CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4845-PO

Heard in Montreal, July 13, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The arbitrability of the dismissal of Conductor Tim Persoage of Winnipeg, MB as outlined in the Company's Preliminary Objection outlined in its Step 2 Grievance Reply.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. T. Persoage was dismissed for a failed substance test performed on February 26, 2021.

The Company advanced a preliminary objection to the Union's attempt to challenge the dismissal through arbitration based on the timeliness of the Union's Step 2 grievance in relation to the Collective Agreement time limits to submit a grievance.

Union Position:

The Union submits that there are reasonable grounds to grant extension of prescribed time limits per Section 60(1.1) of the Code. In CROA Case No. 3824, Arbitrator Picher commented that "an underlying purpose of the discretion granted to the Arbitrator under the Canada Labour Code to extend time limits is to avoid undue technicality in the administration of a collective agreement which would defeat the legitimate interests of employees and their Union, as well as an employer in the case of a Company initiated grievance."

The evidence is not stale-dated, and the Company has not suffered any prejudice. The Union submits that, as in the circumstances before Arbitrator Picher in CROA Case No. 3824, "this is not a circumstance where there has been a long-time abandonment of the grievance by the Union or where it submits that documents that would be in evidence have since gone missing or that witnesses are no longer available." As a result, the Union submits the grievance should be heard on its merits, in the circumstances.

Company Position:

The Company disagrees and maintains that the grievance must fail on the basis of not being timely.

The Company replied to the Step 1 grievance of the dismissal of the Mr. Persoage on July 14, 2021. Based on Article 40.03 of the Collective Agreement, the Union had 60 days to appeal this Step 1 decision:

> Article 40.03
> Step 2 - Appeal to General Manager

> Within 60 calendar days from the date decision was rendered under Step 1, the General
> Chairman may appeal the decision in writing to the General Manager, whose decision will be rendered in writing within **60 calendar days** of the date of the appeal….
> 40.04 **Any grievance not progressed by the Union within the prescribed time limits shall be considered invalid and shall not be subject to further appeal**.…….
> [EMPHASIS ADDED]

The deadline for the Union to submit a Step 2 Appeal was therefore on September 12, 2023 (60 days after the Company's reply to the Step 1 grievance. The Union's Step 2 Appeal was issued on December 13, 2021 some 152 days after the Company's response to the Step 1 grievance i.e. 92 days late (152-60).

Therefore, based on the contract language between the parties, the grievance for discipline assessed to T. Persoage is invalid and not subject to further appeal.

FOR THE UNION:
(SGD.) D. Fulton
General Chair CTY-W

FOR THE COMPANY:
(SGD.) J. Bairaktaris
Director Labour Relations

There appeared on behalf of the Company:

J. Bairaktaris	– Director, Labour Relations, Calgary
L. McGinley	– Director, Labour Relations, Calgary

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, CTY-W, Calgary
D. Edward	– Vice General Chairperson, CTY-W, Calgary
P. Boucher	– President, TCRC, Ottawa

AWARD OF THE ARBITRATOR

PRELIMINARY OBJECTION (Timeliness)

[1] This Award addresses a preliminary objection raised by the Company that the Grievance is not arbitrable.

[2] For the reasons which follow, the preliminary objection is over-ruled.

[3] The Grievance is arbitrable and is to proceed to be heard on the merits, as scheduled.

Facts

[4] The Grievor was dismissed on March 23, 2021 for a positive substance test. The Union filed a grievance against the dismissal on May 18, 2021. This was a detailed

document setting out the basis for the Grievance. The Company responded on July 14, 2021 and denied the Grievance.

[5] Under the terms of the Collective Agreement, the Union had 60 days to advance the Grievance to Step 2. That time period expired on September 12, 2021.

[6] After the deadline for the advancement to Step 2 had passed, the parties continued to discuss settlement. Three offers of settlement were provided by the Company after that date. The first offer was provided on October 4, 2021 and was stated to be made "with prejudice/without precedent". The other two offers were sent on October 26, 2021 and December 3, 2021 and did not have that wording.

[7] The Union advanced the Grievance to Step 2 on December 13, 2021, which was approximately three months (92 days) late.

[8] The Company argued the Grievance was inarbitrable under Article 40 of the Collective Agreement (reproduced in the JSI). The Company urged that Article 40 is a mandatory provision, not directory; that the parties had agreed on the consequences of failure to comply with those time limits; and that the Article must be given force or that provision would be meaningless. The Company argued the Union had the burden to establish there were "reasonable grounds" for the delay, even if Article 60(1.1) were applied, and it has not met that burden.

[9] For its part, the Union relied on the jurisdiction given to the arbitrator by Article 60(1.1) and the jurisprudence which has developed for the application of that discretion. It argued there are six factors to be considered, which factors support that jurisdiction on the facts of this case. Those factors are: the nature of the grievance; whether the grievance occurred in launching or advancing the grievance; whether the grievor was responsible for the delay; the length of the delay; and whether the employer could reasonably have assumed that the grievance had been abandoned: It noted this was an advancing and not a filing delay; a discharge was in issue; the grievor was not involved; the Union had an explanation and the passage of time was short at only three months. It urged that reasonable grounds have been established on the facts of this case and that the Company has suffered no prejudice. The dismissal related to a positive test and that evidence is still available

to the Company. It argued the jurisprudence supported an exercise of discretion to extend the timelines.

Analysis and Decision

The Legal Framework

[10] An arbitrator is given jurisdiction under the *Canada Labour Code*[1] to extend timelines "for taking any step in the grievance or arbitration procedures set out in a collective agreement". That jurisdiction is contained in section 60(1.1):

> **Power to Extend Time**
>
> (1.1) The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of time, if the arbitrator or arbitration board is satisfied there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.

[11] In **CROA 3824**, Arbitrator Picher commented on the "underyling purpose" of section 60(1.1) of the *Code,* which was to "… avoid undue technicality in the administration of a collective agreement". He felt that type of technicality would "defeat the legitimate interests" of the seeking party.

[12] There appears to be some disagreement in the jurisprudence regarding how "reasonable grounds" are established. While **CROA 3493** (decided in 2005) suggested that *the Union* must demonstrate there are "reasonable grounds" through the explanation for the delay, the same arbitrator six years later in **CROA 4017** (decided in 2011), backed away from that conclusion. After setting out a passage from **CROA 3493**, the arbitrator then stated:

> The issue then becomes the operation of section 60(1.1) of the *Code.* At first blush, it is arguable that no reasonable grounds for the extension have been demonstrated in the instant case, to the extent that the Union's delay appears to be attributable entirely to what may be characterized as the gross negligence of [ ] who, it appears, did not progress the grievance…**The *Code* does not, it should be stressed, require that the Union provide a reasonable explanation or a reasonable excuse for the delay so as to prompt an arbitrator to extend the time limits. *The question for the arbitrator is whether overall there are***

[1] R.S.C. 1984, c. L-2

> ***"reasonable grounds" to grant such an extension,* coupled with the question of whether an extension would prejudice the opposite party.** In assessing the question of reasonable grounds, some weight must be given to the nature of the grievance, which in the instant case relates to the discharge of an employee. The substantial consequence of a discharge is of itself a consideration of some importance in assessing whether there are grounds for the extension of time limits (at p. 8, emphasis added).

[13] In that case, the arbitrator extended the timelines, despite a recognition that the union was negligent.

[14] I prefer the analysis in **CROA 4017** and accept it is an arbitrator's task to determine "whether overall there are "reasonable grounds" to grant such an extension, coupled with the question of whether an extension would prejudice the opposing party"**.** See also **CROA 4201.** I further accept that the factors to be considered by an arbitrator in making that determination are those noted by the Union[2].

[15] The jurisprudence sets out a two part analysis when considering whether the jurisdiction in section 60(1.1) of the *Code* should be exercised: The first question is whether there are reasonable grounds for the extension; the second question is whether the opposite party would be unduly prejudiced: **CROA 4017; CROA 4201;** *Vancouver Airport Authority v. Public Service Alliance of Canada*. Both parts of that test have received consideration in this industry.

[16] Several principles emerge to guide an arbitrator in applying this two-part test. These principles are:

a. If the grievance involves a discharge, that is a factor which weighs heavily towards an exercise of discretion to extend time limits: **CROA 3824**; **CROA 3761; CROA 4201;** *Goderich and Exeter Railway and TCRC*[3]*.* The rationale for this is the grievor should not lose "access to arbitration" for such an important issue due to powers and actions outside of his or her control.

b. Prejudice does *not* arise from the fact that a time limitation would no longer act if an extension is granted. Rather, there must be another form of "specific prejudice" raised by the Company: **CROA 3824; CROA 3761.** Prejudice could

[2] *Vancouver Airport Authority v. Public Service Alliance of Canada* 2014 CanLII 10745, at p. 12
[3] 2013 CanLII 99353; see also CROA 3824

include such facts as whether witnesses are still available, or whether documents have been destroyed.

c. The length of delay is often significant but this has not prevented the exercise of jurisdiction to extend the time limits: **CROA 3824** (nine month *filing* delay; extension granted); *Canadian National Railway Company and Teamsters Canada Rail Conference*[4] (no "irreparable prejudice" from *filing* delay of seven months); and **CROA 4017** (delay close to a year and extension granted).

d. Unique factors can attract an arbitrator's jurisdiction to extend timelines: **CROA 3824** ("turmoil and disorganization" in the union due to a change in representation); **CROA 3761**, (all of the General Chairpersons of the union (not the current Union) were removed from office).

e. Dereliction of duty by a union or some negligence is only one factor to consider: **CROA 4017**.

Application to the Facts

[17] I next turn to applying these principles to the facts of this case.

[18] This case involves a case of *advancement* of a grievance, rather than *filing* of a grievance. I am satisfied that in arbitral jurisprudence, a delay is considered to be less significant when a grievance is *advanced* late than when a grievance is *filed* late.

[19] This is because when the issue is *advancement,* the employer has already been made aware by the *filing* that there is a grievance to respond to and often has at least *some* details (and in this industry those details are extensive), and can take steps to preserve evidence. In contrast, in the case of late *filing* of a grievance, an employer is not even aware there *is* a grievance to respond to.

[20] In this case, the Company was made aware of the Grievance in considerable detail (over four pages of detail; single-spaced) and had provided its response in a letter dated July 14, 2021.

[21] The nature of the grievance in this case involves a discharge. This was described as a "weighty consideration" due to its significance.

[4] 2011 CarswellNat 2147

[22] The length of delay is short (when compared with the jurisprudence tabled) at approximately three months (92 days). `

[23] While I accept there was some negligence on the part of the Union for not advancing the grievance due to its own internal processes, those actions are only one factor, which must be considered in concert with the other factors.

[24] I agree with the Union that the Company has not raised any facts of irreparable and specific prejudice acting on it from the fact that there was a 92 day delay between when the Step 2 time period had expired and when the Union sent its Step 2 letter in December of 2021.

[25] That said, I agree that the Company should not be responsible for any financial impact from the delay, should the Grievance be successful on the merits.

[26] There is another, unique factor in this case.

[27] The Company and the Union continued to discuss the Grievance *after* September 13, 2021, when the time to advance the Grievance to Step 2 had expired. On October 4, 2021, the Company sent the first of three conditional offers to reinstate the Grievor.

[28] Settlement offers are often sent on a "***without*** prejudice/without precedent" and as settlement documents they are not considered by an arbitrator if the grievance proceeds. In determining this preliminary objection, I have not reviewed the details of those offers.

[29] However, in this case, the first offer was made by the Company to be "***with*** prejudice" (emphasis added). In doing so, the Company specifically *preserved its right to rely on the settlement offer as against the Grievor in any future proceeding*, including to defend the reasonableness of its position at any arbitration hearing.

[30] The Company has argued that it was not actually aware that the time had lapsed when it made that offer, so it should not be impacted by that choice. I cannot agree with this conclusion. At issue in this case is not a question of "waiver" in the strict sense, but whether there is an "overall sense" that there are reasonable grounds to grant the extension. The Company's actions must be seen through this lens.

[31] At law, parties are held not only to what they actually *know*, but what they *should have known.* In this case, the Company was aware of the date of its own Step 1 response and the timelines in the Collective Agreement. Whether it I was *actually aware* or *only should have been aware* of the expiry of those timelines when it created and presented its "with prejudice" offer, the Company cannot retreat from its "with prejudice" representation to the Union that it was willing to settle the Grievance on specific terms, as of October 4, 2021.

[32] While the Company has urged the grievor had no intention to accept that offer, it is the fact it was made to the Grievor "with prejudice" that is relevant.

[33] This is a "unique" factor in this case that must be considered.

[34] Reviewing all of these factors, I find there exists reasonable grounds to exercise my discretion under the *Canada Labour Code* to extend the timeline for the Union for the advancement of the Grievance to Step 2. That extension is granted for three months (92 days), to December 13, 2021, when the Union took action to advance the Grievance to Step 2.

[35] The merits are scheduled to proceed at the CROA session in September of 2023. To address the short delay, I direct that if there is any liability of the Company found on resolution of the merits dispute, that liability will not include liability for the three month time period between September 12, 2021 and December 13, 2021.

[36] I remain seized to address any issues relating to the implementation of this Award and to address any errors or omissions to give it its intended effect.

August 10, 2023

CHERYL YINGST BARTEL
ARBITRATOR