CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5138

Heard in Montreal, February 11, 2025

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Remedy and Policy Grievance on behalf of all Conductors in Winnipeg, MB and specifically, Yard Operating Employee Jadon Howarth (183580) who was allegedly directed to violate Addendum 54B of Agreement 4.3

JOINT STATEMENT OF ISSUE:

On October 10, 2021, Conductor Howarth (the Grievor) was called for service on the 0001 hump assignment, Y5XF01. At approximately 0215 the Grievor was instructed to pull track WR06 for the purposes of humping. After humping half of the track, the Grievor was instructed to switch the car DTTX 888929 (three pack intermodal car) and spot it into track WI02.

It is the Union's position that the duties allowable while working as a Yard Operating Employee (YOE) are expressly limited to that required to purely hump cars. The agreement contains specific mention that the only manner to deviate from those strict limitations is through the use of a second employee, called as a Utility Person. The Grievor was required to switch a car from the cut of cars being humped and spot it to its end destination, Winnipeg Intermodal yard without the aid of a Utility Person.

The working conditions and provisions related to Addendum 54B have been discussed and reviewed many times. The Union contends there is no reasonable vein of thought that could lend credence that the Company unknowingly violated Addendum 54B. It is the Union's position the Company had complete disregard for the Grievor's collective rights and intentionally violated the negotiated provisions in favor of operation ease.

The Union request a cease and desist be issues compelling the Company to adhere to the clear and unambiguous provisions of Addendum 54B. Furthermore, the Company cannot be trusted in good faith to guarantee there will be no future violations. As such, the Union requests a suitable and substantial remedy be afforded to the Grievor and be applicable to grievances akin to the instant matter, and other violations of Addendum 54B.

The Company maintains the instructions provided to the Grievor were within the confines of Addendum 54B. The language expressly allows for a Do Not Hump car to be set out, which is what took place in the instant matter. The car in question was a Do Not Hump car and was set

out, in accordance with the provisions of Addendum 54B. The Union has failed to provide any evidence to support their conjecture that the car was not a Do Not Hump nor have they provided any evidence to support their assertion the car was intended for track WI02 in Winnipeg Intermodal Yard.

The Company maintains there has been no violation of Addendum 54B and the Union's requests for a cease-and-desist order and for a remedy are egregious and unnecessary.

For the Union:	**For the Company:**
(SGD.) R. Donegan	**(SGD.) J. Girard**
General Chairperson	Senior Vice President, Human Resources

There appeared on behalf of the Company:

F. Daignault	– Director Labour Relations, Montreal
A. Abdulle	– Superintendent Transportation, Winnipeg

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Thorbjornsen	– Vice General Chairperson, Saskatoon
J. Smith	– Local Chairperson, Winnipeg
M. Anderson	– Vice General Chairperson, Edmonton

AWARD OF THE ARBITRATOR

Context

1. This matter concerns a claim from October 2021 for a contested hump switching movement in Winnipeg. The Union claims that the movement took place contrary to Addendum 54B, which permits limited exceptions for work to be done by a one person Yard Operations Employee, when normally the work in the yard is done by a two-person crew, or with the assistance of a Utility crew employee. The Union alleges that the Grievor was required to spot a Do Not Hump intermodal flat car some distance from the Hump, rather than merely setting the car aside.

2. The Company contests the violation of Addendum 54B, alleging that there is no evidence that the car was spotted, rather than merely set aside.

Issues

A. Preliminary objection by the Company as to whether the matter is arbitrable;
B. Interpretation of Addendum 54B;
C. Application of Addendum 54B to the movement;
D. What remedy is appropriate in the circumstances?

A. Preliminary objection by the Company as to whether the matter is arbitrable

Position of Parties

3. The Union seeks to correct a date in the grievances and JSI, from October 10, 2021 to October 13, 2021.

4. The Company takes the position that this is a new grievance, which has failed to be advanced in a timely manner under article 121.4 of the Collective Agreement and is therefore settled. It also argues that the Union attempt to amend the signed JSI amounts to a new issue at the last minute, contrary to the CROA Rules and jurisprudence (see **CROA 3265, SHP 519, SHP 476, AH 281, CROA 4538** and **AH 660**).

5. The Union argues that this is a clerical error, does not raise any novel issue and has caused no prejudice to the Company. It invokes the broad discretion of an arbitrator under s. 60 of the Canada Labour Code and relies on Court and arbitral decisions holding that cases should not be decided on technicalities of form but should proceed on the merits (see **Blouin Drywall Contractors Ltd v. CJA, Local 2468** 8 OR (2d) 103 (Ont. C.A.); **ACCESS for New Canadians and Opseu, Local 512**, 1996 CarswellOnt 6550, **Coca-Cola Bottling Ltd. and UFCW, Local 393W**, CarswellOnt 9146).

Analysis and Decision

6. There is no doubt that the grievance letter filed by the Union contained an incorrect date. It is true that the grievance tracking system contained the correct date, but this is a secondary document as compared to the grievance or the JSI.

7. There is also no doubt that the error could have been discovered and corrected far earlier, had the Company responded to the grievance in a timely manner, rather than only on January 31, 2025, some 3 years after the initial grievance.

8. It does not appear that the Company has suffered any prejudice from the mistaken date, as it was able to locate the intermodal flat car in its records. It also does not appear that information, or lack of information, about the availability of tracks adjacent to the Hump has been affected by the change of date of the movement.

9. I do not find that a correction to the date of the movement amounts to a new grievance, or to a novel fact or claim, contrary to CROA Rules and jurisprudence. Both Parties were well aware of the nature and key facts in dispute. The cases cited by the

Company deal with entirely new claims, taking the other Party by surprise and causing prejudice. In contrast, this is not an entirely new claim, does not take the Company by surprise and causes little if any prejudice. Arbitrators do have broad discretion under s. 60 of the Code and I find it would be appropriate to exercise it here.

10. Accordingly, the Preliminary Objection is dismissed.

B. Interpretation of Addendum 54B

Position of Parties

11. There is little or no dispute between the Parties as to the applicable rules of contract interpretation. They also agree that the terms of Addendum 54B are clear, the Parties are sophisticated, and that the clear words of the Agreement must apply.

12. The Parties disagree, however, on the application of the terms of Addendum 54B to the facts of the case. This will be discussed in the following section.

Analysis and Decision

13. In **CROA 4881** and **CROA 4884**, Arbitrator Yingst Bartel reviewed contract interpretation principles as set out by the Courts and in arbitral jurisprudence. In **CROA 4881** she noted:

> [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 where 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

14. In **CROA 4884**, she reviewed the facts which can be considered as "surrounding circumstances", as determined by the Supreme Court of Canada:

> [32] However, the limitations of what type of facts can be considered as "surrounding circumstances" - or part of the "factual matrix" - were also clarified by the Supreme Court. These facts must be:
>
> - "uncontroversial" to the parties;
> - "Known to the parties at the relevant time" [when the contract was negotiated] and
> - "Capable of affecting how a reasonable person would understand the language of the document"9.

15. The factual matrix would include a common understanding of what constitutes different kinds of switching. The Parties agree on the distinction between "flat switching" and "hump switching". As noted by the Union at paragraph 12 of their Brief:

> 12. Flat switching involves moving rail cars individually or in small groups between tracks in a yard by using a locomotive (often remote controlled) to push or pull cars into each track as required to assemble trains or to place the cars for loading, unloading, or repairs. Flat switching work is done at relatively low speeds and can be relatively labor-intensive. This is because it involves: multiple back-and-forth movements of the locomotive; operating track switches and/or derails; ensuring that tracks to be used are clear and have room to hold the cars, and; often requires precise control of each rail car's movement.

16. The surrounding circumstances would also include the history of hump switching. The Company sets out at paragraphs 20-31 of its Brief the history of technological improvements in switching and the collective agreements negotiated and imposed to deal with these material changes. The decision of Arbitrator Picher in **AH 257** dealt with the introduction of the Hump in Winnipeg and the material change provision of the Collective Agreement. Arbitrator Picher notes the significant impact on employment caused by this technological change:

> Negotiations between the parties began in April of 1988 in an effort to reach agreement on the measures to minimize the adverse effects on employees resulting from the material change in working conditions at Symington. The notice to the Union and the

> ensuing process of negotiation was prompted by the introduction of a computerized Process Control System (PCS) at Symington Hump Yard. Whereas the assembly and dis-assembly of train consists at the Yard used to require a two-person crew consist of one yard foreman and one car retarder operator, working in tandem with a locomotive Engineer, the automated PC system allows one person, working with the assistance of a computer and occupying the newly-designated classification of Hump Foreman, to work alone, along with the locomotive engineer, to perform the functions previously accomplished by two yard employees. Although it is not material to this dispute, it is common ground that eventually, with the introduction of fully automated locomotives in the Hump Yard, it is contemplated that the Hump Foreman will perform the function of all three employees, controlling the movements of the locomotive by means of a portable remote-control mechanism.

17. The end result is that flat switching is done with at least two crew, while hump switching is done with one. Arbitrator Picher notes the tension between the Company's desire for efficiency and the Union's desire to protect employment:

> I turn to consider the merits of the dispute. The issues raised are of substantial importance to both parties. The ability of the Company, on the one hand, to implement technological and organizational changes to keep its enterprise efficient and safe while maximizing profitability is no less a legitimate concern than is the Union's desire to ensure that employees adversely impacted by such changes are afforded the greatest possible protection in the face of the dislocation that is ultimately inevitable.

18. Hump switching is specifically dealt with in Addendum 54 B, which reads as follows:

> This is in response to the concerns raised with respect to the duties of the Hump assignments at Symington Yard. In this regard the Company will require these assignments to perform the following work:
>
> 1. Humping.
> 2. Pulling trains or cuts of cars to hump.
> 3. Setting out bad order and "Do Not Hump" cars.
> 4. Shove humped cars which failed to clear the lead.
> 5. Shove or kick cars with engine only to make room in the class tracks, provided protection pursuant to Rule 103 is provided by the Yardmaster.

19. The key provision for this matter is the interpretation and application of: "Setting out … "Do Not Hump" cars, as part of the hump assignment.

20. The Parties agree that the terms of the Agreement are clear and must be applied. I agree. The meaning of the term “setting out” must be found by applying a purposive approach, in light of the surrounding circumstances. Here, the material change provision resulted in significant increased efficiencies, but also significant job loss. The Parties must have intended that such changes would be limited to necessary adjustments caused by that material change. It was not an opportunity to institute widespread change to the working relationship of the Parties throughout the Yard. The intention of the Parties must have been that the “setting out” be an exception to the hump work, permitting limited flat switching. To be otherwise, a single hump employee could displace the usual two person crews outside the hump operation.

21. If the flat switching by a single Hump employee was intended to be limited, the Parties must have intended that the “Do Not Hump” cars be placed in the nearest available track to the Hump, permitting the Hump employee to get back to his core functions.

22. If the car needed to be moved further, Yard crews could perform the work, or a Utility person could be added to assist the hump employee. It is noteworthy that the Parties agreed that a Utility person could be called to assist the hump employee. This is set out in the March 4, 2000 letter of the Company:

> This has reference to our meeting on January 31, 2000 regarding the grievances surrounding the application of Addendum 54 of Agreement 4.3. The intent of the meeting was to clarify the duties required of the Symington Hump assignments in an effort to improve the flexibility in these assignments to better suit present operating requirements. The parties have agreed to the following:
> […]
> b. Should the Company determine that the services of the Utility person are required to assist the regular hump assignment, a spare employee will be called. When a Utility person forms part of the Hump crew, there will be no restrictions on the duties this assignment may be required to perform.
>
> If his/her services are required elsewhere during the shift for any reason, the Utilityperson may be reassigned at any time without restrictions.

23. This letter recognizes that the Hump employee has restrictions on his duties when working alone. It also recognizes that an additional employee may be required to complete certain tasks. Both of these points buttress

the interpretation that “setting out” is a limited exception to the core functions of the Hump employee.

C. Application of Addendum 54B to the movement

Position of the Parties

24. The Union takes the position that Addendum 54B was breached when the Grievor, as a single YOE, was asked to move an intermodal flat car out of the hump yard and instead of setting it out in the nearest available track, had to flat switch the car to the intermodal track in a different part of the Yard.

25. The Company takes the position that it is highly likely that closer tracks to the hump yard were probably not available and the Company’s only choice may have been to put the car on track W102 in the Intermodal Yard. It argues further that Addendum 54B does not specify where a Do Not Hump car may be set off and that the Company was following the Collective Agreement in the circumstances.

Analysis and Decision

26. Firstly, both Parties agree that the Hump Yard work is distinct from work performed elsewhere in Symington Yard. A single YOE may perform Hump Yard work, rather than the two person crews required for yard work elsewhere.

27. Secondly, both Parties agree that the car in question was a “Do Not Hump” car and could not go over the hump.

28. Thirdly, both Parties agree that the Grievor was required to extract the Do Not Hump car from the other cars as part of his duties under Addendum 54B and to “set it out”.

29. The Parties disagree, however, whether the actions of the Grievor amounted to “setting it out”. The Grievor moved the car from the Hump Yard track to the Intermodal Yard.

30. A review of the Symington Yard layout (see Ex 14, Company documents and Exhibit 17, Union documents) reveals that that the two tracks are some considerable distance apart. It also reveals that to get to the Intermodal Yard, multiple other tracks had to be passed. These other tracks include two “Escape Tracks”, which are commonly used for setting out cars which cannot go through the hump process.

31. The Company argues that it is “highly likely that other tracks were not available” and that “The Company’s only choice to place this car may likely have been on W102” (in the Intermodal Yard). The Union argues that two Escape Tracks are available, which are typically used for cars which cannot go over the hump. It argues further that it is not a coincidence that the car was set out on the Intermodal Track, which is obviously convenient for the Company. To do so required the Company to ignore other closer tracks. I find that the Company has the evidentiary burden of proof to show that the closest available track was the Intermodal track. I find that the Company has not established factually that none of the other, closer, tracks were available at the time, and in particular, neither of the two “Escape Tracks”, which are typically used for cars which cannot go over the hump.

32. The Company has therefore not met its evidentiary burden of proof to establish that flat switching to the Intermodal Yard was required to set out the Do Not Hump car under Addendum 54B.

D. What remedy is appropriate in the circumstances?

Position of Parties

33. The Union argues that the breaching of Addendum 54B is an on-going problem, with some 150 grievances outstanding since 2015.

34. It argues that article 121.10 of the Collective Agreement should apply, or I should use the discretion provided by s. 60 of the Code to craft a suitable remedy which would be a deterrent to future collective Agreement violations.

35. The Union seeks a remedy of 300 miles at yard rates to the two-person yard crew which was available, or to the first person of the yard crew, if the Company had opted to call a Utility Person. It further seeks a payment of 500 miles to the Grievor. Finally, it seeks a Cease-and-Desist Order, in light of the concessionary language of Addendum 54B.

36. The Company argues that there is no agreement that there is a Collective Agreement violation, such that article 121.10 of the collective Agreement does not apply. It argues that a Cease-and-Desist Order is not appropriate in the circumstances. Finally, it argues that as there has been no violation, no remedy is necessary.

Analysis and Decision

37. Firstly, a remedy is required, in light of my finding of the violation of Addendum 54 B, set out above.

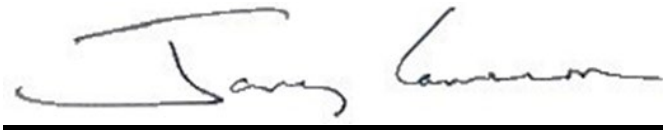
38. I do not find that the Union has established that either a remedy under article 121.10 of the Collective Agreement or a Cease-and-Desist Order are appropriate in the circumstances. In **CROA 4895** and **CROA 5013**, I examined the facts necessary for the application of the article. Unlike in **CROA 4883**, and like **CROA 5013**, here there is no agreement between the Parties that an obvious violation of the Collective Agreement has occurred. As in **CROA 5013**, I do not find that a back log of grievances is indicative of a "pattern of violations", as none of the grievances have yet been decided. This militates against a finding that a Cease-and-Desist Order is appropriate. Should other decisions be made finding similar violations of Addendum 54B, or there be agreement as to an obvious violation of the Collective Agreement under article 121.10, future decisions could be different.

39. I find that a remedy of $1500 to the Grievor and $1500 to the Utility Person the Company could have called to be appropriate in the circumstances. This is the same remedy awarded for a not dissimilar breach of the Collective Agreement in **CROA 5013**.

Conclusion

40. The grievance is therefore upheld and the Company is ordered to pay to the Grievor and the Utility Person the sum of $1500 each.

41. I remain seized for any question of interpretation or application of this Award.



May 8, 2025

JAMES CAMERON

ARBITRATOR