CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4881

Heard in Calgary, November 14, 2023

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

On November 30, 2015 Conductor T. Pinkerton requested a Personal Leave Day (PLD) to start at 21:15 hours. This request was made in accordance with Article 96 of the 4.16 Collective Agreement. The Company denied this request.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On November 30, 2015, Conductor Pinkerton contacted the Crew Management Centre at 1712 hours and requested a leave day to start in four hours, the notice set out in Article 96 of the 4.16 Collective Agreement his leave day was scheduled to commence at 2115 hours.

At 1919 hours the Company called Conductor Pinkerton for train 501 assignment commencing at 2115, the exact time that his PLD was to start. The Company informed Conductor Pinkerton that he had to accept the call which he did. Conductor Pinkerton was duty at 0515 from train 501.

Union's Position:

The Union contends that the Company is in violation of Articles 96, 85, 85.5 of the 4.16 Collective agreement along with arbitral jurisprudence when the Company failed to respect the rights of Conductor Pinkerton under the Collective Agreement.

The Union submits that there are only two criteria that must be met in order to obtain a PLD; 1) there must be a Terminal allotment (PLD) available; and 2) a minimum of four hour's notification must be provided to the Company. The Union further submits that Conductor Pinkerton meet both of the requirements in this instance.

In view of the above it is the Union's position, however not limited hereto, that the Company has violated Articles 85, 85.5, and 96 of Agreement 4.16, ADHOC CA 2015-4414, arbitral jurisprudence and past practice.

Given the violations of the 4.16 Collective Agreement the Union contends that a substantial remedy is applicable in these circumstances consistent with Addendum 123 of the 4.16 Collective Agreement.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On November 30, 2015, Tyler Pinkerton #162861 requested a PLD to start at 2115. Mr. Pinkerton claims to have made the request 4 hours and 3 minutes before the start of the requested

PLD. Two hours before the start of the requested PLD, the Company called Mr. Pinkerton to work the L501 assignment commencing at 2115.

Consistent with the practices of the Company and Agreement 4.16, Mr. Pinkerton's PLD was subsequently cancelled and returned for use at subsequent time.

Company's Position:

As a preliminary matter, the Company submits that the Union's grievance has not been properly filed at Step 1 of the grievance procedure as provided for under the Agreement 4.16. Therefore, the Company objects to the Union's progression of this grievance on the basis that it was not filed in compliance with Agreement 4.16. The Company asks that the Arbitrator decline jurisdiction.

In the event that the Arbitrator finds just cause to exercise his discretion to grant relief despite the preliminary objection, the Company's position is that its actions with respect to Mr. Pinkerton's requested PLD are consistent with Agreement 4.16, Ad Hoc 644, arbitral jurisprudence and the past practice of the Company.

The Company submits that consistent with the agreements, practices, and understandings of the Parties, employees are available for a call during the 4 hours notice period and, as such was required to accept the call. The Grievor was available to go to work and required to attend work. His PLD was cancelled and returned for use at subsequent time.

The Company further submits that it has not violated Article 85 of the Agreement and the Union's claim of past practice and its reliance on ADHOC 644 are without merit.

The Union seeks a "substantial" remedy under Addendum 123 for the violation of Agreement 4.16. The Company disagrees with this position. If the Company is found to have committed any violation of Agreement 4.16, which it expressly denies, such a violation, does not warrant a remedy an application of Addendum 123. Addendum 123 is not engaged in this stage of the grievance procedure.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Lennie	**(SGD.) F. Diagnault**
General Chairperson CTY-C	Director, Labour Relations

There appeared on behalf of the Company:

J. Landmann	– Counsel, Norton Rose, Calgary
H. Buckley	– Counsel, Norton Rose, Calgary
S. Fusco	– Senior Manager, Labour Relations, Edmonton
I. Muhammad	– Manager, Labour Relations, Edmonton
D. Wenston	– Manager, Labour Relations, Edmonton

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, CTY-C, Hamilton
G. Gower	– Vice General Chairperson, CTY-C, Brockville
E. Page	– Vice General Chairperson, CTY-C, Hamilton
M. Kernaghan	– General Chairperson, LE-C, Trenton
R. S. Donegan	– General Chairperson, CTY-W, Saskatoon
K.C. James	– General Chairperson, LE-W, Edmonton

AWARD OF THE ARBITRATOR

Background, Issues & Summary

[1] This Grievance raises a question of contract interpretation. It is one of several which have arisen to address questions relating to unpaid personal leave days ("PLD") under Article 96.[1]

[2] Article 96 was first introduced into Agreement 4.16 in 2005. The resolution of this Grievance has implications beyond just this Grievor, as is apparent from the observers who attended this hearing from various divisions of the Union. Both parties were also represented by legal counsel.

[3] The facts are straightforward. In summary, the Grievor is a Conductor. On November 30, 2015 he provided four hours notice to start a PLD under Article 96.2(1).

[4] While the Company raised an issue in its Brief regarding the timeliness of this notice, its *ex parte* Statement of Issue did not raise the timeliness of that notice as an issue to be determined at this hearing. As such, as a CROA Arbitrator, I do not consider I have been given jurisdiction by the parties to address that issue, in this Award.[2]

[5] Two hours before the Grievor's PLD was set to begin, the Company called the Grievor into work. The Grievor did not finish this assigned work by the time his PLD was to start. He was therefore unable to take the PLD.

[6] The Union grieved that the Company's action was in breach of Article 96 of Agreement 4.16.

[7] The Company raised a preliminary objection that the Grievance was not processed appropriately under the Grievance Procedure in Article 84, as it was commenced at Step 3, instead of Step 1. It argued this error is fatal to the arbitrability of this Grievance.

[1] See also **AH644** and **AH569.**
[2] Item 14 of the Memorandum of Agreement establishing CROA, revised November 2023 limits the jurisdiction to issues raised in the Statements of Issue.

Collective Agreement Provisions

[8] The following collective agreement provisions are relevant to this dispute:

> **ARTICLE 79.7 Disputes Re Application of this Article**
>
> The applicability of this Article 79 to run-throughs and changes in home stations is acknowledged. A grievance concerning the applicability of Article 79 to other material changes in working conditions shall be progressed immediately to Step 3 of the grievance procedure, within 60 days from the date of the cause of the grievance.
>
> **ARTICLE 84 Grievance Procedure**
>
> **84.1** In the application of this Article, grievances concerning the interpretation or alleged violation of this Agreement shall be processed in accordance with paragraph 84.2 except that:
>
> (a) appeals against discipline will be initiated at Step 2 of the Grievance Procedure;
>
> (b) appeals against discharge, suspension, demerit marks in excess of 30, or demerit marks which result in discharge for accumulation of demerits, restrictions (including medical restrictions) and conditions of "mobile accommodation" (i.e. whether or not they are comfortable and sanitary), will be initiated at Step 3 of the Grievance Procedure.
>
> **84.2**
> (a) Step 1 - Presentation of Grievance to Immediate Supervisor
> (1) within 60 calendar days from the date of cause of grievance the employee or the Local Chairman may present the grievance in writing to the immediate supervisor;
> (2) the grievance shall include a written statement of grievance as it concerns the interpretation or alleged violation of the agreement and identify the specific provisions involved;
> (3) the supervisor will give his decision in writing within 60 calendar days of receipt of the grievance. In case of declination the supervisor will state his reasons for the decision in relation to the statement of grievance submitted;
> (4) time claims which have been declined or altered by an immediate supervisor or his delegate, will be considered as being handled at Step 1.
>
> **NOTE:** When disputed time claims are submitted at Step 1, the Agreement reference including the Article number under the provisions of which the claim is made must be quoted (i.e.: Runaround, Called and Cancelled, etc).
>
> (Refer to Addendum 43)
>
> (b) Step 2 - Appeal to District Superintendent (Transportation)
> (1) within 60 calendar days of the date of the decision under Step 1, or in the case of an appeal against discipline imposed within 30 calendar days of the date on which the employee was notified of the discipline assessed, the Local

Chairman may appeal the decision in writing to the District Superintendent (Transportation);

(2) the appeal shall include a written statement of grievance as it concerns the interpretation or alleged violation of the agreement, and identify the specific provisions involved. The written statement in the case of an appeal against discipline imposed shall outline the Union's contention as to why the discipline should be reduced or removed;

(3) the decision will be rendered in writing within 60 calendar days of receipt of the appeal. In case of declination, the decision will contain the Company's reasons in relation to the written statement of grievance submitted;

(c) Step 3 - Appeal to Vice-President
(1) within 60 calendar days of the date of decision under Step 2 the General Chairman may appeal the decision in writing to the Regional Vice-President. The appeal shall be accompanied by the Union's contention and all relevant information concerning the grievance and shall:

(2) if agreed between the General Chairman and the Vice-President or their respective delegates, be examined at a joint meeting within 60 calendar days of the date of the appeal. The Vice-President shall render his decision in writing within 30 calendar days of the date on which the meeting took place; or

(3) should the General Chairman or the Vice-President consider that a meeting on a particular grievance is not required he will so advise the other accordingly. In the event a meeting is not agreed to the Vice-President shall render his decision in writing within 60 days of the date of the appeal.

NOTE: The Company must respond to the Union’s grievance particulars at each Step of the Grievance Procedure.

Final Settlement of Disputes
84.3 A grievance which is not settled at the Vice-President's Step of the grievance procedure may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work. (Refer to Addendum No. 22)

84.4 A request for arbitration shall be made within 60 calendar days from the date decision is rendered in writing by the Vice-President by filing written notice thereof with the Canadian Railway Office of Arbitration and on the same date a copy of such filed notice will be transmitted to the other party to the grievance.

NOTE: In the application of this paragraph upon receipt of a request for arbitration, the Company will meet with the General Chairman, within 30 calendar days from receipt of such request, to finalize the required Joint Statement of Issue. Failure to comply with the provisions of this paragraph will permit either party to the dispute to progress the dispute to the Canadian Railway Office of Arbitration on an "ex parte basis" pursuant to the provisions of the Memorandum of Agreement governing the Canadian Railway Office of Arbitration.

(Supplemental Arbitration Process - Refer to Addendum 132)

Grievances Not Timely

84.5 Any grievance not progressed by the Union within the prescribed time limits shall be considered settled on the basis of the last decision and shall not be subject to further appeal. The settlement of a grievance on this basis will not constitute a precedent or waiver of the contentions of the Union in that case or in respect of other similar claims. Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may, except as provided in paragraph 84.6, be progressed to the next step in the grievance procedure.

Disputed Time Claims

84.6 In the application of paragraph 84.2 to a grievance concerning an alleged violation which involves a disputed time claim, if a decision is not rendered by the appropriate officer of the Company within the time limits specified, such time claim will be paid. Payment of time claims in such circumstances will not constitute a precedent or waiver of the contentions of the Company in that case or in respect of other similar claims.

General

84.7 Where provision is made in this Article for the appeal of a grievance to a designated Company officer, the Company may substitute another Regional or District officer for the officer designated by advising the General Chairman's concerned in writing.

84.8 The settlement of a grievance shall not under any circumstances involve retroactive pay beyond a period of 90 calendar days prior to the date that such grievance was submitted at the first applicable Step of the grievance procedure.

84.9 Time limits specified in this Article may be extended by mutual agreement.

84.10 When a recorded conversation may be relevant to the disposition of a grievance, the Local Chairman may make a request to hear a specific recorded conversation. Such requests must be made within 60 days from the date of the conversation. Arrangements will then be made to permit the Local Chairperson to listen to the recorded conversation.

84.11 Committees consisting of the TCRC-CTY General Chairman's (or his/her delegate), a TCRC-CTY member appointed by the General Chairperson and the Company's General Manager Operations and Director Labour Relations, or their respective designates, two from each party, will be established. This committee will be known as the Labour / Management Committee, and may (at each parties option) meet monthly, unless otherwise agreed, to review the application of the Collective Agreements.

ARTICLE 85 Application and Interpretation of Agreement

…

Workplace Environment
85.5 Management agrees it must exercise its rights reasonably. Management maintains it ensures a harassment free workplace environment.
…

ARTICLE 96 Personal Leave Days
96.1 Employees will, at their discretion, be entitled to take up to and including a maximum of 12 cumulative unpaid personal leave days per calendar year as provided herein. Personal leave days will be recognized, under this agreement, as active cumulative compensated service. However, personal leave days, when taken will not be used in the calculation of Guarantees and/or Maintenance of Earnings. Employees may, at their discretion, activate their entitlement to leave days, jointly or severally up to the cumulative maximum.

96.2 Notice in respect of this leave will be given as follows:
1) One day (24 hours) – upon four hours notification prior to the commencement of such leave time;
2) Two or three consecutive calendar days – upon three calendar days notification prior to the commencement of the leave days;
3) Four consecutive calendar days but less than seven consecutive calendar days – upon seven calendar days notification prior to the commencement of leave days;
4) Seven consecutive calendar days or more – upon twenty-one days notification prior to the commencement of leave days.
NOTE 1: Employees in the application of this provision shall not be entitled to activate personal leave days between and including December 20th and December 31st.
NOTE 2: Personal Leave Days (allotments) shall be established at each terminal utilizing the following exampled criteria:

Terminal X – 100 (Employees) X 12 (PLD)/353 (days) = 3.4 daily allotments.

In such calculations, numbers shall be rounded upward.

Preliminary Objection

Arguments

[9] The Company argued this Grievance did not meet the limited exceptions where a grievance can be filed at a Step beyond Step 1. It argued those exceptions are contained in Article 79.7 (material changes; working conditions) and Article 84.1(a) (Step 2 for appeals against discipline) and (b) (certain appeals relating to discharge, suspension, restriction and conditions of “mobile accommodation”). The Company noted it raised its objection in 2016 when the Grievance was filed; that it lost two opportunities to settle the Grievance when it was commenced at Step 3; and that

this was a “fatal procedural error”, which in principle was similar to that considered in **AH665**.

[10] It was the Company’s position that an Arbitrator appointed under the Memorandum Establishing the CROA & DR (the “CROA Agreement”) only has jurisdiction for those cases properly processed through the grievance procedure: items 6 and 9, so to accept jurisdiction would act to modify the collective agreement in contravention of item 14. It further argued there was no harm to the Union if the preliminary objection was accepted, as the parties were moving into bargaining at the end of November 2023 and the Union would be free to negotiate the provision at bargaining.

[11] I note that the Collective Agreement was amended in 2019 to allow grievances which affect multiple employees to be filed at Step 3[3], so this last argument of the Company is moot. This is an issue that is limited in time to a grievance such as this one, filed before that amendment.

[12] The Company also relied on **CROA 4658** and **4659** which interpreted provisions in Agreement 4.3, which it argued were “nearly identical” to those in Article 84.1(a) and (b).

[13] In its response to this objection, the Union argued the Company carries the onus to establish there is no jurisdiction.

[14] The Union argued grievances are to be construed liberally in arbitration as noted in *Re Blouin Drywall Contractors Ltd. v. C.J.A., Local 2486*[4]*,* and that the grievance procedure is also to be construed broadly and liberally: *Re Communications Union Canada and Bell Canada*[5]*;* It relied on *Parry Sound and OPSEU* for a broad interpretation where the employer suffers no prejudice.

[15] It noted the Company’s objection was never particularized prior to the filing of its Brief for this hearing – even though the Union had filed its *ex parte* Statement of Issue in 2016 – since the Company only filed its *ex parte* Statement of Issue two days before Briefs were due for this hearing, in late 2023.

[3] Article 84.2; Note 2
[4] (1975) 8 O.R. (2d) 103.
[5] (1976) 71 D.L.R. (3d) 632.

[16] The Union argued that Article 84.2 used the permissive language of "may" when referring to the various steps, and not the mandatory "shall" of Article 84.1, which gave it the ability to file this Grievance at Step 3. The Union also noted that the CROA rules provide jurisdiction to the Arbitrator over this Grievance by virtue of items 6(A) and 9, as the Grievance *was* processed through the "last" step of the Grievance procedure, which was Step 3.

[17] In the alternative, the Union argued the doctrines of waiver and estoppel prevented the Company from objecting to this Grievance being filed at Step 3.

[18] It argued the Company has a consistent and longstanding practice of not strictly applying alleged "mandatory" collective agreement articles relating to the processing of grievances at Step 3. The Union argued that for many decades it has consistently initiated Grievances at the General Chairperson's level by way of a policy grievance at Step 3. It urged the past practice between the parties reflected that the Company has accepted grievances filed at Step 3 multiple times, including only months before this grievance was filed. The Union argued it relied on this action in continuing to bring such grievances at the Step 3 level, leading to estoppel by conduct. It argued this action also supports the Union's interpretation of Article 84; and also establishes waiver.

[19] The Union relied on two other grievances and responses as examples of this practice, where the Company has not raised objection when a grievance was filed at Step 3. One was in close proximity in time (several months before) to when this grievance was filed. It also relied on **CROA 3467**, where Arbitrator Picher dismissed the Company's preliminary objection of filing at Step 3 where it was alleged the grievance wasn't particularized; where no issue with filing at Step 3 was raised; and **CROA 3444**, which was another grievance which it argued was commenced at Step 3 by the Union, and which proceeded without objection.

[20] The Union has argued it has suffered prejudice since the Company failed to particularize its objection until two days before Briefs were due, including prejudice from an inability to secure witnesses to establish estoppel and/or waiver, if necessary. It noted that CROA Rules require that the Office be advised of the need

for witnesses when cases are scheduled. However, as the Company did not file its *ex parte* Statement of Issue until one month after the case was scheduled, the Union could not schedule witnesses.

[21] In its Rebuttal argument, the Company argued that the preliminary objection was a matter of jurisdiction rather than a defect in form as argued by the Union; that it had not waived its right to bring the preliminary objection nor is it estopped from doing so as it clearly and unequivocally raised the preliminary objection seven years ago, in its Step 3 response; that the reference to processing through the "last" stage of the Grievance Procedure impliedly included "all" stages of the Grievance Procedure; that the use in Article 84.2(b) and (c) of the word "may" cannot mean that a grievance can be initiated at *any* Step of the Grievance Procedure, as that would run contrary to the fundamental purpose of *having* a Grievance Procedure; rather the permissive language means the Union "may" or "may not" escalate a grievance to the next step; that the Union was not left without an ability to access a Grievance Procedure, but rather was required to comply with that Procedure to obtain that access; and that the Company had very little notice this case was be finally proceeding, leading to its late filing of the *ex parte* Statement of Issue. It distinguished the two additional grievances relied on by the Union as insufficient to establish waiver/estoppel. It also noted those cases predate the decision in **CROA 4658/4659**.

[22] In its Rebuttal, the Union argued that the Company's argument does not reflect the facts of the past practice between the parties, which is that the Company has accepted grievances filed at Step 3 multiple times in the past and responded to those grievances without objection, including only months before this Grievance was filed; that this supports both the Union's interpretation of Article 84 and its argument for waiver/estoppel; and that the Company's internal Grievance Tracking System ("GTS") was developed by the Company to comply with its obligations, and accepted the Grievance and other Grievances filed at Step 3 up to the current date.

[23] The Union distinguished **CROA 4658/4659** as being based on a different agreement, a different issue, without benefit of the Union's current submissions

and/or argued it was wrongly decided and urged it should not be followed. It urged the Company had not met its burden of proof for its objection.

Analysis & Decision

[24] As noted above, three years after this Grievance was filed, Agreement 4.16 was specifically amended by the parties to allow certain grievances – including Grievances such as this one – to be filed at Step 3. "Note 2" after Article 84.2 now states:

> A grievance processed against Company practices and procedures that affect multiple members will be initiated at Step 3 of the Grievance Procedure (Item 19 – Nov 2019 MOA)

[25] However, that Note did not exist in late 2015, when this Grievance was filed.

*The Impact of **CROA 4658/4659***

[26] I will first address the Company's reliance on **CROA 4658/4659** (contained in one decision, issued in February of 2019). I do not agree with the Company that it is dispositive of this Grievance, as the *ratio* of those decisions is quite narrow, and the reasoning brief.

[27] In those two grievances – as in the one before me – the Company filed an objection to the arbitrability of the Grievance. The CROA Agreement was also raised by the Company in that case. Estoppel, delay and bad faith were argued by the Union, in addition to Article 152. That Article allowed the General Chairperson to file a Grievance at *any* stage of the Grievance Procedure and in particular at Step 3, since that Article made reference to the ability of the General Chairperson to file grievances at Step 3. The Company argued that Article only allowed filing at that level in cases alleging harassment and intimidation. The Arbitrator noted that Article 152 was the "principal argument" of the Union.

[28] The Arbitrator in those two cases spent the majority of his reasoning addressing the Article 152, which he found was narrow in scope and limited to cases of intimidation and harassment. He held that to find otherwise would violate the "clear and specific language" of the Collective Agreement. He held the wording of the grievance

procedure was both "specific and mandatory" and that the Union had an obligation to comply with the "strict and clear provisions of Article 121.1". Arbitrator Hornung stated:

> My jurisdiction has been clearly circumscribed by the parties in Sections 6 and 9 CROA & DR. Given that the Union has failed to comply with the requirements of Article 121.1 and that my jurisdiction is "…conditioned upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this agreement", I lack jurisdiction to hear these matters.[6]

[29] Article 85.5 in this Agreement does not provide any similar right to the General Chairman to bring Grievances at Step 3, so that Article does not provide any support for the Union's argument. A requirement to act "reasonably" in Article 85.5 does not extend to allowing the General Chairperson to file grievances at a Step other than what is required.

[30] I also cannot agree with the Union that the use of the word "may" is permissive as to which Step can be used by the General Chairperson. Rather, I agree this allows the Union to determine whether or not to file and/or progress a grievance; and not that it can choose a particular step other than as set out in Article 84.1. If that were the case, then the word 'shall' would be stripped of all meaning, and Article 84.1 would be redundant. The principles of contract interpretation require an interpretation that allows all clauses to have meaning.

[31] In finding in favour of the Company, also Arbitrator Hornung found the evidence was *insufficient* to establish estoppel or bad faith. However, in doing so, he did not outline *what* evidence of estoppel had been filed before him, rather, his reasoning was limited to a finding in one sentence that estoppel had not been established. Given the brevity of that reasoning, this decision does not provide direction when issues of estoppel have been raised. Whether or not estoppel or waiver can be established is – in large part – a factual question.

[32] As far as it goes, I disagree with the Union that **CROA 4658/4659** was "wrongly decided". Like Arbitrator Hornung, I am prepared to find that the language in

[6] At p. 12

Agreement 4.16 is both "specific and mandatory" relating to the advancement of grievances. Article 84.1 states that grievances "shall be processed in accordance with paragraph 84.2 except….". The word "shall" is mandatory. The fact that the parties specifically contemplated in Articles 84.1 and 79.7 which grievances *could* be advanced at a Step other than Step 1 supports that the parties had turned their collective minds to that issue and set out the circumstances where such a filing could occur.

[33] In **CROA 4106** Arbitrator Picher noted that "there is no language in Addendum 95 to suggest that the normal Steps of the grievance procedure can be ignored". He also commented on the purpose of proceeding through the steps of the grievance procedure:

> In Canadian collective bargaining the grievance procedure is well recognized to be intended to assist in identifying issues and, if possible, resolving them through whole or partial settlements or, in the vent they are found to be without merit, their possible withdrawal by the Union. In my view the parties should be presumed to have wanted to preserve that exercise for all grievances….

[34] I should also note that I disagree the Company's system for the filing of grievances can give to the Union any greater rights than it has under the Collective Agreement. It is that agreement – and not the Company's system – that governs.

Waiver and Estoppel

[35] *However*, that finding does not resolve the issues between these parties, in this case. The Union has also argued waiver and estoppel. It must be emphasized these are two different legal concepts, with different elements that must be established.

[36] Considering first waiver, I cannot agree a waiver has been established. As noted by Brown & Beatty, a waiver holds that by failing to make a timely objection and "by treating the grievance on its merits in the presence of a clear procedural defect, the party waives the defect".[7] In this case, shortly after the Grievance was filed, the Company noted its objection. That objection prevented the application of waiver in this case.

[7] *Brown & Beatty,* Section 2:63

[37] The Union has also argued the Company is estopped by its words and its conduct from insisting on strict adherence to the filing of this Grievance at Step 3.

[38] Estoppel is an equitable doctrine which applies when one party in a legal relationship has acted in a way that has led the other party to believe that it would *not* rely on a particular right, and the second party has relied on that representation, to its detriment. Estoppel holds that in such cases, it would not be equitable to allow the first party to then raise that right against the second party.

[39] Estoppel requires both an action(s) on the part of the Company and detrimental reliance by the Union. It can be established by words or by conduct. Whether it has been established is a factual determination. Estoppel is also one of the narrow exceptions for the consideration of extrinsic evidence in contract interpretation[8]. It allows the past practices of the parties to be examined, but only to determine whether estoppel is established.

[40] I have carefully considered the evidence of the Union advanced on this point. I am in agreement with the Union that it has established the Company is estopped from insisting the Union file this Grievance at Step 1.

[41] To support is argument, the Union relied on jurisprudence between the parties where a grievance was filed at Step 3 and accepted by the Company: **CROA 3467** and **3444**. It also referred to a grievance filed in April 2009 and a Grievance filed May 6, 2009 at Step 3 and responded to by the Company – without objection – on July 16, 2015, which was only four months before this Grievance was filed. It also relied on two letters between the parties. The Company did not file any evidence relating to the estoppel argument. That evidence could have included grievance responses where it took the position a grievance impacting multiple individuals could not be filed at Step 3 but must be processed through Step 1. That evidence was lacking.

[42] Considering first the Union's examples of jurisprudence where no preliminary objection was made by the Company, **CROA 3467** relates to the filing of a "policy"

[8] See **CROA 4884** for discussion of those principles.

grievance", at Step 3, by way of a letter from the General Chairperson to the Vice-President for Eastern Canada (Step 3 provides for a grievance to be advanced to the Vice-President). While the Company filed a preliminary objection, that objection related only to "insufficient specificity". The Company did not otherwise raise an issue that this "policy" grievance could not be filed at Step 3.

[43] The issue before the arbitrator was "whether the grievance letter contains information sufficient to present an arbitrable issue" (at p. 4). The Arbitrator noted the "matter is brought forward as a policy grievance with the obvious intention of resolving the issue of principle first reserving the right to then advance specific claims in response of individuals who may have been adversely impacted" (at p. 6). The Arbitrator was alive that this grievance was filed at Step 3, noting there was a risk of an adjournment as a result (but not an issue of jurisdiction). He was satisfied the issue was sufficiently set out to satisfy the requirements of the CROA Agreement:

> In the Arbitrator's view the foregoing ***does satisfy the requirements of this Office and sufficiently states an arbitrable issue to be heard.*** **The Union must, of course appreciate that commencing a grievance at Step 3 and failing to provide sufficient particulars will place the matter at risk of being adjourned upon the request of the employer**; pending a direction by the Arbitrator that the Union should provide further particulars. That, however, has not arisen in the case at hand[9].

[44] While the Company has argued this was decided *before* **CROA 4658/4659**, there are three answers to this argument.

[45] First, while there is no *stare decisis* in labour arbitration, if an Arbitrator deliberately chooses not to follow another decision between the same parties relating to the same issue, jurisprudence requires that the Arbitrator clearly explain that choice, as arbitrators do not lightly choose to disregard other relevant decisions between the same parties.[10] There is no such explanation in **CROA 4658/4659.** I am satisfied Arbitrator Hornung was not made aware of **CROA 3467** and was not by his finding intending to over-rule that earlier decision which found a direct filing at Step 3

[9] At p. 8, emphasis added.
[10] See for example a reference to this respect in **AH816**, paragraph 28.

satisfied the requirements of the CROA Agreement and did not raise an issue of jurisdiction under the CROA Agreement. In this expedited process, that can easily occur. Had he intended to overrule that earlier finding, as an experienced Arbitrator I am satisfied he would have provided more expansive reasons.

[46] Second, reviewing the CROA Agreement, I am satisfied it requires that a dispute must be processed through the "last step" of the grievance procedure before it can be heard, which – if the Company is estopped – is Step 3[11]. I am further satisfied it is the intention of the CROA Agreement to support that grievance procedure. The grievance procedure provides to the parties the ability to discuss their dispute and narrow the issues brought to arbitration. It is an important and key step to effective labour relations. That process also provides an opportunity for the parties' to resolve a dispute before it reaches this Office. Once at this Office, the grievance procedure provides an important part of the record Arbitrators are entitled to rely upon to determine the issues. Parties are of course free to raise a preliminary objection that the grievance procedure was not complied with – even if the final step was reached – and therefore the issue is not properly before this Office (as occurred in this case), but it will be the requirements of that procedure in that agreement - and not the CROA Agreement – that will apply to determine jurisdiction.

[47] Thirdly, **CROA 3467** was offered by the Union to demonstrate that the Company has acted in a manner *inconsistent* with the position it is now taking, being that the Union must file this "policy" type grievance at Step 1. That case *does* advance that proposition, precisely because the Company failed to raise that objection, in that case.

[48] I do not therefore find that **CROA 4658/4659** has in any way "over ruled" **CROA 3467.**

[49] In **CROA 3444**, it was not clear at what Step the Union filed the grievance, so I do not find that case helpful to the Union's arguments.

[11] Item 9

[50] Turning to the examples provided of two other grievances filed by the General Chairman to a Senior VP of the Company (which is Step 3) to demonstrate the Company's response, in one case, the Company's answer to the grievance was offered *after* its answer in this case (and six years after the grievance was originally filed at Step 3), so that is not relevant or applicable. The conduct must occur *before* the grievance is filed to estop the Company.

[51] However, the second example does again demonstrate the Company accepted a "policy" type grievance at Step 3. In that case, the grievance was filed May 26, 2009 *by a letter to the Senior VP – Eastern Canada from the General Chairman*, regarding the creation of Utility positions. Step 1 would have required that it be filed to the "immediate supervisor", which would be very difficult for a policy grievance, which impacts multiple individuals, as it is not clear "who" the immediate supervisor would have been for a grievance filed against the establishment of a Utility position. While the Company raised an objection regarding *timeliness*, it did not raise an objection that the Grievance was filed inappropriately when it was not filed at Step 1 but commenced by a letter directly from the General Chairman to the Senior VP at Step 3.

[52] That grievance response was provided only a few months *before* the Grievance was filed in this case. I agree with the Union that this timing is relevant.

[53] As noted above, the Company did not provide evidence to rebut that of the Union and support its position that it was not estopped from insisting the Grievance be filed at Step 1. That evidence could have included grievance responses before this case, raising objection to the General Chairman filing grievances by letters to the Senior VP at Step 3 and arguing that these "policy" issues must be processed through Steps 1 and 2. This evidence was lacking.

[54] Turning to the issue of detrimental reliance, the Union has argued prejudice from the late filing of the Company's *exparte* Statement of Issue. I do not agree the Union has been prejudiced regarding an inability to gather evidence to establish an estoppel – since the Company first raised its objection in 2015 and the Union has had ample time to gather its evidence. At that point the Union was put on notice

that the Company would be taking the position the Grievance was not properly filed. The Union could have requested that the case be docketed to allow it to bring witnesses to establish an estoppel by conduct. I fail to see any other particulars that the Union required before it could do so.

[55] However, I *am* satisfied that there has been detrimental reliance by the Union on the Company's unequivocal conduct. In this case, when the Company first raised its objection on February 11, 2016 to the Union's grievance, that objection was raised well beyond 60 days from the time of the alleged contravention of the Collective Agreement[12]. The Union was then not then in a position to bring a Step 1 grievance to respond to the Company's objection, as it was out of time. The Union's reliance on the Company's acceptance of "policy" grievances at Step 3 was therefore detrimental to the Union's ability to advance this Grievance.

Conclusion on Preliminary Objection

[56] From a review of the totality of evidence, I am satisfied the elements of estoppel have been established by the Union: The Company has acted in a manner which is inconsistent with its insistence that all grievances must be commenced at Step 1.

[57] I am further satisfied this action induced the Union to believe the Company would not insist on strict adherence to a requirement that "policy" type grievances – which have implications for many employees – must be filed at Step 1. I am satisfied the Union relied on these actions, to its detriment.

[58] The Preliminary Objection is over-ruled.

The Merits

Issues and Summary

[59] The issue relating to the merits of the Grievance are:

a. Was the Company in breach of Article 96.2(1) when it failed to provide the Grievor his PLD under these circumstances?

[12] As required by Article 84.2

[60] For the reasons which follow, the Grievance is allowed. The Company has breached Article 96.2(1). While the Company can call the Grievor in to work *during* the notice period for a PLD, he must be assigned work that can be *completed by the time his PLD is to begin.*

[61] Any other interpretation would render 96.2(1) meaningless.

Analysis

[62] As noted in **CROA 4884**, the rules of contract interpretation require that primacy be given to the words the parties chose to ink their deal, which are considered within the broader context under which they were negotiated, and given any specialized meaning that is apparent. A purposive approach is to be applied to the interpretive task.[13]

[63] While surrounding circumstances are relevant and must always be considered as part of the "factual matrix", the Supreme Court of Canada has directed what types of facts are appropriately considered as "surrounding circumstances".[14] While there is no *stare decisis* for arbitral jurisprudence, the prior arbitral awards between the parties are one example of a relevant "surrounding circumstance", as is the industry in which the parties operate.

[64] Extrinsic evidence is only appropriately considered in narrow circumstances, such as where a provision is ambiguous – which is were a provision is reasonably susceptible to more than one meaning. Difficulty of interpretation is not ambiguity.[15] The subjective intentions of the parties regarding meaning are never relevant and are inadmissible.

[65] It is not the task of a rights arbitrator to make a different deal for the parties. As noted in *Service Employees International Union, Local 1* v. *Bluewater Health:*

> The task of a rights arbitrator is to determine what the collective agreement provides or requires, not what he or one of the parties thinks it should say, regardless of the apparent fairness of the effect on either party or on bargaining

[13] See **CROA 4884** or a more fulsome explanation of these principles, and a discussion of the types of facts which qualify as "surrounding circumstances" that must always be considered.
[14] As discussed in detail **in CROA 4884**.
[15] *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing* 2017 ABCA 157, at para. 87

> unit employees. The parties are entitled to no more or less than what the collective agreement stipulates, and clear wording triumphs all considerations other than legislation…[16]

[66] This limitation has also been expressed in jurisprudence in this industry: *CP Railway v. TCRC (Unassigned Pool and Spareboard Employees)*[17], where Arbitrator Stout noted that it was "not the role of a rights arbitrator to set public policy or rewrite the parties' collective agreement". The same comments were made in **AH569** and **AH816.**

[67] Turning to the language chosen by the parties, the first sentence of Article 96.1 states: "Employees ***will, at their discretion***, be entitled to take up to and including a maximum of 12 cumulative unpaid personal leave days per calendar year….".

[68] In that same first paragraph, the parties agreed "Employees may, **at their discretion**, **activate their entitlement to leave days**, jointly or severally up to the cumulative maximum"[18].

[69] "*Will*" is mandatory language. The next question is: "Will" what? *"will at their discretion be entitled to take up to and including a maximum of 12 cumulative unpaid personal leave days per calendar year*" and "may, at their discretion, activate their entitlement…".

[70] I am satisfied "their discretion" refers to the discretion to be exercised by the employee, to use a PLD.

[71] Article 96.2 then refers to the "Notice" to be given by that employee – which I am satisfied serves to "activate" their entitlement. That Notice depends on how many days are required to be taken.

[72] Article 96.2(1) states that "One day (24 hours) – upon four hours notification prior to the commencement of such leave time". There is also provision for taking "two or three consecutive calendar days" (96.2(2)); "Four consecutive calendar days but

[16] At para. 23
[17] July 6, 2016; Union Tab 29 at p, 30
[18] Emphasis added.

less than seven…" (96.2(3)); and "Seven consecutive calendar days or more" (96.2(4)).

[73] A "blackout period" between December 20th and December 31st is indicated in "Note 1". Note 2 provides to for the establishment of PLD "allotments" at each terminal using an included formula.

[74] That is all that that Article 96 states.

[75] A clause is only ambiguous if it is "reasonably susceptible of more than one meaning".[19] I am not satisfied these words are reasonably susceptible to more than one meaning. I am persuaded by the Union that the words used in Article 96 are clear and unambiguous and am persuaded the Union's interpretation demonstrates the parties' objective and mutual intent.

[76] Giving those words their plain and ordinary meaning, those words provide considerable discretion to an employee to take a PLD day, once two criteria are satisfied: a) an allotment for such a day must be available; and b) notice must be given as provided in the Article. I am satisfied the Company only negotiated flexibility from the requirement of *notice*, and not by retaining any ability to call an employee to work *over* their PLD day, so long as that call to work is made during the notice period.

[77] To find a competing meaning, I would have to imply a discretion to the Company to which the parties did not agree. I note specifically that the parties did not negotiate any limitation on the ability of an employee to take that PLD – such as that "regard must be given to the requirements of the Company's operations", or that the "Company retains discretion as to whether the PLD is granted and must exercise that discretion reasonably", as they could have done, and as is often seen.

[78] The Company relied on its general management right to direct its workforce, in requiring working through the notice period. While I agree with the Company's ability to exercise its management rights generally, that is only the case if it has not

[19] *IFP Technologies (Canada) Inc. v. EnCana Midstream* at para. 87

otherwise fettered those rights. A party is always able to fetter any right which it has, by what it chooses to agree to, in a Collective Agreement.

[79] In Article 96.2(1), the Company agreed to a "four hour" notice period to be given by an employee to use a PLD. It did not need to do so. It could have required that such days could *only* be used with *greater than* 24 hours notice, if it required that scheduling flexibility. It did not negotiate that flexibility. The Company could have also retained discretion to itself to determine if a PLD could be appropriately taken, given the demands of the Company's service. It did not retain negotiate that flexibility, either.

[80] In my view, the Company has fettered its right to call an employee to work *over* the time a PLD is to start. While I agree with the Company that an employee is "available for work" *during* the four hour notice period, they are not "available for work" *beyond* that four hour notice period, as they are to be on a PLD at that point in time, having given the appropriate notice.

[81] The Company has also argued the Union's interpretation would not make sense given the Company's industry - as it is very difficult to find "short service" work of four hours or less. That may well be, but the Company must be held to what it chose to negotiate – for its own reasons – in Article 96. It is not for an Arbitrator to speculate why the Company failed to retain the flexibility it now argues it requires.

[82] If the Company's interpretation were to be preferred – that it could call an employee in to work even if that work continued *past* the notice period and into the PLD - then Article 96.2(1) would be rendered meaningless. The Company could always circumvent that day by assigning the employee work which extended *beyond* the notice period, so long as it did so before the PLD was due to start. That would result in an "empty" ability to use a PLD on four hours' notice. It is a fundamental canon of construction in contract interpretation that an interpretation must not be preferred which renders the words used by the parties meaningless.

[83] As the Company's argument would strip Article 96.2(1) of any meaning – and I have found the Company did not retain discretion as argued – I cannot accept the Company's interpretation reflected the parties' mutual objective intention.

[84] While the parties referred to correspondence at the hearing between them dating from months *after* the MOA was negotiated (in August of 2005) as to what the clause requires, I am restricted from considering that evidence. That correspondence is not a surrounding circumstance that can aid my interpretation, given its timing from well *after* the MOA clause was negotiated. Such correspondence is not evidence of uncontroversial background facts stemming *from when the contract was negotiated,* and so part of the factual matrix that gives context to meaning[20]*.* In its Reply, the Company also provided emails from October 2005 as to what it considered it was required to do, but that evidence suffers the same restriction.

[85] Correspondence from *after* a contract is negotiated, discussing how the provisions *should* be interpreted – or what the parties *intended* the terms to mean – would be considered as either extrinsic evidence which offends the parol evidence rule where no ambiguity is found, *or* as evidence of subjective intentions, which is never admissible as it is irrelevant[21]. Either way, it is not part of the factual matrix that can be considered to determine meaning, in this case.

[86] A rights arbitrator has no jurisdiction to create a new deal for the parties. As was noted by Arbitrator Picher in **AH569**[22], "[a]ny adjustment in that circumstance must be a matter for negotiation, and not for arbitration".

Conclusion

[87] For the foregoing reasons, the Grievance is allowed.

[88] I find and declare the Company breached Article 96 of the Collective Agreement when it required the Grievor to work beyond the time when his PLD was due to begin.

[89] The PLD provisions were newly added to the Agreement in 2005. The provisions have been subject to several arbitration decisions to determine what the parties objectively meant. While I have found the Company does not have discretion to

[20] As required by the Supreme Court of Canada; see the analysis in **CROA 4884.**
[21] See the analysis of contractual interpretation principles from both the level of the Supreme Court and the Appellate level, in **CROA 4884**
[22] A similar comment was made by Arbitrator Stout in **AH816**.

require an employee to work beyond when a PLD is to begin, I accept that these newer provisions were reasonably subject to interpretation. I therefore do not agree that this is an appropriate case for a damages remedy under Addendum 123 or for a cease and desist order to issue. I am satisfied that declaratory relief will bring about the required compliance.

[90] However, the Grievor was also inconvenienced by this breach of contract and could not take his personal leave day as he was entitled to do under the Collective Agreement. As a remedy for his inconvenience, I award one extra PLD day to be added to the Grievor's credit, and subject to the same notice provisions in Article 96 as if it were issued under that Article.

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

March 7, 2024

CHERYL YINGST BARTEL
ARBITRATOR