CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4835

Heard in Edmonton, June 22, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Grievance regarding an ESB's (Clayton Wright) declined wage claim (OA) due to his pool turn not having 10 hours off duty (8 + 2) between round trips as submitted by Conductor Clayton Wright for being withheld from his regular position to protect work as a Locomotive Engineer.

THE JOINT STATEMENT OF ISSUE:

On November 6, 2019 at 0034, Conductor Wright was held from his Conductor's turn in the East Pool for anticipated future service as a Locomotive Engineer.

Mr. Wright was called and worked as a Locomotive Engineer on November 6, 2019 on duty at 04:50, returning on November 7 (off duty at 06:50 at his home terminal).

Mr. Wright's Conductors Turn worked as follows;

1st round trip (turn worked by Nathan Peacock)

- Train 2244-03 on duty @ 02:30 Nov 6 & off-duty AFHT 07:30 (total time on-duty 05:00)
- Deadhead on duty @ 1410 Nov 6 and turn off-duty HT at 1909 Nov 6 (on-duty 04:59)
- Total time (Mr. Peacock working Mr. Wright's Cndr's turn) on duty for 1st round trip was 9:59
  5 hrs and 11 minutes elapsed from time turn went off-duty till it was on duty again.

2nd round trip (turn worked by Simon Mussen)

- Train 2244-05 on duty @ 00:20 Nov 7 & off duty AFHT 06:40 (total time on-duty 06:20)
- Train 141-07 on duty @ 20:30 Nov 7 and off-duty HT at 04:30 Nov 8 (total time on-duty 08:00)

Clayton Wright worked 1 adhoc Locomotive Engineer trip as follows during the above timelines:

- Train 244-05 on duty at 04:50 November 6 and off-duty AFHT at 11:45 (total time on-duty 06:55)

- There was 8 hrs and 55 mins between trips at the AFHT then Mr. Wright worked:
- Train 141-06 on duty at 20:40 November 6 and off-duty HT 06:50 Nov 7 (total time on duty 10:10)

Mr. Wright submitted an OA claim for the difference between:
a) the earnings of his single round trip as a Locomotive Engineer and
b) the sum of earnings of the two round trips of Conductors Peacock and Mussen.

His OA claim was denied by the Company Auditor with the following remarks:

NO OUTSTANDING CO WAGES - SECOND OA CLAIM ONLY APPLICABLE WHEN TURN WAS OFF FOR 10 HOURS TOTAL (8+2)

Subsequently, Mr. Wright, submitted an IP (interpretive) claim with new reasoning and a modification to his original claim which was declined with the following remarks.

NOT ENTITLED TO 2ND TURN <10HRS BTWN CO TURNS.

Mr. Wright then submitted a grievance on the calculation of his OA wage claim with the new reasoning and more detail.

The division grievance was initially declined.

The Union then submitted its' Step 3 grievance which was denied by Labour Relations on May 14, 2020.

The Union submitted this grievance to CROA for the June 2023 session. After having done this the Company then advised the Union the claim would be paid without P&P and it would have no bearing on any other claim held in abeyance. The Union did not accept this as a final resolution to the matter.

UNION POSITION

The Union contends the Company's actions are in violation of the LEEB language provided in Article 113 of the CCA as well as their violation of unilaterally creating new rest language (the Company bulletin) that has never been part of the LEEB Article, payment of OA claims. The Company has in the past created their own rest provisions which Arbitrator Stout Awarded it was a violation. Mr. Wright **(any employee)** under Article 113 is entitled to all compensation that their Conductors turn has earned once removed from their regular position to work adhoc LE trip(s), that is the clear language of the CBA.

The Union does not agree that the Company's $316.06 payment to Mr. Wright without P&P resolves this dispute as the dispute goes further than just the loss of wages, the Company's unilateral new restrictions per their bulletin which is not part of the Collective Agreement as can be seen in the Step 3 decline by LR.

The Union asks: if Mr. Wright was not entitled to the turn that went out before the Company created 10 hours, then what turn or other tour(s) would he be entitled to, as Mr. Wright has provided in his Step 2 grievance.

The Union maintains that Article 113 requires the Company to pay the Held ESB the difference in wages based on what his Conductor's turn earned and what the employee earned while held/working as an adhoc LE, which in this case was $558.84. This means that $242.78 remains outstanding.

After the Company issued its' bulletin requiring employees to have rest etc. an abeyance code was created to track claims.

The Union seeks a finding that the Company has violated the Collective Agreement as indicated above and an order that the Company cease and desist its ongoing breaches as described

The Union is also seeking any further relief the Arbitrator deems necessary in order to ensure future compliance with the Articles in question.

COMPANY POSITION

As a preliminary matter, the Company objects to the Union's request for a cease and desist order which is not valid and premature at the very least. The scope of this dispute involved one OA claim from Conductor Wright which has already been paid per his written grievance.

On the merits of the dispute regarding C. Wright's wage entitlement while working an adhoc trip as a locomotive engineer in November 2019, the Company disagrees and denies the Union's request. At most the scope of the dispute is a disputed portion of the OA claim as calculated by the Union and what was already paid on a without precedent or prejudice basis i.e. $242.78, an amount equal to what the employee claimed thereby resolving the dispute

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey	**(SGD.) L. McGinley**
General Chairperson CTY-E	Director, Labour Relations

There appeared on behalf of the Company:

L. McGinley	– Director Labour Relations, Calgary
D. Guerin	– Managing Director, Labour Relations, Calgary
R. Araya	– Labour Relations, Officer, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, CTY-E, Smiths Falls
D. Fulton	– General Chairperson, CTY-W, Calgary
J. Hnatiuk	– Vice General Chairperson, Calgary

AWARD OF THE ARBITRATOR

I. Issue

[1] The parties are signatories to a Consolidated Collective Agreement governing the services of Conductor's/Trainmen/Yardmen and Locomotive Engineers, employed in Eastern Canada. The Grievor is a Conductor who is also qualified as a Locomotive Engineer.

[2] This Grievance puts in issue Article 113.01(6), which governs payment for work done by Conductors on the Locomotive Engineer Extra Board (the "LEEB"). That work is subject to Article 113 of the Collective Agreement.

[3] Article 113.01(6) states:

> If it becomes necessary to withhold a qualified Locomotive Engineer not working as such from their regular position in order to protect work as a Locomotive Engineer for an *ad hoc* trip, **they will be paid not less than the earnings they would have made on their regular position,** whether or not they are used… (emphasis added)

[4] The interpretation of the bolded phrase has been put in issue.

[5] In addition to Article 113.01(6), the federal Regulation relating to *Work/Rest Rules for Railway Operating Employees*[1], are relevant to this dispute. While that Regulation was recently amended (as of May 2023), it was the Regulations which were in effect at the time of this Grievance that are applicable.

[6] The relevant portions of those Regulations state:

> ….
>
> 4. Definitions
>
> …
>
> "Call Time" means the amount of advance notice given to operating employees before going on duty as established by the respective railway company.
>
> 3.1The Work/Rest Rules have been developed pursuant to section 20(1) of the Railway Safety Act R.S. 1985, c. 32 (4th Supp).
>
> 3.2These Rules apply to railway companies and operating employees under the jurisdiction of the Department.
>
> 3.3 These Rules define the requirements for hours of work and rest for such persons.
>
> 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…
>
> ….

[1] Pursuant to s. 20(1) of the *Railway Safety Act,* R.S. 1985, c. 32 (4th Supp)

> 5.1.3.The maximum combined on-duty time for more than one tour of duty, operating in any class of service, cannot exceed 18 hours between 'resets' as outlined in subsection 5.1.4
>
> 5.1.4.The following is required to 'reset' the calculation of combined on-duty time to zero:
>
> a) … [yard service]
>
> b) At the home terminal, 8 continuous hours off-duty time, 'exclusive' of call time if applicable, when entering into road service or;
>
> c) At other than the home terminal, 6 continuous hours off-duty, 'exclusive' of call time if applicable.

[7] For the reasons outlined below, the Grievance is allowed.

II. Facts

[8] As a Conductor, the Grievor's name was included in the East Pool. According to both the Union and the Company, the Grievor "owned" a turn in that pool, referred to as EP01. In the JSI, this is referred to as the "Conductor's turn".

[9] The Grievor had also placed his name on the LEEB, to work as a Locomotive Engineer. When he is required to do that work, he is withheld from his work as a Conductor.

[10] In its submissions, the Company maintained it had begun seeing claims for OA for multiple trips missed, when it would have been impossible for that Conductor to have worked both trips. An example would be where taking that work would have violated the Work/Rest Rules. Therefore, in December of 2018, the Company issued two bulletins outlining how it intended to apply Article 113.01(6) of the Collective Agreement.

[11] The first Bulletin was dated December 5, 2018, with the subject of "OA Claims for ESBs". It stated:

> Attention: T & E Employees
>
> Off Assignment (OA) claims: When an employee is held for ESB work, the following process applies regarding Off Assignment claims:
>
> - When the employee's Conductor turn gets back to the Home Terminal, **a regulatory rest reset "check" will occur upon tie up of that turn in cases where the ESB is making a second OA claim. Specifically, if**

> **the turn was off for 10 hours total (8+2) then the owner of the turn may be eligible for 2nd OA claim if other conditions are met as indicated below.**
>
> - If that employee's turn goes out again AFTER 10 hours, AND upon tie up of the employee's tour of duty (as Engineer) he/she books personal rest of 12 hours or less, the employee will also be entitled to the OA claim of the wages made on the 2nd tour his turn went out on.
> - **IF upon tie up of the employee's tour of duty (as ENG), books more than 12 hours rest, there will be NO entitlement to the OA claim for the 2nd tour.**
> - The Auditor will arrange to update the miles, as required, once the claims has been processed.
>
> Please be governed accordingly
>
> [emphasis added]

[12] The Company created an Abeyance Code for OA claims over what was provided for in the December 5, 2018 Bulletin, which was outlined in the second Bulletin, dated December 18, 2018. This allowed the Company to keep a record of these types of claims while the dispute was being resolved.

The Dispute

[13] On November 6, 2019, the Grievor worked a round trip as a Locomotive Engineer. He worked for 6 hrs and 55 minutes. He then had 8 hrs and 55 minutes between trips, then worked again for 10 hrs and 10 minutes, for a total of 26 hours and 1 minute. While he was occupied in that role, his "turn" went out on two different trips, with two different replacement Conductors (the "First Trip" and the "Second Trip").

[14] The First Trip was for a total time on duty of 9 hours and 59 minutes (04:59 of which was deadheading). The Second Trip involved a different employee as Conductor, who worked for 6 hrs and 20 minutes. There was a break of 5 hrs and 11 minutes between the First Trip and the Second Trip. As the "Call Time" required is two hours, effectively there was a break of 3 hours and 11 minutes between the First Trip and the Second Trip.

[15] While the Company provided background regarding how a "turn" works in different situations, I am satisfied the Grievor would not have been separated from his "turn" under the circumstances of this case: He would not have been booked off on sick

leave or personal leave, had he not been working as a Locomotive Engineer, and would therefore have been "attached" to the work of his turn and capable of accepting the work of both trips.

[16] The Grievor submitted a claim for the difference between what he worked during his one round trip as a Locomotive Engineer and what he *would have worked on both trips,* had he stayed in the Conductor's pool. That total was $984.30.

[17] The Company declined the Grievor's claim for the two trips "due to less than 10 hours between your 2 CO turns as per Bulletin CMC 053-18" and suggested that the Grievor resubmit the claim with the abeyance code OA01.

[18] The Company unilaterally paid a portion of this amount in April of 2023 (the difference relating to the First Trip), but on a without prejudice/without precedent basis. That payment was not for the entire amount.

[19] While the Company took the position this resolved this grievance and it is therefore inarbitrable, I cannot agree that a settlement payment which was not accepted by the Union to resolve the Grievance can have done so. The wage difference claimed was not fully paid. Further, the Union did not only seek payment of the wage difference. It also sought a declaration that the Company had breached the Collective Agreement. That issue is also outstanding.

[20] The grievance is arbitrable.

[21] Under the CROA Rules, an arbitrator is entitled to solicit whatever evidence they require to resolve a dispute.[2]

[22] During the hearing, this arbitrator asked whether the Grievor would have violated the Work/Rest Rules had he worked *both trips* as a Conductor.

[23] The Union provided information that the Grievor would <u>not</u> have violated Work/Rest Rules had he worked <u>both</u> trips. The Company did not disagree with this information.

[2] Memorandum of Settlement, CROA&DR, as amended; Item 13

[24] Neither did the Company suggest there were any mileage limitations acting on the Grievor that would have prevented him from accepting the work, had he remained in the Conductor pool.

III. Arguments

[25] The Union urged the principles of interpretation are well known and that Article 113.01(6) is clear on its face. The Union argued the Company's denial of the Grievor's claim is not grounded in the wording of the Collective Agreement. It argued the Grievor had fulfilled all of the conditions outlined in Article 113.01(6): He was "withheld" from his "regular position", to protect work for a Locomotive Engineer for an *ad hoc* trip and he *did* receive less earnings that he would have made on his "regular position". It argued that there is no basis fpr the requirement of "10 hours rest" between trips in the language of Article 113.01(6). The Grievor's "turn" had two trips and the Grievor is entitled to payment for the difference between those two trips and what he earned. It argued that what the turn earned, the Grievor could have earned. Even if the Company were correct regarding the Grievor's intentions, the Union also argued, in part, that the Grievor is the Local Chairperson of the Division and was the individual who wrote the Grievance, indicating his intention would have been to work both trips, had he stayed in the Conductor pool. This is the "best" evidence of the Grievor's work intentions.

[26] While the Company noted in the JSI that the Grievance was denied for lack of 10 hours of time between the two trips, at the hearing, the Company also argued that it was not likely that the Grievor *would* have worked both trips. It argued the likelihood of him accepting that work is what must be determined by considering the Grievor's own rest pattern history: **CROA 4694**. The Company argued the evidence – both for the Grievor and for the East Pool Conductors on average – was that rest was regularly booked after round trips which was well in excess of the limited time that would have been available to the Grievor between the First Trip and the Second Trip (3 hours excluding Call Time). It argued it was entitled to deny the Grievor's rest on this basis. It also argued that the 10 hour rest "reset" policy between trips was reasonable.

[27] The Union raised issue with the Company's ability to rely on its argument relating to **CROA 4694**, as this argument was not mentioned in the JSI or the grievance procedure, so the parties had not had the opportunity to discuss it. In view of the ultimate disposition of this case, it is not necessary to determine this objection.

IV. Analysis and Decision

[28] This is an interpretation grievance. At issue is what was the Grievor's "regular position" for the purposes of Article 113.01(6). Precedents which do not involve the same wording are of limited value for this type of grievance.

[29] As was noted in **CROA 4830** – a decision of this arbitrator released on the same day – the "modern principle" of interpretation requires an arbitrator to determine the parties' objective intentions. This task must be grounded in the words the parties have chosen to record their deal, which words are to be given their "plain and ordinary" meaning. An arbitrator must also be alive to the "factual context", which includes "surrounding circumstances" which existed when a contract was negotiated[3].

[30] In this case, that factual context includes a recognition that fatigue management is an important principle in this highly safety-sensitive industry. The Work/Rest Rules exist to address this issue by imposing mandatory "reset" time after a certain number of hours are worked. These Rules are not suggestions; the Rules are imposed by legislation to control fatigue and to impose mandatory rest, *whether an individual may believe they need that rest or not.* The Work/Rest Rules exist outside of the Collective Agreement but are binding on the Company and the Grievor.

[31] The legislature has therefore turned its mind to what are appropriate and reasonable requirements for rest in what is a dangerous industry, uniquely impacted by the results of fatigue. Those Rules are subject to review by the legislature and were recently updated in May of 2023.

[32] A further factual context in this industry is that there are also mileage limitations which impact how much work can be performed in a certain amount of time.

[3] *Sattva Capital Corporation v. Creston Molly Corp;* 2014 SCC 53

*What did **CROA 4694** Decide?*

[33] The main argument of the Company at the hearing was that **CROA 4694** was dispositive of this Grievance. That case was decided in July of 2019.

[34] Even assuming the best case for the Company – that the Union's objection to the Company even *raising* this argument is not sustained - I do not agree that **CROA 4694** stands for the proposition for which the Company has offered it, and that it is dispositve of the issues raised by this Grievance.

[35] The Company has argued **CROA 4694** determined that the phrase "regular service" must be interpreted by considering subjective evidence of what a specific grievor *would actually have* worked. The Company argued the evidence to determine *that* question is the grievor's past history of booking personal rest. The Company urged the question of how much personal rest the Grievor would have worked between the First Trip and the Second Trip must be based on a balance of probabilities assessment.

[36] It is trite to state that a decision must be read carefully to determine what was actually decided, to assess is precedential value. To resolve this dispute, it is important to review what **CROA 4694** actually says. I have carefully considered that case, which is a short decision[4]. I am unable to agree that the *ratio* of that case is as argued by the Company. A close reading of that decision demonstrates it did not resolve the question of the meaning of this Article *on the merits* by interpreting what was included in a Conductor's "regular position" and what the grievor in that case was therefore entitled to.

[37] There was no finding made in **CROA 4694** that the grievor's subjective intentions of what he did in the past were relevant or should be considered on a balance of probabilities standard, as argued by the Company. Rather, in **CROA 4694**, the arbitrator noted that *neither party* had provided appropriate facts to enable the arbitrator to decide whether the grievor was entitled to the second assignment.

[4] Decided five months before the Supreme Court of Canada's direction to adjudicators in *Canada v. Vavilov* 2019 SCC 65

[38] The arbitrator in **CROA 4694** did not make clear *what* evidence would have been required to resolve the issue.

[39] The facts that were lacking in **CROA 4694** *may well have included the facts elicited by the arbitrator in this case,* which are a) whether the grievor had any restrictions on accepting the second trip due to the impact of the Work/Rest Rules; and b) whether the Grievor had any mileage limitations that would have impacted his entitlement to accept that work as part of working his "regular position" as a Conductor, which I accept was connected to EP01 on the dates in question.

[40] Since the Union bore the burden of proof and without evidence it could not meet that burden, the Grievance was dismissed. This is not the same as the Company being successful on the question of whether the phrase "regular position" included a second trip.

[41] I am satisfied from a careful review of **CROA 4694** that there was *no finding* made that the grievor's subjective intentions of what he did in the past had to be considered, so his personal rest history was relevant to whether he would have worked both trips. The *ratio* of **CROA 4694** does not resolve that issue, because the arbitrator was not in a position to do so.

[42] Nor would such a framework make logical or reasonable sense. First, a grievor's work history is not information which is available to the Grievor or the Union, but only to the Company who keeps those statistics. Yet, it is the *Union* that carries the burden of proof. To suggest that facts which the Union cannot know are crucial to satisfying its burden is not logical or reasonable. Second, it could never be determined what a grievor "would have done" regarding working two trips as a Conductor – even on a "balance of probabilities" - as the Grievor was *not* put in that situation. How could it be determined how tired the Grievor "would have" been after this First Trip, for example, to determine how much rest he would have needed and would have booked *on that particular day*? It may well have been the Grievor had a particular expense and needed the money that month, so would have taken all work that was available on that day. What the Grievor "would" have done on that

day is simply an “unknowable” fact that cannot be assessed on a “balance of probabilities” basis by considering averages.

[43] Even if the Company *were* correct, I agree with the Union that the “best” evidence of what the Grievor “would have done” had he worked as a Conductor comes from the Grievor himself. That is the “best” evidence as it is reliable as first-hand information of the Grievor’s intentions, while the Company’s information is only based on averages. It is the Grievor’s information that he would have worked both trips on that day.

[44] The merits of this case are whether the Grievor was entitled to the Second Trip under the terms of Article 113.01(6). This is the question that **CROA 4694** was *not* able to determine, but which is again at issue in this case. This question is therefore of first instance.

What Would the Grievor Have Earned in His “Regular Position”?

[45] As noted in **CROA 4830**, the modern principle of interpretation requires an adjudicator to determine the objective intention of the parties by placing primacy on the words the parties have used to record their deal. Parties are presumed to “mean what they say”. This in turn requires an adjudicator to first consider the “plain and ordinary meaning” of a word or phrase.

[46] The parties have used the phrase “regular position” to define the scope of earnings for the Grievor. Dictionary definitions are helpful for determining the meaning of particular words unless the factual context or the Collective Agreement itself suggests a different interpretation for a particular phrase. In this case, I do not find there is a specialized meaning.

[47] The Merriam-Webster Dictionary defines the word “regular” as “constituted, conducted, scheduled, or done in conformity with established or prescribed usages, rules or discipline. The word “position” is defined in the same Dictionary as “an employment for which one has been hired”.

[48] As was noted by the Company, the Grievor *may* book personal rest after a round trip, but he would not be *required* to book rest. What he *was* required to do to work

his “regular position” was to work within the legislated Work/Rest Rules and the mileage limitations. Those were the “prescribed usages, rules or discipline” that limited the Grievor’s ability to work in the “employment for which [he] has been hired”.

[49] As such, *unless the Grievor was separated from his turn,* he would be entitled to the work that the turn was subject to, *assuming* that work was within the “prescribed usages, rules or discipline” of the Work/Rest Rules and the mileage limitations, and assuming he had not been separated from his turn, such that the work would not have been available to him to accept. These are the only limitations which provide a boundary around the work the Grievor would have been able to do as a Conductor, had he not been working as a Locomotive Engineer.

[50] In this case, I am prepared to accept that the Grievor’s “regular position” in the East Pool was as a Conductor who was associated with turn EP01. In this case, there were no limitations acting on the Grievor to perform the work which was performed by the two other employees working the First Trip and the Second Trip (such as Work/Rest Rules or mileage limitations or booking off on sick leave or personal leave such that he would have become separated from his “turn”). Therefore, the Grievor would have been able to take the work of the turn on November 6/7, 2019.

[51] The Company urged its policy of requiring 10 hrs of time between the first and second trips was “reasonable”. It noted it had seen requests for payment for multiple trips that that could not even be taken as they would not have complied with the Work/Rest Rules. While that may be, in *this* case, there are no Work/Rest Rule limitations.

[52] A policy which is unilaterally imposed by an Employer is not reasonable if it is demonstrated it is inconsistent with the requirements of the Collective Agreement: *Re Lumber & Sawmill Workers’ Union, Local 2537 and KVP Co. Ltd.* 1965 CanLII 1009 (ONLA). That burden has been met in this case.

[53] The Company has taken issue with the “blanket” determination the Union effectively seeks. The breadth of any decision from this Office may be subject to argument and

interpretation by subsequent arbitrators in this industry. That is a matter over which this arbitrator has no control.

V. Conclusion

[54] The Grievance is allowed. The Grievor is entitled to be paid for the difference between what he earned as a Locomotive Engineer and what he would have earned in his regular position as Conductor, for his work in early November 2019.

[55] In view of this finding, it is not necessary to determine the preliminary objection of the Union that the Company was not entitled to rely on its arguments from **CROA 4694**.

[56] The Grievance is allowed. A declaration will issue that the Company has breached the Collective Agreement by:

a. Altering the requirements of Article 113.01(6) by unilaterally imposing on the Grievor a 10 hr rest requirement; and
b. by using the Grievor's personal rest history to determine the earnings the Grievor "would have made" on his "regular position" under Article 113.01(6).

[57] I remain seized to address any issues in the implementation of this Award, and to correct any errors or omissions to give it the intended effect.

August 30, 2023

CHERYL YINGST BARTEL
ARBITRATOR