# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

# CASE NO. 4676

Heard in Montreal, April 9, 2019

Concerning

**VIA RAIL CANADA INC.**

And

**UNIFOR NATIONAL COUNCIL 4000**

**DISPUTE:**

The application of Article 4.26 Collective Agreement #2 for the Fall General Bid 2016 for the Winnipeg Terminal.

**JOINT STATEMENT OF ISSUE:**

The Union contends that the Corporation deprived employees under Collective Agreement #2 namely Deborah Boardman, Steve Rivard, and Rose Marie Soutter of the layover period of their work cycles with guarantee protections as identified through the Operation Run Statement (ORS). The Corporation violated the provisions of Articles 4.26(b) and (d) of the Collective Agreement by forcing these employees to take vacation time in lieu of their earned layover dates.

The Union requests that the grievors Boardman, Rivard and Soutter be made whole for this layover period through additional vacation days consistent with what their earned layover days would have been, and that those grievors forced to pick up their assignments be made whole for all time worked at punitive rates.

The Corporation submits that Article 4.26 was applied correctly regarding the October General bid and was consistent with long established practice. The grievors were not entitled to layover protection from the previous assignment with guarantee protection in the case of a 12.1 bulletin.

In addition, the Corporation denies that any grievor suffered a loss of earnings as a result of following the terms of Article 4.26 and puts the Union to the strict proof thereof.

| **FOR THE UNION:** | **FOR THE COMPANY:** |
|---|---|
| **(SGD.) B. W. Kennedy** | **(SGD.) E. Houlihan** |
| National Representative | Director, Employee Relations |

There appeared on behalf of the Company:

| | |
|---|---|
| W. Hlibchuk | – Counsel, Norton Rose Fullbright, Montreal |
| E. Houlihan | – Director Employee Relations, Montreal |
| L. Mayes | – Senior Manager Western Canada, Montreal |
| M. H. Jutras | – Senior Human Resources Business Partner, Montreal |

And on behalf of the Union:

| | |
|---|---|
| B. Kennedy | – National Representative, Edmonton |
| D. Kissack | – President, Winnipeg |
| D. Andru | – Secretary Treasurer, Toronto |
| L. Hazlitt | – Regional Representative, Winnipeg |

## AWARD OF THE ARBITRATOR

There is no dispute that the three junior employees were returning from their respective assignments, covering the period from October 16, 2016 to October 20, 2016, to their home terminal in Winnipeg. The three employees had received new assignments after the Company reduced its passenger rail service in the fall of 2016. These new assignments were advertised on a General Bid and provided to employees, pursuant to article 12.1(b) of the collective agreement.

The Union claims that the ORS, which sets out the details of the assignment, including the “layover at home and distant terminal” [article 1.1] as well as articles 4.26 (b) and 4.26 (d), allows employees returning from an assignment to their Home Terminal to take their layover and guarantee protections from that assignment. The layover at the Home Terminal, the Union notes, is recognized as part of the complete ORS; the guarantee is protected because it is considered as earned time off within the ORS. The Union further submits that the Corporation’s decision to deny the grievors their earned layover periods and guarantee protections at the Home Terminal caused them to have to work more hours than the threshold hours established in the collective agreement. From the Union’s perspective, the Employer’s actions essentially amount to forced overtime.

The Employer pointed out that all three employees were junior employees who could not hold their previous cycle due to their seniority rank and were required to pick up their “new assignment”. The agreed provisions set out in the collective agreement required them to pick up these new assignments; their only alternative if they chose not to do so was to take vacation time or provide valid proof (such as a medical certificate) regarding their inability to work their assignment. The Employer further notes that article 4.26 (b), which sets out that an employee will be protected by guarantee, applies in cases where an employee is awarded another regular assignment under article 12.3, which deals with vacancies and newly-created positions. The three circumstances where an employee is otherwise entitled to a guarantee when they pick up their new assignment are set out at articles 4.26 (b) and article 4.26 (d). Article 4.26 reads as follows:

> **Article 4.26**
> (a) Employees holding regular assignments who are awarded other regular assignments by bulletin under **Article 12.3** will be protected by guarantee until expiration of layover on the last trip of their previous assignments and guarantee will resume on the date they pick up their new assignments. Employees will be permitted to pick up new assignments prior to the expiration of layover.
>
> **(b) Assigned employees who obtain other regular assignments by bulletin under Article 12.1 will be protected by guarantee as provided for under Article 4.26(d).**
>
> (c) In cases of displacement or abolishment, employees who exercise their seniority after displacement or abolishment, will be protected by guarantee as provided for under Article 4.26(d), and they displace any junior employee due out occupying the selected classification on the run of their choice.
>
> **(d) (1) The guarantee of employees will be protected who pick up their new assignment prior to the expiration of their previous layover if possible at straight time rates over and above their guarantee applicable for General Bid only;**
>
> **or –**

**(2) The guarantee of employees will be protected who pick up their new assignment on the same day of the expiration of their previous layover of their last trip of their previous assignment,**

**or –**

**(3) An employee unable to pick up any assignment in his existing classification prior to the expiration of his layover of his previous assignment or on the last day of his layover of his previous assignment, will have his guarantee protected up to three days (5.71 hours per day), commencing at 0001 hours of the day following the expiration of his previous layover.**

**Article 12**

12.1 (a) All employees will be given their choice of run on a General Bid which will be posted in the second quarter once per year.

The Local Chairperson will be notified of the date of the General Bid by March 01.

During the open period of the General Bid, assigned employees will remain on their assignments until the effective date of the new assignments.

(b) When a change is significant to a service or services, the Corporation may determine that an additional bid be posted.

1. A thirty (30) day notice will be provided to the Local Chairperson.

2. The additional bid may be posted on a Regional basis.

3. The same protection as on a General Bid applies for the employees when an additional bid is posted.

12.3 (a) Vacancies in regularly assigned positions, temporary vacancies and newly- created positions any of which are known to be of 30 calendar days' duration or more, shall be bulletined on their respective seniority regions within 5 calendar days of the vacancy occurring except as provided for in Article 12.1.

I agree with the Company that the rights referred to in article 4.26 (a), which sets out the guarantee period for those employees governed by article 12.3, are specific to that group of employees, i.e. those filling vacancies or newly-created positions. The

language is clear in article 4.26 (a) that those employees will be protected by guarantee until the layover period expires from their last trip of their previous assignment; and, their guarantee will resume on the day their new assignment begins.

In circumstances where article 12.3 does not apply (i.e. no vacancy or newly-created position is bulletined), then one must review the guarantees set out for those employees who have been given new assignments as a result of change of service (article 12.1), such as occurred here when the Company reduced its passenger rail service in Western Canada in the fall of 2016 after the peak travel season.

Article 4.26 (b) states that employees who have received new assignments under article 12.1, such as the three employees in this case, *"…will be protected by guarantee, as provided under Article 4.26 (d)".* As Company counsel points out, one then turns to the three scenarios that speak to the circumstances where the guarantee will be paid in cases of employees who are awarded new assignments. In this case, the Company maintains that the three employees who were required to give up earned layover from the first assignment were paid according to article 4.26 (d), including any overtime resulting from an excess of hours during the working payment period.

I note that Arbitrator Kates in **CROA 1498** concluded that he was confined to abiding by the terms of the collective agreement. In that case, he stated that he felt *"…constrained to define layover and additional layover period in the specific and*

*particular context of the parties' collective agreement".* In **CROA 1242**, the same arbitrator found the language to be "*clear, straightforward and definitive."*

I find that a reading of the relevant provisions of the collective agreement similarly does not present any discernable ambiguities. It is equally "straightforward and definitive". Article 4.26 (b) refers to "employees who obtain other regular assignments". The provision goes on to say that those employee will be protected by the guarantee set out in article 4.26 (d).

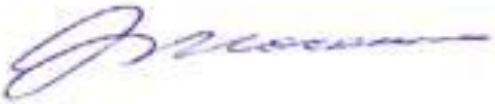
This is clear wording and captures unambiguously the intention to apply those three scenarios found in 4.26 (d). This is a case where the parties have been specific about what guarantees are payable and the specific conditions that give rise to those payments. Any interpretation which would allow for a benefit beyond those specified guarantees would be adding to the collective agreement.

I understand that junior employees such as those in this case are faced with personal disruption when they are unable to use their full layovers before reporting for duty on a new assignment. That they may be required to use vacation days in order to take advantage of their anticipated layovers from their first assignment is no doubt a personal inconvenience. Any remedy for such an inconvenience, however, can only be addressed at the bargaining table.

I would add that there is insufficient evidence before me to support a finding that a breach of section 169 of the *Canada Labour Code* has occurred. The collective agreement has an agreed formula for averaging hours of work and days of assignment, the scope of the guarantee being 320 hours according to the Employer (the Union submits it is closer to 306 hours). In this case, those hours were not exceeded given that they were averaged over both the old assignment and the new assignment.

For all these reasons, the grievance is dismissed.

May 1, 2019



**JOHN M. MOREAU, Q.C.**
**ARBITRATOR**