CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5006

Heard in Edmonton, February 15, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The issue in dispute is the Company's misinterpretation and incorrect application of Articles 2, 6, 18, of the Common Provisions of the Consolidated Collective Agreement, and the RAC Railway Association of Canada Work/Rest Rules. The Company has issued Bulletin CMC 022-20 to all T&E employees in Canada, which by consequence adversely affects all employees.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

April 21, 2020 the Company issued Bulletin CMC 022-20 titled Tie Up Scenarios Involving Over 10 Hours Revision 2. Specifically highlighted within the referenced bulletin was scenario 7 entitled "CALLED IN STRAIGHT-AWAY SERVICE FROM THE HOME TERMINAL, RELIEVED EN ROUTE, AND DEADHEADED BACK TO THE HOME TERMINAL".

Union's Position

The Union contends that Article 18 Road Service Rest is explicit that when proper notice of rest has been provided, the Company has an obligation to have the crew off duty within ten hours at either the objective or home terminal, not at an intermediate location. Article 18.06 (1) states: "Employees must provide notice of rest within the first 5 hours on duty. The amount of rest desired to apply after 10 hours. In such cases the Company has the existing obligation to have them into the objective or home terminal and off duty in 10 hours." (Underscore added) and as per 18.08 "…in all instances, be transported to their objective or home terminal…" Absent in this Article is a clause which allows the Company to show off duty at an intermediate terminal for the purposes of changing ones call from straightaway to turnaround.

The Union further contends that the Company's position that a "new" tour of duty is created by fact of a deadhead claim from station 55555 is in contravention of the Work/Rest rules for operating employees as published by the Railway Association of Canada (RAC), specifically item 5.1.2 which states: "Ticket splitting in order to circumvent compliance with subsection 5.1.1 is prohibited." The deadhead payment of a minimum day is an arbitrary payment for having one's call changed from straightaway to turnaround and is not considered a new tour of duty whereby now, the eighteen (18) hours in a twenty-four (24) hour day is contemplated.

The Company did not respond to the Union's Step 2 or Step 3 grievances; therefore, the Union is not in possession of the Company's position on the matter and this leaves the Union at a disadvantage. The Union reserves its' rights to object and respond to any positions presented by the Company based on their silence.

For all of the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union requests the Company abide by the Collective Agreement, AH657 award and further, that the Company cease and desist knowingly violating the Collective Agreement with respect to rest notices. Further, that the Company rescind bulletin CMC 020-20, more specifically, scenario #7, in addition to such further relief the Arbitrator deems necessary in order to ensure future compliance with the above provisions in question.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Dispute

The issue in dispute is the Union's contention that Scenario #7 of the Company's bulletin CMC 022-20 titled "Tie Up Scenarios Involving Over 10 Hours REVISED" (issued April 21, 2020) is a misinterpretation and incorrect application of Articles 2, 6, 18, of the Common Provisions of the Consolidated Collective Agreement, and the RAC Railway Association of Canada Work/Rest Rules and affects all employees.

Company Position

As a preliminary matter, the Company must point out that the Union has been intimately aware of and familiar with the Turned Enroute "55555" process they refer to for many years (including throughout more than the decade they pursued the Over Hours dispute through several arbitration hearings and ultimately Federal Court) yet they did not advance a grievance. Moreover, for over five years since late 2018 the Union and Company have participated in Bi-Weekly "Over Hour 10" conference calls where the parties delve into specific details of alleged Over Hours cases.

The 2020 grievance is therefore untimely and fails on that basis alone. The principles of estoppel also apply to this long-standing procedure.

Even if the grievance were timely, the Union has not demonstrated that any violation of Work Rest Rules (in effect at the time the grievance was submitted) took place as a consequence of the Bulletin at the centre of their grievance. Clearly, the grievance relates only to the "scenario 7" section of the bulletin which is the extent of the scope of this dispute. Not a single example is provided in the grievance correspondence to suggest that the bulletined procedures caused a violation.

This self-declared Chapleau, Ontario Terminal grievance also states that it "…has application across the system…". The claim of national application is contradictory given the fact that only the General Chairmen of the Eastern Region are signatories to it.

The Union's allegation that Bulletin CMC 022-20 reflects a misinterpretation, incorrect application and violation of Article 2 (Fixed Mileage Method of Pay provision) is not supported by a valid explanation.

The allegation that Bulletin CMC 022-20 reflects a misinterpretation, incorrect application and violation of Article 6 is false. The article is exclusively about deadheading. Nothing within bulletin CMC 022-20 conflicts with Article 6. The Union's reference to "…continuous tours of duty…" and "….no provisions in the Collective Agreement to tie-up at an intermediate location

with the exception as provided for in Article 18.08 or 18.09…" and Article 6 does not make out their case that the Bulletin is a violation of Article 6.

The allegation that Bulletin CMC 022-20 reflects a misinterpretation, incorrect application and violation of Article 18 is not supported by a valid explanation. Rather, the grievance simply states that employees that provide proper notice are entitled to be in and off duty within 10 hours and that the 5555 process "…does not give the Company 10 more hours".

The Union's request that the Company abide the AH657 arbitration award is hung onto the foot of the Union's grievance without any explanation or rationale as to how or why the Bulletin contravenes the Award. All claims of violations that are absent of evidence and/or rationale are not valid grievances under the Collective Agreement or CROA rules.

The Union's cease and desist remedy request is neither coherent nor appropriate particularly under the circumstances where the Union has for the first time formally disputed a re-issued procedure in a bulletin reflecting a long-standing practice well-known to both parties that has not been shown to be a blatant and deliberate violation or violation of any kind for that matter.

In the Step 2 grievance the Union made its' cease-and-desist request as follows: "…cease and desist its' violations, adhere to the RAC Work/Rest Rules and reissue Bulletin CMC 022-20 correctly."

In the Step 3 grievance the Union altered their cease-and-desist remedy request to point to a Collective Agreement provision relating to rest notices "…cease and desist knowingly violating the Collective Agreement with respect to rest notices."

Neither grievance points to a single actual example of a violation of any kind that is caused by the bulletin at the heart of the grievance.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey (and) **E. Mogus**	**(SGD.) J. Bairaktaris**
General Chairperson CTY-E & LE-E	Director, Labour Relations

There appeared on behalf of the Company:

J. Bairaktaris	– Director, Labour Relations, Calgary
D. Guerin	– Managing Director, Labour Relations, Calgary
D. Zurbuchen	– Manager, Labour Relations, Calgary
A. Harrison	– Manager, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, CTY-E, Smiths Falls
E. Mogus	– General Chairperson, LE-E, Toronto
D. Fulton	– General Chairperson, CTY-W, Calgary
J. Hnatiuk	– Vice General Chairperson, CTY-W, Vancouver
G. Lawrenson	– General Chairperson, LE-W, Calgary
C. Ruggles	– Vice General Chairperson, LE-W, Lethbridge
S. Orr	– Vice General Chairperson, LE-E, Oakville

AWARD OF THE ARBITRATOR

Analysis and Decision

Background

[1] This Grievance raises issues with a concept that has come to become known as "Over Hours" or the "10 Rule", relating to 'rest'. The Article of the Consolidated Collective Agreement is Article 18, titled "Road Service Rest".

[2] Article 18 now has 'virtually the same wording'[1] as former Article 27 for Locomotive Engineers and former Article 29 for Conductors (before the collective agreements were consolidated), which references re made in earlier jurisprudence.

[3] Sweeping a broad brush across Article 18 for the purposes of this summary, Article 18 allows road service employees to be "the judge of their own condition" and to "book rest after being on duty 10 hours..." (or 11 hours in certain circumstances): Article 18.04. Employees are to give their notice (which will be referred to in this Award as "Rest Notice") within the first 5 hours on duty. Once this Rest Notice is given, the Company must then have those employees "into the objective or home terminal and off duty in 10 hours: Article 18.06(1).

[4] The Company issued Bulletin CMC 022-20 (the "Bulletin"). That Bulletin contains a scenario, titled "Scenario 7", as outlined below. The Union became concerned the interpretation of that Bulletin could act to "reset" an employee's ability "on-duty clock and have his or her Rest Notice reset.

The Issues

[5] The issues raised by this Grievance are:

a. Is the Grievance timely?; and

b. Is Scenario 7 of the Bulletin in breach of Article 18 by its potential impact on Rest Notice?

[1] Federal Court Award at para. 14.

[6] For the reasons which follow:

a. The Preliminary Objection is over-ruled. The Grievance is timely.

b. The Bulletin could be interpreted in a manner which is not consistent with Article 18. Scenario 7 as currently worded is therefore not in compliance with the *KVT Test*.

Relevant Provisions

Bulletin CMC 022-20; Scenario 7

[*The following is included before the various scenarios are discussed*]

In an effort to clarify different examples of tie ups pertaining to "over 10" situations, below are various scenarios of tie ups involving over 10 hours and the associated $80 payment entitlement.

Please note that if the system does not auto-generate an $80 payment, and you feel you are entitled, please enter an "IP" claim with detailed comments including pertinent dates, times and locations.

Regular audits will be performed to ensure compliance.

…

Scenario #7

CALLED IN STRAIGHT-AWAY SERVICE FROM THE HOME TERMINAL, RELIEVED EN ROUTE, AND DEADHEADED BACK TO THE HOME TERMINAL [all caps used in original]

HOW TO TIE IT UP:

Change the FINAL destination station to 55555

[*reference to what is considered as "Order Time"; DOMTS AOMTS, Off Duty*]

[*computer screen capture*]

Contact the Crew Dispatcher after you tie up, and ask them to call you on a DH home from 55555 using your off duty time at the turning point for the order time. Once you tie that up you will have two straight-away trips.

[*computer screen capture*]

NOTE: You cannot enter 55555 in the INT STN to determine eligibility for an $80 NG payment. If you think you are entitled, enter an IP claim for one mile on the working ticket, and n the comments, advise if you gave notice, where you were relieved, and what time you departed in taxi. This will route to the auditor who will verify, and pay if applicable.

Collective Agreement Provisions

Article 2:

2.01 The Fixed Mileage Method of Pay will apply to employees who successfully complete a working tour of duty in unassigned through freight service between the stations listed n 2.07 below.

…

2.07 Payment under the Fixed Mileage method of Pay system will be made at the applicable rate of pay on the following runs referred to on the next page [there follows a table with 68 locations]

Article 12.11 Intermediate Points

12.11 (1)

Work train crews engaged in any service covered by and paid for under the provisions of this Article may be laid up at intermediate points at the end of their day's work when necessary to do so.

12.11(2)

When laid up at an intermediate point suitable sleeping and eating accommodation will e provided for Work train crews. Work train crews in work train service when laid up at other than a terminal will be paid continuous time if sleeping accommodations are not provided. When in wreck train service suitable sleeping accommodation may be provided on auxiliary.

12.11(3)

Work crews will be provided transportation to their home terminal in scheduled rest days and return transportation to this tie-up point of the work train following their rest days, unless other arrangements have been mutually agreed to.

Article 18

18.06 Employees who book rest enroute will, in all instances, be transported to their objective or home terminal in a vehicle provided by the Company, or on their own or another train, unless the circumstances in Clause 18.09 below are applicable. For the purposes of this Clause, an intermediate point in work train service, as described in clause 12.11, will be considered as an objective terminal.

18.09 When, due to circumstances beyond the Company's control, such as impassable road conditions, it becomes necessary to take rest enroute, arrangements will be made by the company for the necessary accommodation, including eating facilities, at the location at which rest is taken or employees will be transported to the nearest location where necessary accommodation and eating facilities can be provided. Rest will commence when accommodation is reached. Upon expiry of rest, if unable to complete their tour of duty on their own train or another train tied up at that location where their train was left, employees will be deadheaded to the objective or home terminal.

Legislative Provisions

Work/Rest Rules: Rule 5 [in force prior to 2023]

4 Definitions

"Ticket Splitting" means when operating employees are placed off-duty and on-duty, while en route, expressly for the purpose of circumventing the maximum on-duty provisions contained in subsection 5.1.1

5.1 Maximum Duty Times

5.1.1.

a) The maximum continuous on-duty time for a single tour of duty operating in any class of service, is 12 hours, except work train service for which the maximum duty time is 16 hours….

…

5.1.2

Ticket splitting in order to circumvent compliance with subsection 5.1.1. [maximum time on duty provisions] is prohibited [removed with 2023 amendment]

Facts

The Context of this Dispute

[7] There is significant context which colours this dispute, from before this Grievance was filed. I am satisfied I can consider this context:

a. In this industry, Road Service employees are not paid on an "hourly" basis, as is typical in other industries. Rather, these employees are paid on a "mileage" basis.

b. Transport Canada has issued "Work/Rest Rules" for Railway operating employees (the "Rules"), as noted above. The Rules define certain requirements for hours of work and rest.

c. Those Work/Rest Rules were amended in 2023, however the Work/Rest Rules in place at the time of this Grievance contained a prohibition against "ticket splitting" to avoid the impact of the Work/Rest Rules. "Ticket splitting" is defined in those Rules, as noted above.

d. Rest Notice is a key and important issue to both parties. Article 18 – in its earlier numbering – has attracted the flow of significant arbitral and judicial ink, to determine its requirements and impact.

e. The two decisions which are of particular importance as surrounding circumstances to this dispute are:

   i. **AH657** (March 23, 2018)**,** which is a lengthy award of Arbitrator Clarke issued on March 23, 2018 (the "Clarke Award" which was not subject to judicial review); The parties sought Arbitrator Clarke's assessment of several grievances and issues; and

ii. *CP Railway Company v. TCRC (Turned Back to the Away From Home Terminal Grievance)*[2]; (September 23, 2019) *(*the "Kaplan Award"); and

f. The Clarke Award held the Company had violated the 'rest provisions' and ordered the Company to "cease and desist". This decision was not judicially reviewed.

g. The Union filed the decision with the Federal Court five days after it was issued, in March of 2018.

h. 15 months later, on June 25, 2019, the TCRC filed a show cause motion in Federal Court on the basis the Company was acting in contempt of the Clarke Award.

i. That motion was *filed* before the Grievance in this case was filed[3].

j. In September 2019 the Kaplan Award was issued. That Award considered the issue of whether a crew which had given Rest Notice could be transported back to an Away From Home Terminal, or had to be taken back to their Home Terminal, and whether – if turned – they were entitled to pay for 100 miles. The Kaplan Award found the Company was entitled to change the class of service from straightaway to turnaround, and then either arrange transportation to a Home Terminal, *or* pay compensation of 100 miles if turned. He determined the fact that the crew had booked "rest" did not create any requirement to return that crew to their Home Terminal or "preclude the Company from changing the class to turnaround"[4].

k. Meanwhile – prior to the hearing of that show cause motion in Federal Court, but after it was filed, and after the Kaplan Award was issued – the Company issued its revised version of the Bulletin on April 21, 2020.

[2] No cite provided by the parties
[3] The motion was not *heard* until 2021 and following and was not *decided* until June of 2023.
[4] At p. 4.

I. While the Bulletin specifically highlighted that "Scenario 7" had been "added", I am satisfied that Scenario 7 in the same form was also in the *first* version of the Bulletin, which was issued two years earlier, in April of 2018.

[8] Evidence from either or both of the parties from *after* the Agreement was negotiated as to what the term was intended to mean or what problem it was meant to solve would be evidence of subjective intentions, which is never admissible as it is never relevant.[5]

[9] Issues resulting from the application of Article 18 continue to have considerable importance for both parties.

[10] The Union ultimately filed this Grievance in May of 2020, concerned with the impact of the Bulletin on Rest Notice issues. Its Step 3 filing noted it was a "group grievance encompassing both the CTY and LE working in Chapleau and has application across the system given the bulletin is addressed to all T&E employees". The Grievance was executed by representatives of both the Conductors and Locomotive Engineers in Eastern Canada, under the Consolidated Collective Agreement (the "Agreement"). Personnel from Union Divisions in Western Canada also attended this hearing, as observers. The issue has now reached this Office for determination.

[11] The Company raised a preliminary objection that the Grievance was not timely.

Preliminary Objection

Arguments

[12] The Company argued the Grievance was not timely. It maintained that the parties were aware of the fictitious station of 55555 for decades and that it is used for "pay" determinations. It argued this tie-up procedure for pay generation was known by the Union long before they grieved about it. It argued the Union was aware of the Bulletin since 2018. It argued the Union had acquiesced to the Bulletin and was estopped; and that even if not, there has been a delay and there are no grounds for

[5] See **CROA 4884** for a discussion of the basis for this statement.

a time extension. It also noted there was an absence of examples of a contravention by the Company, which it argued was fatal.

[13] The Union resisted the application. It noted that the Company had not responded to any stage of the grievance and so did not raise this issue at an early stage. It noted the preliminary objection was first alluded to by the Company on December 29, 2023. It objected to the late raising of that issue and argued the Company has raised novel issues in a late *ex parte* Statement of Issue, which was prejudicial to the Union. It argued that through its protracted silence, the Company had waived its right to object.

[14] The Union also argued the Company's reliance on estoppel was not supported, as on duty clocks had not earlier been impacted by Scenario 7 and that any practice of disrupting Rest Notice was not longstanding or uninterrupted, so the Union cannot be estopped. Further, it argued there was no detrimental reliance. Even were it estopped, the Union clearly signalled by this 2020 Grievance that the practice was to be discontinued, and estoppel could only apply to the expiry of the Agreement in 2021. It noted the Company did not negotiate any changes that would permit Scenario 7 to be consistent with the Agreement.

Analysis and Decision: Preliminary Objection

[15] This is a complex industry with many "terms of art" that are not necessarily included in the Agreement but are understood and used by the parties. It is also an industry with particularly deep and foundational roots in this country.

[16] The term "tie up" is one such example of a term which has a specific meaning in this industry. There is no definition in the Agreement of a "tie up".

[17] A benefit of this expedited process is the expertise which sits around the table – on both sides – at each hearing, available to clarify any questions of an arbitrator as disputes are heard. In this case, that personnel included Mr. Guerin, the Director of Labour Relations of the Company and Mr. Apsey from the Union, who are both individuals with considerable experience in this industry. Both are also referenced

in the documentary evidence relating to this particular dispute, as noted above. A further benefit is the CROA Agreement, which allows CROA Arbitrators to solicit the evidence which they require, to determine a dispute.[6]

[18] This Arbitrator sought the expertise of the parties in satisfying herself that a "tie up" refers to the process undertaken by a crew to end their work on a particular assignment.

[19] The Company's objections raise issues of *what* the issue *is* between the parties; and also, *when* this Grievance arose.

[20] Scenario 7 is called "Straightaway-Service From the Home Terminal, Relieved En Route, and Deadheaded Back to the Home Terminal". It is noted as one of the scenarios "pertaining to "over 10" situations", which I am satisfied refers to situations when Rest Notice is given.

[21] That Bulletin required crews to remove themselves from fixed service at the turnaround point, referred to as "55555". Crews were to contact the Crew Dispatcher after tie-up and be called on a "DH" (a deadhead). The Bulletin then stated that that "Once you tie up…you will have two straight-away trips".

[22] On February 22, 2019, Mr. Aspey posed the following question to the Company:

> Is it the Company's position that when turned back to the originating station and using the "55555" that there will now be 2 separate tours of duty? In other words, if on duty for 9 hours when turned and then another 3 hours returning there is no over hours violation.

[23] Mr. Guerin answered on February 28, 2019 that he was "…still researching that issue. As this appears to go back several years (2002 or even earlier) I want to make sure we have all the relevant info to make an informed decision."

[24] Mr. Guerin also asked the Union to provide any previous grievances on the subject because '"[a]s you know this was not an item placed before Arbitrator Clarke". I am satisfied this was a reference to the Clarke Award.

[6] Article 13.

[25] While waiting for that answer, on March 23, 2020, Mr. Apsey also noted that there was a missing entry in the "Over Hours" Report created by the Company and asked the Company about that missing entry.[7] On March 28, 2020, Mr. Apsey again asked if that missing entry was ever provided in the Over Hours Report. It does not appear the Union's question was ever answered by the Company.

[26] The Company then issued its *second* version of the Bulletin in April of 2020, which version continued to have Scenario 7 in its prior form.

[27] Mr. Apsey then immediately questioned the Company by email, asking "how are you able on the last example to say it is 2 separate straightway tours, employees cannot go off duty in the middle of nowhere so a new 10-hour clock can be started, this is no more than ticket splitting".

[28] Considering the factual context and the evidence relevant to the issue of when the Grievance arose, I am satisfied the Union had reasonably become concerned the Company intended to "reset" the on-duty clock through the application of Scenario 7 – i.e. that the on-duty clock would be "reset" at this intermediary point, which could be "in the middle of nowhere".

[29] If that interpretation were given to Scenario 7, the Union considered the Company's Bulletin would be inconsistent with the Agreement, and in particular what it considered as core and fundamental principles surrounding rest in Article 18, which are of significant importance to Union members.

[30] I find this concern was brought forward to the Company by Mr. Aspey's questions, but that an answer was not forthcoming from the Company.

[31] It must be recalled the Union was not seeking the Company's opinion regarding how the Company intended to interpret the Agreement, but rather how the Company intended to interpret and apply a policy which it had promulgated unilaterally.

[7] As noted by the Federal Court, such reports were created by the Company to track issues.

[32] The Union continued to seek that information in March of 2020, but again that information – and the assurances which are now given in the Company's Brief – were not provided to the Union.

[33] The Company argued the Union has been "tying up" – and noting the turnaround point as "55555" on that "tie up" – for decades; that the Union has known of this practice for a lengthy period of time and has acquiesced to it and that the Union is therefore estopped from raising this Grievance. It also urged there is no reasonable grounds to extend time limits.

[34] With the greatest of respect, I find I cannot agree with the Company's position.

[35] While I am satisfied from the evidence that the Company has directed crews to use 55555 to determine how to "*pay"* its employees for the work/deadheading that is done when a crew called in straight-away services is turned – and has used that notional "tie up" point to make ***that*** distinction – I cannot agree that the issue between the parties in this Grievance is the existence of the fictitious 55555 ***for pay purposes***. Rather, I am satisfied *this* issue in this Grievance is whether the Company can consider the on-duty clock of such crews as "reset" when they are turned *en route* under Scenario 7*.*

[36] It is the impact of the tie up on the on-duty clock that has been raised by the Union. That is a different and distinct issue from how pay is determined under the Bulletin. I cannot agree there is any evidence the Union has acquiesced to *that* practice, or is otherwise estopped or prevented from pursuing a Grievance against *that* interpretation of the Bulletin, which would impact Rest Notice under Article 18.

[37] It is that interpretation of the Company's own Bulletin – and not examples of a contravention of the Agreement – that is at the heart of this case.

[38] While the Company now maintains in its Brief that the Bulletin only relates to *pay* and will only be interpreted in that context, I note the Union first questioned the Company regarding its intentions for interpreting its own Bulletin in 2019 and sought that clarification. It was not forthcoming.

[39] Further evidence that there was no acquiescence for Rest Notice issues is clear from the Union filing its show cause motion nine months before the Bulletin was released (in June of 2019), regarding issues surrounding the Rest Notice.

[40] While the Company argued the earlier version – which also had Scenario 7 – meant that the Union knew of this potential issue and is out of time, I am satisfied the existence of this second version without change – after the exchange referred to above – actually strengthens the Union's argument: When the second version of the Bulletin in April of 2020 was unchanged even after the Union raised the potential conflict with Article 18 and the Work/Rest Rules, this must be considered in the context existing at that time:

a. The Clarke Award had been issued;
b. The Union considered the Company to be in contempt of that Award; and
c. The Company had then issued a further version of the Bulletin which still contained the concerning wording.

[41] As the Union was not given any assurance the Company only considered the tie up at 55555 to be relevant for pa*y* purposes and not to *reset the on-duty clock*, it was reasonable for it to have a concern there existed an interpretation which the Company could take *of its own Bulletin* that could offend the Article 18 Rest Notice provisions.

[42] In this factual context, it was not then unreasonable for the Union to raise its concerns with the Company's policy through the filing of this Grievance at Step 3 and to have the matter determined by this Office.

[43] I am satisfied the Union filed its Grievance in a timely manner (filed May 20, 2020), once Scenario 7 appeared in the revised Bulletin as unchanged in the fact of its questions to the Company in April of 2020. I am satisfied it was at that point when this Grievance arose. I consider the Grievance was therefore raised in a timely manner.

[44] The preliminary objection is over-ruled.

Analysis and Decision: The Merits

Arguments

[45] The Union has argued the Company cannot "reset" the 'rest' clock at the fictitious "55555" terminal, which could be in the middle of nowhere. It argued that the only type of service that can "tie up" at an intermediate point – that is not a "home" or "away from home" terminal – is work train service – as outlined in Article 12.11 of the Agreement. It argued that the parties did not negotiate the same ability for other road service employees. The Union argued that if the Bulletin were interpreted to allow the on-duty rest clock to be "reset" this would be ticket-splitting "at its highest" and would interfere with the important safety rights which are advanced by the provisions of Article 18. The Union argued its members were being disciplined for not tying up appropriately and provided a 2020 grievance demonstrating its Grievance of that concern.

[46] The Company argued that the Bulletin is only a tie-up procedure for pay purposes and is not inconsistent with the Agreement. It outlined the history of how that developed. The Company noted that deadheading back to the objective terminal was explicitly permitted by the Work/Rest Rules. It further noted that Article 2 is a "pay" Article, as noted by its title: "Fixed Mileage Method of Pay" and that Article 6 relates to Deadheading and has not been violated. The Company noted that Articles 48 and 73 provide for release from duty where rest is taken when replaced by a relief road service employee. It also pointed out that the 1997 Method of Pay Memorandum of Agreement Frequently Asked Questions document also notes that if rest occurs enroute, the employee would be paid in straightaway service to the location where turned, then transportation would be arranged ack to the home terminal. The Company argued there were no examples brought forward by the Union to demonstrate that the Company is not in compliance with the Articles of the Agreement, and the Work/Rest Rules. It argued the Union cannot meet its burden of proof without those examples to suggest the Agreement has been violated.

Analysis and Decision

[47] This Grievance raises both an issue of contract interpretation and an issue of whether the requirements of the *KVP Test* have been met[8]. The *KVP Test* requires that any unilaterally promulgated policy of an employer must meet certain requirements. One of those requirements is that it not be inconsistent with the collective agreement. I am satisfied the Bulletin is such a unilaterally promulgated policy of the Company. As such, it must be consistent with the Agreement.

[48] The principles of contract interpretation have been set out in some detail by this Arbitrator in **CROA 4884**. Those principles will be adopted – but not repeated – here. To summarize, the modern principle of interpretation require arbitrators to consider the surrounding circumstances or the "factual matrix" in which an Agreement has been negotiated, as an aid to its interpretation. Such factual context clothes the words with context.

[49] Prior jurisprudence between the same parties is considered an important surrounding circumstance that provides that factual context. In this case, that jurisprudence includes the Clarke Award as well as the undisputed and uncontroversial fact that the Union filed its 'show cause' motion on a contempt application in Federal Court in June of 2019.

[50] It is not necessary to venture into the details of the Federal Court's Award – issued in June of 2023 – for the purposes of resolving this dispute.

[51] With respect, I am not able to agree with the Company that the Union's concern in this case was without substance and that there was no potential conflict with the Agreement. It must be recalled that all of the scenarios listed in the Bulletin are stated to be related to "clarify different examples of tie ups *pertaining to "over 10" situations*"[9].

[52] Regard must be had to the factual context of the Clarke Award and the Union's position the Company was not complying with that Award, and that it had filed a

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[8] As developed in *Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.* ("*KVP*").
[99] Emphasis added.

"show cause" motion in Federal Court regarding that concern. It is also not disputed there is no actual Station with a Station number of 55555.

[53] I find this is a fictitious station number, used when employees are called in straightaway service and then are turned *en route* and must be deadheaded.

[54] Turning to the Agreement, Article 18.06 requires that the Company must have employees who have given Rest Notice **back to their "objective or home terminal** and off duty in 10 hours"[10]. There is no provision in that Article for a tie up at an intermediate point *for the purposes of Article 18*, as this sub-Article specifically notes which types of terminals apply for that purpose.

[55] I am satisfied this choice of wording forecloses the use of a fictitious intermediate position as an "objective or home terminal" to "reset" an employee's "on-duty" clock and disregard properly given Rest Notice.

[56] While the parties *did* contemplate rest at an "Intermediate Point" – I am satisfied that this only applies to work service crews under Article 12. The parties did not negotiate any similar provisions for road service employees. In particular, the parties did not negotiate that the Company could turn around employees called in straightaway service and thereby consider those employees to be on two separate and distinct trips; and the "on duty" clock reset, thereby interrupting properly given Rest Notice.

[57] The Company has argued the Union has not brought specific examples where the Company has breached the Agreement, in a situation where there was "no obvious conflict" with the Agreement, which it argued was fatal to this claim.

[58] The issue raised by this case is that the Bulletin has a potential conflict with the Agreement. If so, it cannot meet the requirements of the *KVP Test.* I cannot agree with the Company that there is "no obvious conflict" with the Agreement created by the Company's unilaterally promulgated Bulletin. The Union has argued that its members are being investigated for not tying up at the time of being turned *en route,* citing an example of a recent Vancouver grievance from 2020.

[10] Emphasis Added

[59] At the risk of being repetitive, it is key that the Bulletin is a unilaterally promulgated policy. Scenario 7 is not contained in the Agreement, which was freely negotiated by the parties, where a breach is alleged in a grievance to be from a particular factual example. In this case, a breach is effectively alleged because a unilaterally promulgated policy was *created* by the Company – in Scenario 7 of the Bulletin – which was argued to be inconsistent with the Agreement. It is a breach of the *KVP Test* that is at issue, in this case.

[60] It must also be recalled that the Union asked the Company the direct question of whether its intention was to interpret its Bulletin to "reset" the on-duty clock when it considered employees to be on "two straight-away trips" – which question was asked before filing its Grievance.

[61] The Company ultimately failed to provide an answer to that question.

[62] To compound the Union's concerns, the Company then chose to issue its Bulletin in April 2020 *with wording that was unchanged*.

[63] In particular, the notation that employees would be considered to be on "two straight-away trips" when turned *en route* continued to appear.

[64] I am in agreement with the Union that the Company's Bulletin would run afoul of the *KVP Test* as it has the potential to be interpreted by the Company in a manner which is inconsistent with the Agreement: The Union's concern that the Company would consider an employee to be on "two straight-away trips" and so the "on duty" clock was "reset" is not an unreasonable one.

[65] While the Company at this hearing now argued the "tie up" procedure at 55555 has *always* been limited to issues of *pay*, it did not provide that answer when the Union raised its question.

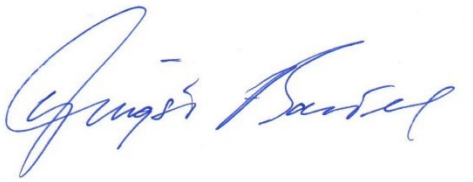
[66] By including Scenario 7 – and not removing or altering it when the Union raised its questions, the Union's concern that the Company would interpret Scenario 7 – its own Policy – in a manner which was inconsistent with the Agreement was reasonable and not unfounded. It was entitled to have that issue adjudicated.

Conclusion

[67] I find and declare that an interpretation of Scenario 7 of the Bulletin which would reset the “on-duty” clock of employees at the fictitious terminal of 55555 when considered to be “on two straight-away trips” would result in the Bulletin being inconsistent with the Agreement and so would not be in compliance with the *KVP Test.*

[68] I am satisfied these declarations are the only remedy required to resolve this issue.

[69] I retain jurisdiction to address any issues regarding the implementation or application of this Award, and to correct errors or address omissions to give it the intended effect.



March 20, 2024

CHERYL YINGST BARTEL
ARBITRATOR