

**IN THE MATTER OF AN ARBITRATION**

**B E T W E E N**

**CANADIAN NATIONAL RAILWAY COMPANY  
(The “Company”)**

**A N D**

**TEAMSTERS CANADA RAIL CONFERENCE  
(The “Union”)**

**RE: Mr. McKay and Violation of Article 29.1**

**SOLE ARBITRATOR: James Cameron**

**Appearing For The Company:**

R. Charney – Counsel, Norton Rose Fulbright, Toronto  
S. Cass – Counsel, Norton Rose Fulbright, Toronto  
F. Daignault – Director, Labour Relations, Montreal  
K. Blair – Senior Manager, Crew Management Centre, Edmonton

**Appearing For The Union:**

R. Church – Counsel, Caley Wray, Toronto  
K.C. James – General Chairperson, LE-W, Edmonton  
T. Russett – Vice General Chairperson, LE-W, Edmonton  
P. Boucher – President, TCRC, Ottawa  
N. Irvén – General Secretary Treasurer, Saskatoon  
E. Landon – Local Chairperson, Edmonton  
M. Kernaghan – General Chairperson, LE-Central, Toronto  
J. Currier – Alt-Vice General Chairperson, LE-Central, Toronto  
J.M. Halle – General Chairperson, LE-E, Montreal

A hearing in this matter was heard in Toronto on June 5, 2024

## A W A R D

1. The Union grieves the Company's failure to pay the Grievor according to Article 29 of the Collective Agreement, following a tie up. The Company relies on the Federal Hours of Service Regulations to justify not paying for the tie up. The circumstances of this matter are described in the Union's Ex Parte Statement of Issue:

DISPUTE:

The Company's reliance of the federal hours of service regulation to tie up Locomotive Engineer McKay at a location in between terminals on November 16, 2016 to deny him the provisions contained in Article 29.1 of Collective Agreement 1.2, and instead imposing Article 28.9 provisions.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On November 16, 2016 Locomotive Engineer McKay was ordered in turn around service at Edmonton on train TL71151-17 at 0800. Mr. McKay taxied to Strachan, his turn point, and worked there from 1100 until 2025. Mr. McKay was relieved at 2025 and transported to a rest facility at Mirror, despite not having filed his rest message.

After seven hours at a Company supplied accommodation, Mr. McKay was returned to his train, which was not at Mirror, and operated back to Edmonton.

Mr. McKay submitted a request to have his ticket reflect that he was tied up between terminals, when he was put to bed by the Company without having filed a request for rest.

The Company position is that Mr. McKay had reached his hours of service threshold of 12 hours that the Company provided the grievor with rest, due to hours of service legislation. The Company states that Mr. McKay was put to bed under the auspices of Article 28.9 and as required by Federal Hours of Service legislation.

The Union position is that federal hours of service do not, in and of themselves, provide the Company the latitude to invoke Article 28 rest en route provisions. It is the position of the Union that Article 29 applies, and with it all the provisions therein contained when Locomotive Engineers do not invoke their right to take rest.

Signed: K.C. James – General Chairperson

2. The Company's position is set out in its Ex Parte Statement of Issue:

Dispute:

The Company's reliance on the federal hours of service regulations to interrupt Locomotive Engineer McKay's tour at a location in between terminals on November 18, 2016, which the Union asserts denied him the provisions contained in Article 29.1 of Collective Agreement 1.2.

### Ex-Parte Statement Of Issue

On November 18, 2016 Locomotive Engineer McKay was ordered in turn around service at Edmonton on train TL71151 17 at 0800. Mr. McKay taxied to Strachan, his turn point, and worked there from 1100 until 2025. Mr. McKay was relieved at 2025 and transported to a rest facility at Mirror. At no time had Mr. McKay exercised his right to book rest.

After 7 hours and 20 minutes at a Company supplied accommodation, Mr. McKay was returned to his train, which was now at Mirror, and operated back to Edmonton.

Mr. McKay submitted a request to have his ticket reflect that he was tied up between terminals, when he was relieved of duty on November 18, 2016 without having filed a request for rest.

The Company position is that Mr. McKay had reached his hours of service threshold of 12 hours and that the Company relieved the grievor of duty, due to the hours of service legislation. The Company agrees with the Union that Article 28 does not apply.

The Union position is that federal hours of service do not, in and of themselves, provide the Company the latitude to depart from the provisions in Article 29. It is the position of the Union that Article 29 applies, and with it all the provisions therein contained when Locomotive Engineers do not invoke their right to take rest.

Signed: S. Cass – Counsel for CN, Norton Rose Fulbright Canada.

### **Preliminary Observations**

3. The Parties spent some time discussing the admission by the Company that article 28 of the Collective Agreement was inapplicable in the circumstances, as the grievor had not made a request for rest. The Union views this as a last minute change of position, only made manifest with the filing of the Company's Ex Parte Statement of Issues. The Company contends that their Step 3 Response made clear that it was relying on the Federal Work Rest Regulations as the basis for its position.

4. In my view, JSIs and even Ex Parte Statements of Issue are intended to clarify and set forth the true issues between the Parties. Dropping weak arguments, to concentrate on strong ones, is a practice to be encouraged. It is a sign of good advocacy and sound labour relations.

5. The Company is to be commended that the weak article 28 argument was dropped.

## Context

6. This matter concerns the interpretation and application of article 29 of the Collective Agreement, within the context of the Federal Work Rest Regulations limiting locomotive engineers to 12 hours of on-duty time.

7. The Union takes the position that article 29 was negotiated between the Parties to deal with situations exactly such as this, when the Company requires an employee to tie up. It is the corollary of article 28, where the employee can request rest. The Union argues that the Company must operate within the existing regulatory structure. The Company takes the position that the Parties have not negotiated any agreement concerning what happens when an engineer comes up against the 12 hour limit, and that it is not for a rights arbitrator to invent or impose one.

## 8. Issues

- A. Does article 29 apply in the context of Federal Work/Rest Rules, and was it breached?
- B. If so, what remedy should apply?

## A. Does article 29 apply in the context of Federal Work/Rest Rules, and if so, was it breached?

### Position of the Parties

9. The primary argument from the Company is that the Federal Work Rest Regulations make rest a joint responsibility of the Company and of the operating employee. It argues that the grievor would have had a personal responsibility to stop working at 12 hours, even if the Company had done nothing.

10. The Company argues that **CROA 4842** is applicable. In that matter, I had found that the decision to prevent the grievor from working due to Covid had been made by the Public Health authorities, rather than the Company. Here, the Company argues that the

Minister, by adopting the Federal Work Rest Regulations, effectively played the same role as the Public Health authorities in Quebec.

11. The Company argues that there is nothing in the Collective Agreement which deals with the issue of pay for off-duty time caused by the application of the Rules. It notes that Regulations may have indirect negative consequences for one of the parties; sometimes it is to the detriment of the employee, sometimes it is to the detriment of the Company. It is not permitted by CROA Rules or the jurisprudence for the arbitrator to create a right by analogy.

12. The Union argues that there is no need to reason by analogy, for article 29 directly applies to the situation. It reviewed a series of employer statements indicating that a decision had been made by the Company to have the grievor tie up. As such, article 29 applies.

13. The Union agrees that if article 29 is found to apply, then the payment made to the grievor for constructive miles is not applicable.

#### Analysis and decision

14. The relevant provisions of the Work/Rest Rules for Railway Operating Employees (2011) read as follows:

##### 2. Statement of Principle

2.1 To meet the safety and operational challenges of managing operating employee fatigue, railway companies, in association with operating employees and their designated representatives, must have flexible approach that will:

- a) take ongoing advantage of new developments in research and technology;
- b) meet operating employees' needs;
- c) meet operational needs of the railway companies; and
- d) be implemented over a wide range of operating conditions.

2.2 Railway companies shall establish and maintain working conditions that allow:

- a) operating employees sufficient opportunity to obtain adequate rest between tours of duty; and
- b) alertness to be sustained throughout the duty period.

2.3 Operating employees have a responsibility to report for work rested and fit for duty.

#### 4. Definitions:

“Deadheading” means the authorized transportation of operating employees from one location to another, but does not include travel allowances when paid for commuting to a reporting location.

“Fit for Duty” means reporting for duty rested and prepared to maintain alertness for the duration of the tour of duty.

#### 5. Maximum Requirements

##### 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. Where a tour of duty is designated as a split shift, as in the case of commuter service, the combined on-duty time for the two on-duty periods cannot exceed 12 hours.

b) When calculating on-duty time as outlined above, arbitrary time or allowances are not to be included. Preparatory and final times each shall not exceed 15 minutes.

##### 5.3 Deadheading

5.3.1. Deadheading at the commencement of a tour of duty is included in the total on-duty time in subsection 5.1.1.

5.3.2. Deadheading is permitted following the expiration of maximum hours on-duty without regard to the duty times in subsections 5.1.1 and 5.1.3.

5.3.3. Mandatory off-duty time may be interrupted at other than the home terminal for deadheading to the home terminal. In such circumstances, upon arrival at the home terminal, the employee will be considered to require full mandatory off-duty time and the provisions of subsection 5.2.1 a) will apply.

#### 6.2 Development and Implementation

6.2.1 Railway companies, operating employees and their designated representatives will be involved in the development and implementation of fatigue management plans including changes to such plans.

15. The relevant provision of the Collective Agreement, Tied Up Between Terminals, Article 29, reads as follows:

Article 29 – Tied Up Between Terminals

29.1 Locomotive engineers, other than those in wreck, work, construction, snow plow, and flanger service, may be tied up at any point between the initial terminal and the point for which called and the tie-up point shall be paid actual miles or hours, whichever is the greater for the road portion of the trip to the tie-up point but not less than a minimum day of 100 miles for the tour of duty, and from time tied up until again resuming duty will be compensated hour for hour on the basis of one-eighth of the daily rate, as per class of service and engine involved, for the first 8 hours in each 24 hours so held. When resuming duty a new day will commence. In the application of this paragraph it is not the intention the locomotive engineer will be left without an engine.

16. The Parties agree that the Collective Agreement must be interpreted in a manner that is not inconsistent with public law. As Arbitrator Picher noted in **CROA 2906** (see Tab 12, company documents):

The Council submits that the Company could not depart from the first-in first-out principle contained within the collective agreement for the purposes of calling the grievor, as provided in article 26(a) and article 5(b)(7) of the collective agreement, in the circumstances disclosed. The Arbitrator cannot agree. It is well established that the parties to a collective agreement cannot negotiate terms in their collective agreement, or apply and administer such terms, in a manner that is inconsistent with public law, be it statute or regulations. In the case at hand it is obvious that the first-in first-out calling provisions of the collective agreement must be rationalized and applied in a manner that is consistent with the federal regulations in respect of mandatory limits on duty, which the Company has undertaken to apply. It is, moreover, significant that the Council, which obviously has an equal interest in seeing reasonable rest provisions enforced for the protection of its members, apparently took no exception to the Company's bulletin of February 18, 1994 which indicated that employees are not to be called should they have insufficient time remaining on their on duty clocks to be able to handle the assignment in question (underlining added).

17. Here, the issue is not whether the Collective Agreement is in conformity with the Work/Rest Rules, but whether it applies at all. The Union argues that article 29 is directly applicable, while the Company argues that the Parties have not yet negotiated whether employees who must comply with the Rules are to be compensated for imposed rest time.

18. For the reasons that follow, I find that article 29 is applicable to this matter.

19. In a discussion at the end of the Hearing, the Company agreed that the assigned trip to the grievor was a turn around service from Edmonton to Strachan to Edmonton. It agreed that while deadheading to the point of work counted in the calculation of hours worked, deadheading home did not, as the grievor would not be operating equipment. Thus the grievor could have deadheaded out to the work site taking 3 hours, worked 9 hours and then been deadheaded back to Edmonton. This process would have respected the Work/Rest Regulations, even if operationally problematic. It would, however, have entirely avoided the application of a tie up and the application of article 29.

20. I also suggested that other options might equally have respected the Work/Rest Regulations and avoided any issue of article 29, such as having the grievor do a straight tour, rather than a turn around, not doing switching at Strachan, or stopping the grievor from working at an earlier point in time.

21. In my view, these options were available to the Company, although they were not operationally advantageous, as they needed switching services and still needed the services of the grievor to get the train back to Edmonton.

22. In paragraph 18 of its Brief, the Company submits: "CN may need to tie up a locomotive engineer en route for a variety of operational reasons, typically related to unforeseen events, including...issues at a customer's facility, such as issues loading the train...In these situations, the Company has the right pursuant to Article 29 to tie up the employee so that duty can resume when the repairs have been made or the situation has otherwise resolved."

23. In my view, this is what took place here. The Company had operational needs in Strachan which prevented them from getting the grievor back to Edmonton. As such, it made a decision to have the grievor tie up. As noted in the Company's Step 3 Response: "the grievor was tied up on line and taxied to Mirror where he was required to take rest....The Chief RTC correctly made the determination that the grievor would be unable to complete this assignment with(in) the maximum 12 hours of service, and therefore provided the grievor with rest based on hours of service legislation".

24. The Company is entitled to have the grievor perform these services, but it meant that a turn around to Edmonton could not take place within the mandated Work/Rest period of 12 hours. When the Company decides to have the grievor perform those duties, and decides not to get the grievor back to Edmonton, it is making a decision that the grievor will have to tie up. Indeed, it recognized that a tie up was necessary, and the Chief RTC gave that order. As such, article 29 directly applies.

25. Despite the able arguments of Company counsel, I do not agree that the Goulet decision in **CROA 4842** is applicable here. There, I found that the Covid-19 Rules implemented by the Public Health authorities applied to both the grievor and the Company:

16. These measures imposed joint obligations on employers and employees as regards those who were ill or potentially ill. Mr. Goulet and the Company both had legal obligations regarding his isolation after testing positive for Covid-19. (See the CNESST Kit, Tab 6 of the Company). I therefore concur with the Company's perspective that the public health authorities are the ones who made the decision to isolate Mr. Goulet. This remains true even if the Company did play an important role in enforcing the law (see the letters and emails between the Company and Mr. Goulet, tabs 10-14 of the Company).

17. In my opinion, it was going one step too far to claim that it was the employer's decision and will to order Mr. Goulet to stay at home during his self-isolation period. Rather, it was a joint obligation that the government imposed on both parties.

26. The Company in Goulet had no choice about having the grievor come to work, nor indeed did the grievor himself. Here, the Company had multiple choices open to it which would have entirely respected the Work/Rest Regulations. For perfectly valid operational reasons, it found it more advantageous not to get the grievor back to Edmonton, but to have him tie up and rest in Mirror. By ordering him to tie up, however, the Company triggered the obligations under article 29.

**B. If so, what remedy should apply?**

27. An employee who is requested to tie up is entitled to the benefits foreseen under article 29. Here the grievor has not received those benefits to which he is entitled. He has, however, received payment for constructive miles to which he is not entitled.

28. The Parties have agreed that the issue of remedy should be remitted to them. Should the Parties be unable to resolve this issue, or there be issues of interpretation or application of this Award, I remain seized.

**June 17, 2024**

A handwritten signature in black ink, appearing to read "James Cameron", written over a horizontal line.

**JAMES CAMERON**  
**ARBITRATOR**