article 8 of the MOA:

> 8. Subject always to the provisions of this agreement and the guidelines appended hereto, **the scheduled arbitrator shall make all determinations necessary for the hearing of disputes**. Guidelines governing the operation of the CROA&DR may be established and/or amended from time to time as deemed necessary by the Committee.
>
> (emphasis added)

15. In the arbitrator's view, this general power over the "hearing of disputes" is not limited to the hearing setting proper. Rather, it applies to all issues arising for the month for which CROA has retained the arbitrator.

Should the arbitrator change the hearing schedule for next week?

16. The TCRC did not persuade the arbitrator to issue an order forcing CP to attend arbitration either one or two days earlier than originally scheduled. The arbitrator fully understands the TCRC's frustrations in not having as many cases heard at each CROA session as it would like. Their cases often involve terminated employees who need a resolution. In addition, there can be significant costs associated with bringing grievors to CROA sessions in another part of the country if the arbitrator ultimately cannot hear the case.

17. But there are costs to CP as well. It appears that for some time the CROA office has scheduled CP and TCRC cases for the Thursday of each CROA week. This reflects in part the MOA's requirement to allocate hearing time fairly to all CROA member organizations. This scheduling practice also allows CP to plan around this Thursday hearing date, particularly when representatives and witnesses must travel from Calgary to Montreal.

18. There are several reasons the arbitrator has decided not to issue the requested order. There are others as well, but the need for expedition limits the analysis.

19. First, special circumstances, such as an abuse of process[3], are usually needed to persuade an arbitrator to order, or enforce, a peremptory hearing date. There is no evidence of such conduct occurring in the current situation.

20. Second, the arbitrator is of the view that issuing peremptory orders will not solve the troubling backlog which the parties face. The CROA scheduling system remains predicated on an arbitrator being able to hear 7 cases each day during a 9-5 hearing session. While some parties still plead a case within one hour, this is now the rare exception. Arbitrators have been willing on occasion to start early, and stay past 5 pm, but the problem will not be solved by longer hearing days.

21. Third, the parties both noted during the teleconference that discussions continue at the CROA Committee level on how to improve the process, given the challenges of some of the cases. For example, duty to accommodate or harassment cases have virtually no prospect of being completed during their allotted time. Similarly, the lack of Joint Statement of Issues (JSI) in most cases, despite their requirement at article 7 of the MOA, has limited the "discovery" which the MOA sought to impose. This leads to significant delays each hearing day when parties require time to check into allegations.

[3] See, for example, Toronto (City) v Toronto Professional Fire Fighters' Association, 2017 CanLII 22583 and OLD Slots at Rideau Carleton v Ontario Public Service Employees Union, 2010 CanLII 97664.

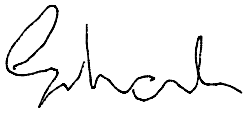
22. In short, the arbitrator agrees with the TCRC that improvement is needed. But the arbitrator is not satisfied that forcing a party to plead a case earlier than originally scheduled will solve the existing problems.

23. The parties themselves need to discuss these issues together and at Committee. The return to using JSIs may help, as well as exchanging briefs in advance of the hearing to avoid delays.

24. A causal reader of this decision might get the impression that the CROA process is not working. That is clearly not the case given the high number of cases CROA resolves each month. While no system is ever perfect, the parties have shown the arbitrator that the system they have developed, and followed for over 50 years, remains the best expedited labour arbitration regime in the country.

25. The arbitrator respectfully dismisses the TCRC's motion.

April 3, 2018



GRAHAM J. CLARKE
ARBITRATOR