IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE

(the "Union")

- and -

CANADIAN PACIFIC KANSAS CITY RAILWAY

(the "Company")

DISPUTE

The Union's appeal of the declination of Mr. Danny Charron's spare board guarantee claim from March 14 – 27, 2022.

JOINT STATEMENT OF ISSUE

Mr. Charron submitted a spareboard guarantee claim for the period of March 14th – 27th, 2022 for the amount of $1026.33 with the comment of ***"Claiming 12 days on the Spare Board GN for 12 days 3,065.64 – 2030.31 what I worked = 1,026.33".***

The Payroll Admin Clerk declined Mr. Charron's claim in its entirety ***"Not entitled – 2 penalties, strike on 03/20 & 03/21".***

The parties agree that CROA rules apply including item 14 of the Memorandum of Agreement Establishing the CROA&DR.

UNION POSITION

The Union's position is that Mr. Charron's SBG has been denied in error.
Mr. Charron was not at work account a work stoppage. It is the Union's position that the work stoppage consisted of a Company lockout and a Union strike happening at the same time by each parties submitted notice of noted intent.

While the work stoppage took place there was no Collective Agreement, the 2 days of work stoppage would not be penalties therefore the SBG should be prorated over that SBG time period.

The Union request Mr. Charron be compensated his submitted spareboard guarantee claim of $1026.33

COMPANY POSITION

The Company disagrees with the Union's position and requested remedies.

It is the Company's position that the March 20th work stoppage was initiated by the TCRC in the form of strike action by withdrawing their services before the deadline that a strike or lockout could legally occur. CPKC did not lockout its employees.

In withdrawing their services, the TCRC members were unavailable for work from 00:01 ET March 20th – 12:00 March 22nd.

Further, the Union has failed to meet their burden of proof to establish that the time absent during the work stoppage should be prorated. There is no collectively bargained language that states time absent due to a work stoppage should be prorated and not penalized.

In contrast, there is collectively bargained language which states employees unavailable for duty will be subject to a reduction (penalty):

> *"each time an employee books sick **or otherwise is not available for duty**, and an additional reduction will be made for each subsequent 24-hour period or major portion thereof commencing at the expiration of 24 hours after the time such employee first booked sick or otherwise made themselves unavailable for duty"*
> *(**Emphasis added**)*

Additionally, the Collective Agreement states that trainpersons on road or common spare board who are subject to more than 1 reduction in the amount of the guarantee payable to him/her in any biweekly guarantee period shall not be entitled to any guarantee payment for such period.

With respect to the Union's argument that there was no Collective Agreement in place during the work stoppage, then there is also no language to govern the prorating of days absent from work. On the Union's own logic their argument must fail.

As an additional comment, failure to specifically reference any argument or to take exception to any statement presented as "fact" does not constitute acquiescence to the contents thereof. The Company rejects the Union's arguments, maintains no violation of the agreement has occurred, and no compensation or benefit is appropriate in the circumstances.

The Company requests the Arbitrator find in favor of the Company's position.

FOR THE UNION:

Signed

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Wayne Apsey
General Chairperson
CTY – CP Rail East
TCRC

April 20, 2023

FOR THE COMPANY:

Signed

_____

Lauren McGinley
Assistant Director Labour Relations
CPKC

Hearing: By video conference. May 10, 2023

APPEARING FOR THE UNION:

Ken Stuebing, Counsel, Caley Wray

Wayne Apsey, General Chairperson, CP Rail East

Danny Charron, Grievor

APPEARING FOR THE COMPANY:

Allan Cake, Manager Labour Relations

Lauren McGinley, Assistant Director Labour Relations

AWARD OF THE ARBITRATOR

JURISDICTION

[1] This is an Ad Hoc Expedited Arbitration pursuant the Grievance Reduction Initiative Agreement of May 30, 2018, and Letter of Agreement dated September 7, 2021, between the parties. The protocols entered into by the parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument. Awards, with brief written reasons, are to be issued within thirty days of the hearing. The parties agree I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND

[2] The Grievor was in active service and held a position on the common Spare Board in Sudbury, Ontario for the period of March 14th – 27th, 2022. He had started his service with the Company on May 19, 2014.

[3] On March 16, 2022, the Company served the Union with the required seventy-two (72) hour lockout notice for 00:01 ET on March 20, 2022. At 20:48 MT on March 16, 2022, the Union served the Company notice of its intent to commence a strike at 00:01 ET on March 20, 2022.

POSITIONS OF THE PARTIES

[4] The Company maintains that it provided a final proposal to the Union at 20:45 MT on March 19, 2022, when it received word that TCRC represented member began to withdraw their services ahead of the 00:01 ET March 20, 2022 deadline. The TCRC Negotiating Committee failed to respond to the Company's 20:45 MT offer and instead opted to withdraw their services before the deadline that a strike could legally take place. In a news release issued prior to the deadline, the Union claimed the Company had initiated a lockout.

[5] The Company maintains that Union has not provided anything to prove their claim that they were locked out at the same time they took strike action. Those are simply not the facts. The TCRC T&E employees were not locked out by CPCK in 2022. In withdrawing their services, TCRC represented employees made themselves unavailable for duty, an essential condition for a wage guarantee.

[6] The Company maintains that a concurrent strike/lockout would not change the fact that the Grievor made himself unavailable by withdrawing his services. There is no collectively bargained language that states time absent due to a work stoppage should be prorated and not handled under the guarantee reductions provisions. Additionally, the Union has not met their burden of proof to establish that the Grievor was available for duty, regardless of whether or not a lockout was in effect.

[7] The Company submits that the Union has failed to meet their burden of proof to establish that the time absent during the work stoppage should be prorated or that the Grievor was available for duty, regardless of whether or not a lockout was in effect. It maintains that there is no collectively bargained language that states time absent due to a work stoppage should be prorated and not handled under the guarantee reductions provisions.

[8] The Company relies on the comments of Arbitrator Picher in CROA&DR 3793 in which he stated:

> While the Arbitrator can understand the reasons for the Company's surmise and suspicion, a board of arbitration cannot reduce the standard of proof to one of mere possibility or suspicion, given the rules of evidence which govern our procedures. It is for the Company to prove, on the balance of probabilities, that the grievor did manipulate the time card of employee S.L. There is, very simply, no direct evidence to confirm that allegation. Indeed, such direct evidence as is before the Arbitrator is entirely to the contrary.

[9] The Company maintains the Collective Agreement is clear. The agreement states that Spare Board employees unavailable for duty will be subject to a reduction (penalty). Article 112.07(1) states the following:

> 112.07 The guarantee will be reduced under the following circumstances:
>
> (1) Each time a employee books sick or otherwise is not available for duty, and an additional reduction will be made for each subsequent 24-hour period or major portion thereof commencing at the expiration of 24 hours after the time such employee first booked sick or otherwise made themselves unavailable for duty

[10] The Company submits that in the Collective Agreement, Article 112.08 that:

> Trainpersons on road or common spare board who are subject to more than 1 reduction in the amount of the guarantee payable to him/her in any biweekly guarantee period shall not be entitled to any guarantee payment for such period.

[11] The Company maintains that the Grievor was unavailable for 60 hours and properly "subject to more than 1 reduction", he was "not entitled to any guarantee payment for such period" as outlined in Article 112.08.

[12] The Company submits that in 2018, 2 employees from the exact same terminal as the Grievor, submitted Spare Board guarantee claims which were both reduced for time missed during the strike. The Company emphasizes that this was not grieved by the Union and was accepted as the correct handling and given the acquiescence by the Union following the 2018 strike reduction assessments, the case before us must be considered the same. CPCK argues that the Collective Agreement does not indicate that the Spare Board Guarantee should be prorated for periods of a lawful labour dispute. Indeed, sophisticated parties do not bargain language in a Collective Agreement to address periods of work stoppage, given that there is no Collective Agreement in place in such instances.

[13] The Union submits that the Company is not at liberty to penalize Spare Board Employees for not attending work during a labour dispute. The Union is not advocating for payment during the work stoppage, but a prorated Spare Board guarantee for the two weeks that include the work stoppage.

[14] The Union Submits that throughout the grievance procedure, during the period from March 20-22, there was simply no work for which any Spare Board employees could be available. There is therefore no prejudice to the Company that could justify a penalty being applied in these circumstances, as no collective agreement was in place during this period of time

[15] The Union maintains that there were no trains of any kind run during this period from March 20 through noon on March 22. During that period, there were certainly no calls. In this regard, the Company issued a Bulletin requiring all employees to return their radios prior to Saturday March 19, 2022.

[16] The union submits that Mr. Charron was duly available for all remaining 12 days between March 14 and 27, 2022. Given the purpose of the Spare Board Guarantee, he is entitled to be paid a prorated guarantee as claimed.

[17] The Union maintains that the work stoppage was not of the Grievor's doing. Bulletin CMC 181-21 indicates five categories of absence that constitute "due to being unavailable for work as outlined in the collective agreement." There are five categories set out in the Bulletin that are said to attract this penalty:

- Miss Call,
- Sick/Unfit,
- Personal,
- Excess Rest,
- Extended Rest

[18] The Union maintains that Mr. Charron was not unavailable for work for reasons of his own accord. Any status other than personal, miss call, sick, excess or extended rest that causes an employee to not be available for work can be considered pro-rated off-status. The Union argues that Mr. Charron's absence from work on March 20-22 is not due to any of those circumstances. He did not book extended rest. He did not book sick. He did not book personal leave. He did not miss any calls. He did not book excess rest, no other BU employee went to work in advance of him per the East rules.

[19] The Union submits that in In Article 112, the central threshold distinguishing these two categories is whether the absence was of Mr. Charron's "own accord." Mr. Creel's March 17, 2022, statement made clear that he attributed the labour dispute to "the Union's leadership," not "our employees, who are the best railroaders in the business."

[20] Union maintains that the Grievor did not did not "make himself unavailable for work." His status did not change during this 2-day period. The legal work stoppage does not give rise to "penalties" set forth in the Collective Agreement and CPKC's December 2021 Bulletin. There cannot be penalties when the Collective Agreement was not in effect

[21] The Union argues that Mr. Charron is Mr. Charron is among those best railroaders in the business. From March 20-22 the parties were in a legal work stoppage. There was no possible ability for Mr. Charron to attend work during this period. He was, however, available for work on the Spare Board at all other relevant times from March 14 to 27, 2022.

[22] The Union submits that the language of Article 112 CMC 181-21 is clear however. If an employee is unavailable on the Spare Board for entire period, their biweekly guarantee is prorated.

[23] Contrary to the Company's submissions, the Union submits that the legal work stoppage does not give rise to "penalties" set forth in the Collective Agreement and CPKC's December 2021 Bulletin. There cannot be penalties when the Collective Agreement was not in effect.

ANALYSIS AND DECISION

[24] There is no dispute that the Grievor was in active service and held a position on the common Spare Board in Sudbury, Ontario at the time of the dispute. As such there is also no dispute that he was subject to the provisions of Article 112 of the collective agreement setting out the Spare Board Guarantee provisions in his class of service for the period of March 14th – 27th, 2022.

[25] On March 16, 2022, the Company served the Union with the required seventy-two (72) hour lockout notice for 00:01 ET on March 20, 2022. At 20:48 MT on March 16, 2022, the Union served the Company notice of its intent to commence a strike at 00:01 ET on March 20, 2022. As a result that application of the reduction provision of Article 112 are the centre of this dispute. In this case the Company maintains that the Grievor was not available for 2 days. The specific provisions of Article 112 provide:

> **ROAD SPARE BOARD GUARANTEE REDUCTIONS**
>
> 112.01 The guarantee will be reduced under the following circumstances:
>
> (1) each time an employee books sick or otherwise is not available for duty, and an additional reduction will be made for each subsequent 24-hour period or major portion thereof commencing at the expiration of 24 hours after the time such employee first booked sick or otherwise made themselves unavailable for duty,….
>
> ……
>
> 112.08 Trainpersons on road or common spare board who are subject to more than 1 reduction in the amount of the guarantee payable to him/her in any biweekly guarantee period shall not be entitled to any guarantee payment for such period.

[26] There can be no doubt as to the importance for both parties for train crew employees to fulfill their availability obligations. Absences can be justified or have little impact on the Company or fellow employees. They can also be inconsistent with the obligations of the collective agreement and negatively impact the operation of the railway and other employees. The Company may face last minute crew shortages and other employees may be forced into unplanned service.

[27] For meeting the obligations set out in the collective agreement, Spare Board employees receive guaranteed pay if available in accordance with the collective agreement. Unauthorised absences or absences inconsistent with the collective agreement are a serious matter and can result in guarantee reductions, elimination or even discipline.

[28] The Company suggested that in 2018 the same situation occurred and no grievances were filed when the claims were denied. The Union objected on the bases that the issue of any past practice being established was raised in the Joint Statement of issue by the Company. I was given no specific evidence or documentation to establish of the timing of the 2018 incident actions of the parties or reasoning.

[29] In this case both the Company and Union gave notices respectively of lockout or strike, which were not cancelled or withdrawn. The Union submits that the implementation of the respective notices took place at the same time. The Company acknowledged that it began an orderly shutdown of the operation. CPKC argues that while it did in fact issue lockout notice, it never did carryout a lockout of any TCRC employees. Once the Union took strike action, the Company performed a structured shutdown of operations.

[30] The Company also maintains that the Union has not met their burden of proof to establish that the Grievor was available for duty, regardless of whether or not a lockout was in effect. The Company argues that that a board of arbitration cannot reduce the standard of proof to one of mere possibility. It points me to the comments of Arbitrator Picher in CROA&DR 3793 where he stated:

> While the Arbitrator can understand the reasons for the Company's surmise and suspicion, a board of arbitration cannot reduce the standard of proof to one of mere possibility or suspicion, given the rules of evidence which govern our procedures. It is for the Company to prove, on the balance of probabilities, that the grievor did manipulate the time card of employee S.L. There is, very simply, no direct evidence to confirm that allegation. Indeed, such direct evidence as is before the Arbitrator is entirely to the contrary.

[31] I find CROA &DR 3793 not on point. This is not a case of proving a Grievor was at work when the Company says he was not. This about guarantee entitlement to employees who do not work on a given day, but claim entitlement in a unique situation with a dispute over the collective agreement language.

[32] I find there is no clear evidence to establish employees being called or advised to be available. There is no evidence that on call Spare Board employees are required to show proof of availability in this or any other related circumstance to claim guarantee. The collective agreement provides specific examples of penalties for unviability. There is no evidence or collective agreement provisions for reduction of the Guarantee in any type of temporary shutdown.

[33] The Grievor did state the reason for his claim was the strike.

[34] I agree with the Company that if the collective agreement language is clear and unambiguous interpretation should be confined to the specific language. It relies on AH 685 in which Arbitrator Hornung addressed principles of Collective Agreement interpretation stating:

> In Gourmet Baker Inc. v. United Food and Commercial Workers Union, Local 832, [2004] M.G.A.D. No. 49, Arbitrator Wood thoroughly reviewed the principles which govern of collective agreement interpretation which, for our purposes here, can be summarized as follows:
>
> 124. ... the fundamental object in construing a term of a collective agreement is to discover the intention of the contracting parties. As noted in Brown and Beatty:

[35] However, in this case, I find that these sophisticate parties with the knowledge of the unique railway Spare Board operation have crafted Spare Board guarantee language and guidelines which can:

> Reduce the guarantee due an employee making themselves unavailable
> Eliminate the guarantee after repeated making themselves unavailability
> Prorate the guarantee

[36] I find Prorating applies for situation in which the employee has:

No control
Little control or
Is otherwise directed

[37] The Company guideline bulletin information to employees provides:

> Spareboard Guarantee Information East
> Provided below is information needed to process a spareboard guarantee claim. Included are the Spareboard periods, rates and penalty information.
>
> Pro-rated
> Any status other than personal, miss call, sick, excess or extended rest that causes an employee to not be available for work can be considered pro-rated off-status. These days are not penalized but instead are prorated and as such employees are not entitled to spare board guarantee for that day. Examples: Annual Vacation, Earned Day Off (EDO), Bereavement, Off Miles, Company Business, Union Business, Held Out Of Service, Investigation, On Duty Injury, Off Duty Injury (more than 3 days).
>
> Penalty
> Reduction in spare board guarantee due to being unavailable for work as outlined in the collective agreement.
> • Miss Call, Sick/Unfit, Personal, Excess Rest, Extended Rest
> *Booking Extended Rest, or being off sick or personal for 36 hours or more counts as two penalties
> Two or more penalties- If you incur two or more penalties you are not entitled to any guarantee payment for that guarantee period

[38] The Evidence established that on March 16, 2022, the Company served the Union with the required seventy-two (72) hour lockout notice for 00:01 ET on March 20, 2022. At 20:48 MT on March 16, 2022, the Union served the Company notice of its intent to commence a strike at 00:01 ET on March 20, 2022. Neither party indicated that it withdrew their notice. The Company maintains that it began an orderly shutdown of the operation when the Union began its strike. The Union argues that the Company gave strike notice and if fact shut down.

[39] The evidence does not establish that the Company ever intended or attempted to operate during the two day period. It did not advise employees to be available if a strike was called. I find that there was no evidence of any opportunity for the Grievor to work during the two days in question or that he should have advised the Company of his availability or unavailability. There is also no evidence or allegation that this Grievor would have been unavailable if the Company continued to operate. Further, it is difficult to reconcile the Company's position with the plain language of the collective agreement. The language expressly refers to actions of the employee stating:

> …. each time an employee books sick or otherwise is not available for duty.

[40] The Company does not dispute its language which differentiates between what triggers a penalty vs prorating of the guarantee. This is important context, which shows that the parties agreed that the implementation is different in different circumstances. In my view, both the language and guidelines support an interpretation of the language requiring prorating of the

guarantee in these facts and circumstance rather than reduction and total loss of any entitlement for the remainder of the Guarantee period. Interpreting the provisions otherwise would treat different situations the same, which is inconsistent with the plain language of the provisions and the Company's own guidelines.

[41] I have not received sufficient evidence to indicate a clear past practice applicable to these specific circumstances. There is no indication as to the specific facts of 2018 as were not set out before me. The existence of any past practice was also not set out in the Joint Statement of Issue by the Company.

[42] In my view, the language is not ambiguous and provides clear guidance as to the party's intent in different circumstances. When Company's bulleting language is considered the meaning becomes clearer.

[43] I find that the parties negotiated clear language, limiting reductions and penalties while establishing a process for providing proration in situations not caused by the employee.

[44] The contextual factors of a disputed strike, lockout or shutdown cannot be used to negate the language of the Collective Agreement. It cannot override the agreed interpretation or the intent of the language. It does not justify an interpretation that is not supported by the language.

[45] Both TCRC and CPKC respectively served notice of strike and lockout. Neither notice was rescinded. In this case, the Company acknowledged that it did not attempt to operate but chose to shut down. The Grievor, like all other bargaining unit employees was in an undefined or disputed status other than personal, miss call, sick, excess or extended rest. That status caused the Grievor to not be available. As such I find that like other employees, he was not entitled to compensation for the two days.

[46] After careful review of the facts and evidence, I find that under the Spare Board guarantee provisions he should have be considered in pro-rated off-status for the two days. Such days are not penalized but instead are prorated. Spare Board employees are not entitled to spare board guarantee payments for that day or days. To do otherwise would assess a potentially greater financial loss to Spare Board employees in comparison to other employees who were in the same status on the same two days. The days in question should not have been penalized to negate an entitlement after he returned to work. Under the language the two days were subject to prorated and as such he was not entitled to spare board guarantee for the two days but was entitled to the remainder of the guarantee.

[47] In view of the foregoing the grievance is allowed and the Grievor will not be compensated for the two days but will be compensated for the remainder of the guarantee period accordingly.

[48] I remain seized with respect to the application and interpretation of this award.

Dated at Niagara-on-the Lake, this 29th day of August, 2023.

Tom Hodges

Arbitrator