CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4889

Heard in Montreal, January 10, 2024

Concerning

BOMBARDIER TRANSPORT CANADA INC.

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's handling of annual vacation for Maintenance employees violating Article 17.06.

JOINT STATEMENT OF ISSUE:

During the last round of bargaining which was completed in 2022 and new Collective Agreement implemented August 17, 2022 provided changes under Annual Vacation for Maintenance employees and in particular new Article 17.06.

17.06 Les salariés de la maintenance choisiront des vacances annuelles par site et ces dernières seront attribuées selon l'ordre d'ancienneté pour ce site.

17.06 Maintenance employees will bid annual vacation at each site (location) and will be awarded in seniority order for that site (location).

Under this new provision that was agreed upon Maintenance employees at each work location would be awarded their AV based on their seniority and done so in order at that location for all employees at the location they were working from at the time they submitted their AV request.

The Company has ignored this Article and are not awarding AV as per Article 17.06 for Maintenance employees.

THE UNION'S POSITION:

For all the reasons and submissions set forth in the Union's grievance which are herein adopted, the Union stands by its' positions as presented in our grievances.

As noted during the last round of bargaining this issue was discussed a lot and in the end the parties agreed on the new language of Article 17.06. In fact, discussions with the Company they have agreed that Article 17.09 should have been removed. The parties further agreed on an errors and omissions aspect for the completion of the new CBA.

The Company provided in its' first grievance decline no more than an excuse to decline the grievance, in the Company's second decline they state that Articles 17.06 and 17.09 are applicable and both must be considered when awarding AV. This cannot happen as they would be contradicting one another. Article 17.06 provides and as negotiated that at each site (location)

AV will be awarded on seniority, period. Article 17.09 speaks about awarding in each classification, this was the whole discussion during bargaining when discussing Maintenance AV and how the Company was awarding. Senior employees at the site were not being awarded AV in seniority at the location but at times by classification. The parties agreed on Article 17.06 for this very reason.

17.09 The company will base the number of employees on AV per week on operation requirements. Using the OBS to submit AV requests, **employees will be allotted their vacation preference by classification on a seniority basis.** AV bids will be run on the first Monday after November 1st each year and posted on the OBS within two (2) days. Bombardier will make every effort to implement an electronic system that will replace the existing paper application system. (Emphasis added).

17.09 La Compagnie fixe le nombre de salariés en vacances par semaine en fonction des exigences opérationnelles. Les salariés présentent leurs demandes de vacances au moyen du système de traitement des choix de vacances en ligne, **et leur période de préférence leur est allouée par classification selon l'ordre d'ancienneté.** Les demandes de vacances sont traitées le premier lundi suivant le 1er novembre de chaque année et les résultats sont affichés dans le système de traitement des choix de vacances en ligne dans les deux (2) jours. La compagnie déploiera tous les efforts possibles pour mettre en place un système électronique qui remplacera le système de demandes sur papier actuel. (Emphase ajoutée)

The Union's position is that the Company has violated Article 17.06 as well has bargained in bad faith if it is now their position that Article 17.09 (which should have been removed) also apply, which as noted contradicts the new agreed upon Article.

The Union is seeking a declaration of a violation of the foregoing; an order directing the Company to comply with the provisions of the Collective Agreement (17.06) as well as work with the Union to determine the number of employees off on AV at each site, each week and such other relief as the Arbitrator sees fit in these circumstances.

COMPANY'S POSITION:

The Company disagrees and denies the Union's request.

As provided in our Step 3 response, ''The Company does not agree with the Union's position as we believe 17.06 and 17.09 are applicable and should both be considered when awarding annual vacation for the maintenance employees''.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Aspey	**(SGD.) A. Ignas**
General Chairperson	Industrial Relation Lead – Canada

There appeared on behalf of the Company:

C. Trudeau	– Counsel, Fasken Martineau, DuMoulin, Montreal
A. Ignas	– Industrial Relations Lead, Kingston
C. Henripin	– Human Resources Business Partner, Montreal

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, Smiths Falls
D. Psichogios	– Vice General Chairperson, CTY-E, Montreal

AWARD OF THE ARBITRATOR

Context

1. The dispute concerns annual vacation entitlements for maintenance employees and the proper interpretation of articles 17.06 and 17.09 in the latest collective agreement.

2. Articles 17.06-17.08 are newly negotiated provisions and read as follows:

> 17.06 Maintenance employees will bid annual vacation at each site (location) and will be awarded in seniority order for that site (location).
>
> 17.07 Maintenance employees moving from one site to another (based on their bid or being forced) will carry their awarded annual vacation to the new site location without impacting other employees who have already been awarded annual vacation, at the site/location.
>
> 17.08 In the event that an employee changes their choice of vacation during the year, the week or weeks of vacation that become available, will be offered by seniority to the other employees of the site (maintenance only).

3. Article 17.09, although newly numbered, has been in the collective agreement since 2012. It reads as follows:

> 17.09 The company will base the number of employees on AV per week on operation requirements. Using the OBS to submit AV requests, employees will be allotted their vacation preference by classification on a seniority basis. AV bids will be run on the first Monday after November 1st each year and posted on the OBS within two (2) days. Bombardier will make every effort to implement an electronic system that will replace the existing paper application system.

4. The dispute concerns whether operational requirements found in article 17.09 continue to apply to the annual vacation bidding of maintenance employees, in light of the seniority by site identified in article 17.06.

Issues

A. Should the collective agreement be rectified to remove article 17.09?

B. If article 17.09 is not removed, is it in conflict with article 17.06?

A. Should the collective agreement be rectified to remove article 17.09?

Position of the Parties

5. The Union argues that article 17.09 was discussed by the parties during negotiations and was slated for removal. It argues that the Company agreed to this and it was only an oversight which explains its non-removal. The parties have agreed to a process to correct such oversights, which should be followed here.

6. The Company argues that article 17.09 was never discussed during negotiations. It notes that the Union was represented by experienced negotiators and if there had been an error, it would have been caught. It strongly argues that any proposal to do away with an operational requirement would have been refused by the Company. It points to the very strict requirements to be met, set out in the jurisprudence, before rectification can be ordered and states that the requirements have not been met.

Analysis and Decision

7. The jurisprudence sets out multiple requirements before rectification can be ordered, with the burden of proof on the party seeking the rectification. In Domcor Health Safety and Security Inc. (2000), 317 LAC (4th) 82, the arbitrator sets out the reasoning behind and the requirements for a finding of rectification:

> 139 In reviewing all the cases provided by the employer, the applicable legal principles are that rectification is available where a party can identify an error in the recording of the bargain reached by the parties. Rectification restores the true bargain. It is not available to rewrite a bargain when a party mistakenly enters into a bargain. It is a potent remedy which should be given only in the clearest of circumstances where the party seeking rectification has demonstrated with clear, cogent and convincing evidence that the written CA is not the bargain reached by the parties in its negotiations. The burden rests with the party seeking rectification to identify the clear agreement that was reached by the parties, which was not correctly recorded in the CA.

8. In West Fraser Mills (2017), 286 LAC (4th) 382 the arbitrator noted that there must be certainty about the alleged error:

> 67 This jurisprudence is clear that arbitration boards have the authority to "rectify" or "correct" a collective agreement in order to accurately reflect the actual agreement was made by the parties. **In order for the doctrine to apply, however, it must be demonstrated that the**

> **negotiators agreed to something different than what was written down. (The doctrine is not applicable when it is a case of one of the parties intending something different.)** it is not the contract itself that is amended but rather the incorrectly recorded document in order to precisely reflect the agreement which was actually reached by the parties: *Western Forest Products Inc.*, *supra*; *Teck Cominco Metals Ltd.v. U.S.W.A., Local 480* (2006), 154 L.A.C. (4th) 161 (B.C. Arb.) (Taylor). **Therefore, to conclude there was a mutual mistake, an arbitration board must be able to "predicate with certainty" what the actual contract was intended to be.**

9. In the same case, the arbitrator quoted from the English Court of Appeal in Frederick Rose (London) Ltd. v. William H. Pim Junior and Co (1953) 2 All E. R. 739:

> 68 In *Vernon Fruit Union*, *supra*, the B.C. Labour Relations Board adopted the following comments concerning rectification from *Frederick E. Rose (London) Ltd. v. William H. Pim Junior & Co.*, [1953] 2 All E.R. 739 (Eng. C.A.): Rectification is concerned with contracts and documents, not with intentions. **In order to get rectification, it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly.** And in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties - into their intentions - any more than you do in the formation of any other contract. You look at their outward acts, i.e., at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. **If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document. But nothing less will suffice.** It is not necessary that all the formalities of the contract should have been executed so as to make it enforceable by law; but, formalities apart, there must have been a concluded contract ... There could be no certainty at all in business transactions if a party who had entered into a firm contract could afterwards turn round and claim to have it rectified on the ground that the parties intended something different. He is allowed to prove, if he can, that they agreed something different; but not that they intended something different.

10. Some aspects of this matter are not contested and are critical to any discussion of possible rectification. Firstly, article 17.09 remains in the signed off collective agreement. Secondly, both sides are represented by experienced negotiators. Thirdly, at the very least portions of article 17 was clearly discussed in some detail. None of these uncontested facts militate in favour of a clear agreement by the parties to remove the contested article.

11. Two other aspects of this matter are somewhat controversial. Firstly, there is no doubt that operational requirements have been part of all previous agreements. Given the importance of operational requirements to the Company, it seems likely that any attempt to remove this requirement would be met with resistance, and at the very least, would have been the subject of highly contested bargaining. There is no evidence of such bargaining. Secondly, there is some controversy whether article 17.09 was ever discussed at all. The Company denies it, while the Union has limited evidence of discussions. Even using the best version of the facts for the Union, it can hardly be said that it is “clear” that the parties had agreed to the removal of the article.

12. The Union has the burden of proof to establish rectification. I find that this burden has not been met. Consequently, rectification and the removal of article 17.09 is denied.

B. If article 17.09 is not removed, is it in conflict with article 17.06?

Position of the parties

13. The Union argues that the general provisions of article 17.09 no longer apply to maintenance employees, given the specific provision found in article 17.06. The Union specifically raised concerns about more senior employees at specific locations not getting preferred vacation, because of the application of seniority based on classification. The intent of article 17.06 was to have vacation for maintenance employees be determined by site and seniority only, which is what the article clearly states.

14. The Union contends that the employer grievance response does not dispute the Union position.

15. It further argues that an earlier provision takes precedence over a later one, and article 17.06 should prevail.

16. The Union submits that if the Company interpretation of the collective agreement is accepted, it would have the effect of rendering article 17.06 meaningless. The Union interpretation accords most harmoniously with the collective agreement as a whole and article 17.06 in particular.

17. The Company argues that all previous versions of the collective agreement have contained an operational requirement provision, as does the current agreement.

18. It argues that general provisions, such as article 17.09, should be given full effect, while exceptions, like article 17.06, should be interpreted narrowly.

19. It notes that article 17.09 applies to both operational and maintenance employees, and cannot be just written out or ignored.

20. The Company submits that if a modification of the collective agreement is sought by the Union, then it should seek such a change through collective bargaining.

Analysis and Decision

21. Given the above finding on the on-going presence of article 17.09 in the collective agreement, the next task must be to apply a number of rules of interpretation to determine whether there is indeed a conflict between the two articles.

22. In Local 401 v Real Canadian Superstore (2008), 172 LAC (4th) 289, the Alberta Court of Appeal set out multiple guiding principles of interpretation:

> 15 **First principles require that the Arbitrator interpret the salient provisions in the context of the Agreement as a whole and in a manner that avoids conflicts or internal inconsistencies within the Collective Agreement. The parties are presumed to have drafted an agreement that avoids such inconsistencies.** It follows that the interpretation which accords with that end reflects the parties' true intent (D.J.M. Brown, Q.C. and D.M. Beatty, *Canadian Labour Arbitration*, 4th ed., looseleaf (Aurora, Ont.: Canada Law Book Inc., 2006) at para. 4:2120).

> 20 **The articulation of the issue, in this case, namely whether Article 30.12 trumped Article 30.17 or *vice versa*, was a serious error that impacted on the assessment of the competing positions. The proper analysis is to discern first and foremost whether the two provisions are compatible. That is to say, whether, mindful of the entire Collective Agreement, the two Articles can comfortably be read in a reconcilable fashion. After all, they need not conflict. To proceed on the assumption that one must trump the other is fatal to the integrity of the decision under review.**

23. Brown and Beatty's Canadian Labour Arbitrations sets out similar principles:

> "Another related general guide to interpretation is that in construing a collective agreement, it should be presumed that all of the words used were intended to have some meaning. As well, it is to be presumed that they were not intended to be in conflict. However, if the only permissible construction leads to that result, resolution of the resulting conflict may be made by applying the following presumptions: special or specific provisions will prevail over general provisions."

24. Brown and Beatty also deal with the interpretation principle of earlier versus later clauses and provides a more nuanced view:

> "And, in the case of conflict between an earlier and later clause, there is authority to the effect that "the part of the contract which is written first overrides that which is written later, and it is only otherwise when the later clause clearly spells out the overriding effect intended", although the better view would seem to be that effect should be given to that part which best carries out the real intention of the parties."

25. Words such as "will" or "shall" have been found by arbitrators to be mandatory (see Brewers Retail Inc. and United Food and Commercial Workers, (1999) OLAA No 228).

26. From the principles set out above, it is clear that the collective agreement here must be read according to the provisions set down by the parties. Clearly, articles 17.06 and 17.09 are part of the agreement.

27. Equally clearly, these two articles must be read for their plain and ordinary meaning. Again, the words used are not ambiguous, nor is the meaning of the articles unclear.

28. Next, and most importantly, the articles must be construed to consider if they can be read harmoniously together. I find that they can be read together in a harmonious manner, without a necessary conflict between articles 17.06 and 17.09. My reasoning is set out below.

29. Firstly, many of the provisions in article 17 clearly apply to all employees. This would appear to be the case for articles 17.01-17.03, 17.05, 17.10-17.13. Generally, then, article 17 as written by the parties is intended to work as a whole, and be applicable to all employees.

30. Even a portion of the contested article 17.09 applies to all employees:

> AV bids will be run on the first Monday after November 1st each year and posted on the OBS within two (2) days. Bombardier will make every effort to implement an electronic system that will replace the existing paper application system.

31. Secondly, the "operational requirement" found in article 17.09 does apply to all other employees and on its face, could apply to maintenance employees as well. If the starting point for the possibility of vacation is the number of employees the Company requires to work, the second step would be how to determine eligibility for vacation amongst those employees not required for work. In the case of all other employees, it would be done on the basis of "vacation preference by classification on a seniority basis" per article 17.09, while for maintenance workers, it would be done on the basis of "maintenance employees will bid annual vacation at each site (location) and will be awarded in seniority order for that site (location)" per article 17.06. Thus, if the "operational requirement" is applied first, the vacation entitlements set out in articles 17.06 and 17.09 are not in conflict.

32. Thirdly, if the Company had no "operational requirement" for a particular week at a particular site, article 17.06 would fully apply to maintenance workers, while article 17.09 would apply to everyone else. Again, the articles would not be in conflict.

33. Fourthly, it is only the mechanism by which employees bid for vacation, after operational concerns are dealt with, which could appear to be in conflict. However, the principle of the specific applying over the general would apply. Article 17.06 is more specific (and even earlier) and would apply to maintenance employees. The most senior maintenance employees on site get to bid on vacation before more junior employees, even if they are in different classifications. Outside maintenance employees, under article 17.09, seniority by classification would continue to apply. Thus, the Union has won recognition for the value of seniority generally, over the existing seniority by classification.

34. Fifthly, the Parties are able to identify situations which are unique to particular groups, as they did in article 17.04 with “Operations only” or in article 17.08 “maintenance only”.

35. I therefore find that articles 17.06 and 17.09 can be read harmoniously together.

36. If the Union wishes to make additional changes to the collective agreement, by making the operational requirements of article 17.09 inapplicable to maintenance workers, it should do so through collective bargaining.

37. For the above reasons, the grievance is dismissed.

38. I remain seized with respect to any questions of interpretation or application of this Award.

March 7, 2024

JAMES CAMERON
ARBITRATOR