IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY

(the "Company")

and

TEAMSTERS CANADA RAIL CONFERENCE

(the "Union")

GRIEVANCE CONCERNING Handling of Unassigned Pool and Spareboard Employees

SOLE ARBITRATOR: John Stout

APPEARANCES:

For the Company:
Chris Clark - Labour Relations
Lauren Smeltzer – Labour Relations

For the Union:
Michael Church - Caley Wray
Wayne Apsey – General Chair, TCRC – CTY East
John Campbell – General Chair, TCRC –LE East
Greg Edwards - General Chair TCRC –LE West
Harvey Makoski - Senior Vice General Chair, TCRC-LE West
Dave Fulton - General Chair, TCRC-CTY West
Doug Edward - Senior Vice General Chair, TCRC-CTY West

HEARINGS HELD IN CALGARY, ALBERTA ON OCTOBER 15, 2016

SUPPLEMENTARY AWARD

BACKGROUND

[1] This award is supplementary to an award I issued on August 3, 2016 (the "August 3, 2016 Award") with respect to a hearing held on July 6, 2016.

[2] This matter concerns a number of group grievances filed by the Teamsters Canada Rail Conference (the "Union" also referred to as "TCRC") alleging that the Canadian Pacific Railway Company (the "Company" also referred to as "CP") violated a 2012 interest arbitration award issued by Arbitrator William Kaplan (the "*Kaplan Award*").

[3] The group grievances were filed on behalf of all four of the Union's General Committee of Adjustment ("GCA"). The two western GCAs represent the Union's running trade members employed by the Company throughout the region known as Western Canada (Thunder Bay west to British Columbia). The two eastern GCAs represent the running trade members employed by the Company throughout the region known as Eastern Canada (Thunder Bay east).

[4] The parties agreed to utilize the Canadian Railway Office of Arbitration & Dispute Resolution (CROA) process for hearing and resolving the grievances. The CROA process involves the parties filing an extensive brief, which includes a written statement of their position together with evidence and argument. The arbitrator has jurisdiction to make such investigation, as she or he deems proper, including whether or not oral evidence is necessary for resolving the dispute.

[5] In the normal course, the parties would file a Joint Statement of Issue (JSI) outlining the nature of the dispute. Unfortunately, the parties were unable to agree on a JSI in this matter. Instead each party filed a "Ex Parte Statement of Issue".

[6] The Ex Parte Statements of Issue are reproduced in my August 3, 2016 Award. Generally, the Union asserted that the Company violated the first-in and first-out provisions of the Collective Agreements and sought individual relief for affected employees. The Company denied violating the Collective Agreements and disagreed with the relief sought by the Union. The Company asserted that they have a right to arrange employee schedules in a manner that ensures minimum rest is taken.

[7] At the hearing on July 6, 2016, the parties confirmed that I have the jurisdiction to hear and determine the group grievances as well as adjudicate a number of claims arising from **CROA 4102**. It was specifically agreed at the hearing that I would remain seized with respect to any dispute arising from my award and any grievances referred to me.

[8] During the July 6, 2016 hearing, the parties focussed their submissions on the Company's implementation of a rule referred to as the "Enhanced Rest Procedure" ("ERP").

[9] In my August 3, 2016 Award, after carefully considering the parties submissions, I found that the ERP violates the Collective Agreements and is an unreasonable rule. The relevant paragraphs of my August 3, 2016 Award are set out below:

> 102. Therefore, after carefully considering the evidence and submissions of the parties, I find that the ERP violates the Collective Agreements and is an unreasonable rule.
>
> 103. Before concluding, I am compelled to make mention of the fact that the role of an arbitrator is to interpret the collective agreement between the parties. As noted earlier, part of the interpretive process includes interpreting and applying employment related statutes. However, where the collective agreement provisions do not violate any statute, then it is improper for an arbitrator to do anything other than enforce the parties' agreement.
>
> 104. I acknowledge that fatigue is a matter of safety that affects both the Company, the Union's members and the general public. Addressing fatigue is in the best interests of both parties to this proceeding. The issue should be

addressed in collective bargaining either by agreement or in an interest arbitration award. It is not the role of a rights arbitrator to set public policy or rewrite the parties' collective agreement.

105. In conclusion, having regard to my findings in this matter, the Company is ordered to cease and desist violating the Collective Agreements. The Company is directed to comply with their obligations under the Collective Agreements, including the Kaplan Award.

106. The parties are directed to contact my office to schedule a date for having all outstanding runaround claims resolved.

107. I remain seized to address any issues arising from my award and to resolve all outstanding claims.

THE CURRENT DISPUTE

[10] This matter was scheduled to be brought back before me on October 15, 2016 at a hearing in Calgary, Alberta.

[11] On October 10, 2016 the Company wrote to me advising as follows:

> This letter serves to inform you that the Company will raise a preliminary objection with respect to the union's various claims to lost wages. Through several discussions, including September 29, 2016, the Company advised the Union of its intention of raising said preliminary objection.

[12] The Union wrote to me on October 13, 2016 advising me that they would be referring to their initial brief and provided an Ex Parte Statement of Issue, which indicates as follows[1]:

EX PARTE STATEMENT OF ISSUE

Dispute:

1. The failure of the parties to agree on the application of the CPR and TCRC Award in the above referenced matter as it applies to the outstanding runaround (RA) and wage claims. The Union has provided the Company with a "Bucket List" for the RA's and lost wage claims as follows:

[1] The October 13, 2016 letter advised that the document was the Union's proposed JSI which the Union converted into an Ex Parte Statement of Issue at the hearing.

(a) Run Arounds Prior to CROA 4102 on April 11, 2012

(b) Run Arounds subsequent to CROA 4102 and prior to Kaplan Award of December 19, 2012

(c) Run Arounds subsequent to the Kaplan award dated December 19, 2012

(d) Run Arounds subsequent to Kaplan where the Company has imposed rest at the home and away from home terminals

(e) Run Arounds crew runaround by TCS crew and lost wage claim for TCS crew not first out at the AFHT.

(f) Lost wages while held on rest and manager crew worked.

(g) Lost wages account not allowed to work regular assignment due to mandatory rest.

2. The dispute referred to the Arbitrator involves running trades employees governed by the Collective Agreements between the Union and Company, the *Canada Labour Code* and other statutes.

Ex parte statement of issue:

Arbitrator John Stout rendered arbitration award (CPR and TCRC ERP Award) with respect to the group grievances advanced by the Union in response to the Company's ongoing breaches of the 2012 Kaplan Award in regards to the handling of unassigned pool and spareboard employees who have less than maximum hours remaining on their mandatory clocks and the associated runaround claims. In accordance with the August 3, 2016 ruling, the parties are seeking resolution on all outstanding claims.

Union Position

The Union contends, in all cases, the Company's actions are in violation of Article 30 (LE) and Article 15 (CTY West) and Articles 14 and 15 (CTY East), CROA 4102 and the signed agreement dated December 8, 2012. Further, the Union position is that Arbitrator Stout has already ruled on each of these situations.

The Union relies upon *res judicata* in this matter. The Union position is the Arbitrator is *functus officio* of his August 3, 2016 decision.

The parties are in disagreement over the application of Arbitrator Stouts' Award as it applies to the following:

1. Run Arounds Prior to CROA 4102 on April 11, 2012

   Union Position

In accordance with the Collective Agreement, CROA 4102 and the 1994 bulletin employees will be called for the tour of duty provided they have the minimum number of hours in the bulletin.

Accordingly, employees in these circumstances were runaround and the payment is applicable.

2. Run Arounds subsequent to CROA 4102 and prior to Kaplan Award of December 19, 2012

Union Position

In accordance with the Collective Agreement, CROA 4102 and the 1994 bulletin employees will be called for the tour of duty provided they have the minimum number of hours in the bulletin.

Accordingly, employees in these circumstances were runaround and the payment is applicable.

3. Run Arounds subsequent to the Kaplan award dated December 19, 2012

Union Position

On December 8, 2012, the parties agreed to the subdivision run time document in resolve of CROA 4102. Accordingly, employees who have the requisite numbers of hours remaining on their mandatory time will be called.

Accordingly, employees in these circumstances were runaround and the payment is applicable.

4. Run Arounds subsequent to Kaplan where the Company has imposed rest at the home and away from home terminals.

Union Position

On December 8, 2012, the parties agreed to the subdivision run time document in resolve of CROA 4102. Accordingly, employees who have the requisite numbers of hours remaining on their mandatory time will be called.

Accordingly, employees in these circumstances were runaround and the payment is applicable.

5. Run Arounds crew runaround by TCS crew and Lost wage claim for TCS crew not first out at the AFHT.

Union Position

On December 8, 2012, the parties agreed to the subdivision run time document in resolve of CROA 4102. Accordingly, employees who have the requisite numbers of hours remaining on their mandatory time will be called. Accordingly, employees in these circumstances was runaround and the payment is applicable. Further, the employee who ran around the employee at the AFHT should have been taken out of TCS and changed to straightaway service and paid accordingly.

The TCRC asserts these Company actions are in violation of a number of Collective Agreement provisions including, but not necessarily limited to LE Articles 27, 30, and 33, CTY Articles 15, 24 and 29, the KVP Award, CROA 4102, the 2012 Kaplan Award, dated Dec 19, 2012, and the CIRB ruling in regard to operating changes being imposed during the freeze period of contract negotiations / arbitration.

6. Lost wages while held on rest and manager crew worked.

   Union Position

   On December 8, 2012, the parties agreed to the subdivision run time document in resolve of CROA 4102. Accordingly, employees who have the requisite numbers of hours remaining on their mandatory time will be called. TCRC crews have been available with the requisite time available under the mandatory rest rules to be called when the Company chose instead to operate the train with a Management crew. In other cases, the Company chose to run the train with a Locomotive Engineer who was set up as a Conductor and outside the craft. As these violations are clearly not runarounds by definition they affected members are entitled to lost wages.

   The Union asserts that Articles 30.01, 30.03, 5.02 (9), as well as the agreed upon December 8, 2012 Subdivision Run Time document have been intentionally violated and as a result our members were intentionally and avoidably runaround by a non-bargaining unit crews. The Union contends the Company has violated the Canada Labour Code in calling non bargaining unit crews for this work. The Union further asserts the Company has implemented a policy in violation of the parameters of the KVP decision that is affecting our membership system wide.

7. Lost wages account not allowed to work regular assignment due to mandatory rest.

   Union Position

   The Union takes the position that where a regular assignment was missed as a result of ERP, the affected employee is entitled to lost wages rather than a runaround claim. The circumstances are such that the employee is to be made whole not paid a runaround.

The Arbitrator has already ruled the Company's actions were in violation of the Collective agreement including the Kaplan award however no runarounds have been paid. The Union requests the Arbitrator order all outstanding runarounds and lost wages be paid in accordance with the August 3, 2016 award.

Alternatively, without prejudice to the above, the Union requests the Arbitrator to provide guiding principles for the examples above to administer all the outstanding grievances. Should there be an issue with a particular grievance the matter will be returned to the Arbitrator given the facts of that case.

The Union requests the Arbitrator be seized of all outstanding issues.

Company Position (taken from the Company's initial JSI – Tab 1):

The Company maintains that it has not violated the Collective Agreements with respect to runaround claims in any circumstance and disagrees with the Union's request for relief.

In March, 2015 following ongoing complaints raised by the Union during National bargaining and in the public domain about "fatigue" and the Company's development of new analytical tools, CP instituted operational changes that enhanced rest practices in line with the principles of Federal Work/Rest rules.

To further enhance safety and schedule predictability for employees and the public, employees are required to be off duty at the away-from-home terminal at least six hours, exclusive of call and eight hours at the home terminal, exclusive of call.

There are two elements to the Union's submission that the Company requests be dismissed by the Arbitrator:

1. There is a runaround payment that should be paid and;
2. The Company cannot arrange schedules to ensure employees take some minimum rest.

The Company notes that these changes do not reduce costs or enhance operational efficiencies. The changes were implemented to address rest and time off issues, long pleaded by the Union and patterns of decisions made by employees that can now be reviewed in unprecedented detail. The purpose of this change is to:

Ensure that a minimum amount of rest is taken and that employees do not compress their schedule and;

Improve employee schedules/predictability.

[13] The Company elaborated upon their position with respect to the outstanding issues at the October 15, 2016 hearing. The Company asserts that the lost wage claims (referenced in the Union's Ex parte Statement of Issue) are not properly before me and I have no jurisdiction to address lost wage claims as set out in categories 5 through 7 as set out in the Union's Ex Parte Statement of Issue.

[14] The Company submits that the Union did not mention lost wage claims in their original Ex Parte Statement of Issue or in their original brief. The Company asserts that as a result the Union is now barred from seeking such relief.

[15] The Company also relies on the principle of *functus officio*, taking the position that I have exhausted my jurisdiction and cannot expand the scope of the hearing to go beyond the original “runaround” claims.

[16] The Company also made submissions on the merits of the Union’s claims, advising that their submissions were without prejudice to their first position, which is that I only have jurisdiction to address runaround claims and not award lost wages. In terms of the merits, the Company‘s position is as follows:

- The Company asserts that only employees who had sufficient time on their regulatory clock would be eligible for a call. The Company argues that they are not required to pay employee claims in situations where subsequent-event evidence demonstrates that the run would take longer than the employee’s regulatory clock.

- The Company maintains that employees making multiple runaround claims are only eligible to receive one claim. The Company asserts that payment of more than one claim would be absurd and violate the rule against pyramiding.

- Finally, the Company argues that employees making claims are limited to either a runaround claim or lost wages but not both. In instances of a involving a TCS crew from the same terminal and craft, only a runaround claim may be payable, not lost wages. The Company also asserts that no lost wages should be paid as they are not properly before me.

[17] The Union responded to the Company’s submissions at the hearing. The Union points out that my jurisdiction to deal with all the grievances was confirmed at the July 6, 2016 hearing.

[18] The Union also takes the position that my August 3, 2016 Award resolved all the grievances in the Union’s favour because the Company only raised one defence (the ERP), which I found to be unreasonable and in violation of the Collective Agreements. The Union argues that the failure of the Company to assert any other defence in their Ex Parte Statement of Issue should result in my allowing all the claims.

[19] The Union also made the following arguments with respect to the Company's submissions on the merits:

- All runaround claims made by employees who had enough time on their regulatory clocks should be allowed. I should not rely on any subsequent-event evidence because any delay that may have occurred may not have been known at the time the Company made the decision not to call an employee.

- Employees are entitled to be paid for each run-around according to the language found in the Collective Agreements.[2] According to the Union, the payment of more than one claim is not pyramiding as the Company suggests. Rather, it is compensation for each runaround and breach of the first-in/first-out principle.

DECISION

i. Jurisdiction

[20] The first issue to be addressed is the extent of my jurisdiction to entertain the claims that have been brought before me for adjudication.

[21] The Company raises a preliminary objection to my jurisdiction to award lost wages for any of the Union's claims. The Union asserts that I already ruled on the claims.

[22] Generally, the scope of an arbitrator's jurisdiction is defined by the grievance or grievances referred to arbitration.[3]

[23] It is well accepted that while an arbitrator is bound by the grievance(s) referred for resolution, such grievance(s) ought to be liberally construed so that the real complaint is dealt with and the appropriate remedy provided to give

[2] See article 15.02 CTY-West; article 14.01 CTY- East and 30.03 LE-West & East

[3] See Brown & Beatty 2:1300 Jurisdiction of the Arbitrator, *Canadian Labour Arbitration* (4th) Canada Law Book

effect to the parties' agreement.[4] In this case the parties confirmed at the hearing on July 6, 2016 that I have jurisdiction to hear the group grievances and adjudicate a number of claims arising from **CROA 4102**.[5]

[24] The parties agreed to follow the CROA process for hearing and resolving the grievances referred to me. The CROA process mandates that the parties file a JSI. The JSI is to contain the facts of the dispute and refer to the applicable provisions of the Collective Agreements. Unfortunately, the parties could not agree to a JSI and instead they each provided their own Ex Parte Statement of Issue.

[25] The Union's original Ex Parte Statement of Issue defines the dispute as the group grievances and claims arising from **CROA 4102**. The Union asserted a breach of the first-in and first-out principle of the Collective Agreements. The Union sought, amoung other things, individual runaround claims and "such further and other relief the Arbitrator deems necessary".[6]

[26] The Company's Ex Parte Statement of Issue provided a blanket denial of any violation and disagreement with the Union's claims. The Company then solely focused on the ERP.

[27] In my view, the parties Ex Parte Statements must be liberally construed so as to resolve the real complaint between the parties.

[28] The parties were clearly aware and agreed that I would resolve all the group grievances and claims arising from **CROA 4102**. The Union did not waive any claim for damages (including lost wages). Rather, they focussed on the first-in and first-out principle and cast a wide request for relief. The Company also

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[4] See *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324* [2003] 2 S.C.R. 157 at paragraphs 68-69

[5] See paragraph 5 of the August 3, 2016 Award.

[6] See the Union's original Ex parte Statement of Issue as set out in paragraph 3 of the August 3, 2016 Award.

took a broad stroke to denying the grievances and claims arising from **CROA 4102**.

[29] My August 3, 2016 Award focused on the ERP, which was the issue the parties spent the most time addressing (i.e. the ERP).[7]The reason that I focussed on the ERP is because that was the present issue of dispute between the parties that I felt needed to be immediately addressed and resolved. I addressed that issue and found that the ERP was an unreasonable rule that violates the Collective Agreements. I directed the parties to schedule an additional hearing date for having all outstanding runaround claims resolved and I remained seized to address any issues arising from my award and to resolve "all outstanding claims".[8]

[30] It is not unusual for an arbitrator to only address one issue and to remain seized of any other issues arising from the matter referred to arbitration. This is exactly what Arbitrator Michel Picher did in **CROA 4102.**[9]

[31] There is a labour relations rationale why an arbitrator may focus on one issue and remain seized. The first and foremost consideration is to provide the parties with a timely decision. Second, and just as important, is to provide the parties with direction and encourage them to discuss and resolve disputes without the necessity of additional days of hearings or third-party intervention.

[32] As a general labour relations principle, it is always preferable for the parties to resolve their disputes without the necessity of third-party intervention. That is why in many situations an arbitrator will address the big or most urgent issue and remit the matter back to the parties, while remaining seized.

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[7] The Company focused their submissions almost exclusively on the ERP. The Union's submissions were much broader, including the CROA 4102 claims and the ERP.
[8] See paragraphs 106-107 of the August 3, 2016 Award.
[9] Arbitrator Picher is one of the most experienced and respected arbitrators in Canada. He wrote numerous decisions, many of which have been cited as the leading authority. Arbitrator Picher was also the Chief arbitrator at CROA for over 30 years.

[33] In this case, the ERP was the present issue giving rise to numerous complaints and grievances. The resolution of the ERP addressed the current concerns and provided the parties guidance. I expected, at a minimum, that the parties would take my August 3, 2016 Award and settle some of the grievances that arose from the implementation of the ERP.[10] Unfortunately, the parties have a terrible relationship and they clearly can't resolve their differences without significant third-party intervention.

[34] Both the Union and Company rely upon the doctrine of *functus officio*. The *functus officio* doctrine dictates that where an arbitrator has fully exercised their authority and finally determined the matter or matters that were submitted to arbitration, then their authority or jurisdiction is exhausted.[11]

[35] The *functus officio* doctrine only applies to my decision with respect to the ERP. The *functus officio* doctrine does not apply to any issues that are fairly raised by the grievances or the submission to arbitration that I have not yet addressed and I remained seized.[12]

[36] The Union also asserts that the doctrine of *res judicata* applies to the claims they raised in this matter. The Union submits that I have, in effect, already ruled on the claims and allowed the grievances.

[37] As indicated above, the only issue that I have already decided is determining that the ERP is unreasonable and violates the Collective Agreements. I decided no other issue. Instead I remained seized and requested the parties schedule an additional hearing date. In these circumstances, the claims have not been decided and the doctrine of *res judicata* has no application.

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[10] Particularly the grievances filed after the introduction of the ERP in March 2015.
[11] See *Chandler v. Alberta Association of Architects* [1989] 2 S.C.R. 848
[12] See *Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353 (*2009), 98 O.R. (3d) 677 (C.A.) at paragraph 60 and Brown & Beatty 1:5600 Functus Officio, *Canada Labour Arbitration (4th), supra*.

[38] Therefore, after carefully considering the submissions of the parties I find that I have authority to address all of the Union's claims and provide any appropriate relief to give effect to the provisions of the Collective Agreements.

ii. The Company's three questions

[39] In their brief, the Company identified three questions that, in their opinion, needed to be decided to assist the parties in resolving the outstanding grievances and claims.

[40] I am of the view that answering the three questions will hopefully assist the parties in resolving many of the outstanding claims. Accordingly, I have set out below the answers and my reasons.

Eligibility for Call – Is an employee eligible to a call for duty in instances where the remaining time on his or her regulatory clock is insufficient for the required tour of duty, but sufficient according to the run time documents in place?

[41] The parties disagree about the eligibility of an employee to be called for a tour of duty when they have sufficient time on their regulatory clock according to the document in place, but the actual tour took longer.

[42] The parties also disagree as to whether I can rely on subsequent-event evidence to determine if a claim should be denied or allowed.

[43] Before answering this question, it is helpful to reference the Supreme Court of Canada's decision in *Cie miniere Quebec Cartier v. Quebec (Grievances Arbitrator)* [1995] 2 SCR 1095 at paragraph 13, where Justice L'Heureux-Dube indicated the following about the admissibility of subsequent-event evidence:

> This brings me to the question I raised earlier regarding whether an arbitrator can consider subsequent-event evidence in ruling on a grievance concerning the dismissal by the Company of an employee. In my view, an arbitrator can rely on such evidence, but only where it is

> relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented.

[44] The same rationale applies to the matter before me. I can consider subsequent-event evidence if it sheds light on the reasonableness of the Company's decision not to call an employee for a run that they would be eligible to receive under the applicable document (BulletinTT00052 or the December 8, 2012 LOU incorporated into the Collective Agreements by the Kaplan Award).

[45] Turning to the Company's question, I am of the view that the answer depends on the applicable run time document and the surrounding circumstances.

[46] In terms of the February 18, 1994 Bulletin TT00052, one must recognize that this document is a unilateral Company Policy, which was held out as a "guideline". This can be contrasted with the December 8, 2012 LOU, which is an agreement that is incorporated into the Collective Agreements by the Kaplan Award.

[47] In **CROA 2906**, Arbitrator Picher found that the Company was not required to call an employee who did not have the appropriate amount of time on their regulatory clock to complete the run time indicated in the Bulletin TT00052.

[48] In **CROA 4102**, Arbitrator Picher found that the Company could not unilaterally abolish Bulletin TT00052 by the operation of the doctrine of estoppel. As indicated earlier, Arbitrator Picher did not resolve any of the specific claims raised by the Union.

[49] Reading these two decisions together and in the context of Bulletin TT00052 being a guideline, I am of the view that the Company could bypass an employee if they had reasonable grounds to believe that the run time (in Bulletin

TT00052) was not accurate, due to the current conditions, and the employee would not have been able to complete the tour within the time left on their regulatory clock.

[50] In this regard, if the Company did not call an employee, relying on specific information about a delay on the run and the subsequent-event evidence confirmed that the Company's decision was reasonable and accurate, then there would be no violation of the Collective Agreement.

[51] However, I also agree with the Union that the mere fact that a tour took longer than the time stated in Bulletin TT00052 does not mean that the claim ought to be dismissed. In my view, the Company was required to call an employee who had the required time (as stated in the bulletin) on their regulatory clock to finish the tour, unless the Company can point to a specific reason for bypassing the employee at the time the decision was made not to call the employee.

[52] I accept that there could be numerous reasons why a tour took longer than expected. Those reasons could be known before the tour of duty or they could be unforeseen circumstances that occur along the way. In my view, it is only those circumstances that were clearly known at the time that the Company decided not to call an employee that are relevant to determining if the Company made a reasonable decision. Any unforeseen circumstances are not relevant and the Company cannot rely on such circumstances to in effect pull them up by the boot straps.

[53] Therefore, I find that a claim made by an employee who was not called for a tour of duty without any specific reason being given by the Company shall be paid. Further, any claim where the actual length of time for the tour took longer than the employee's regulatory clock will be paid, if the Company did not provide a specific reason or if the delay was due to an unforeseen event that delayed the actual time of the tour.

[54] The answer is different with respect to the December 8, 2012 LOU, which was incorporated into the Collective Agreement by the Kaplan Award. The December 8, 2012 LOU is not a guideline. Rather it is an agreement that "will be applied by the Company".

[55] The parties are bound by this agreement and they specifically addressed planned/long term outages and short term outages or short term operational issues", as follows:

> Any deviation from these run times due to planned/long term outages will establish a minimum of ten (10) hours for all affected subdivisions. In such circumstances, these changes will be advertised via bulletin and VRU. Local management will notify the applicable Local Chairpersons of the change, and LR will notify the applicable General Chairpersons of any changes.
>
> Short term outages or short term operational issues which affect subdivision runtimes, will not necessitate a change to the run times listed below.

[56] In my opinion, the December 8, 2012 LOU mandates that employees will be called if they have the required amount of time left on their regulatory clocks. The parties have addressed the issue of situations that may affect any given subdivision runtime. Therefore, the Company may not bypass an employee who has the required amount of time left on their regulatory clock. If the Company does bypass such employee, then they incur liability for that employee's claim.

[57] I acknowledge that the parties cannot have an agreement that violates *Transport Canada's Work/Rest Rules*.[13] In my view, the December 8, 2012 LOU can be applied in a manner consistent with *Transport Canada's Work/Rest Rules*. The Company and employees are still bound by those rules and in the event that a situation arises where an employee or employees may be at their maximum regulatory time due to a delay on the route, then the Company must provide relief to the affected employees.

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[13] See **CROA 2906**

[58] I acknowledge that providing relief will be costly and inconvenient for the Company. However, cost and inconvenience is not a reason to ignore the parties agreement.

Payment – Is an employee eligible for payment of multiple runaround claims for the same period of time?

[59] The Company takes the position that only one runaround payment is payable to employees, even in situations where they have been not called on more than one occasion. The Company asserts that paying an employee more than once would be absurd and violate the rule against pyramiding.

[60] The Union disagrees and asserts that payment is required each time an employee is bypassed.

[61] I agree with the Union that a payment is required each time an employee is bypassed. Each time the Company bypasses an employee, they have violated the applicable Collective Agreement. The payment of a runaround claim is compensation for each violation of the applicable Collective Agreement.

[62] The language in the CTY Collective Agreements clearly requires payment for “each run-around and continue to stand first out.

[63] I acknowledge that the LE Collective Agreements have different language, that is not as clear. In my opinion, that makes no difference because I am satisfied that each time an employee is bypassed, the Company has violated the applicable Collective Agreement and a new claim arises.

[64] The payment of multiple claims in this situation does not violate the rule against pyramiding. The rule against pyramiding has been applied by arbitrators in situations where an employee is claiming two or more monetary benefits or entitlements for the same hours of work or same job. This most often arises in

claims for both an overtime premium and shift premium, or an overtime premium and a holiday premium for the same hours worked.[14]

[65] The presumption that forms the basis for the rule against pyramiding is easily rebutted when it is found that the payments have different purposes or are for different hours or work. Moreover, particular attention must always be given to the language agreed upon by the parties.

[66] In this case the language is clear that the payment is to be made for each runaround claim. Every time the Company violates the agreement by not calling an employee for a work assignment or tour raises a new claim that requires payment.

[67] The Company also relies on **CROA 231** to support their position**.** In my opinion, the circumstances in **CROA 231** are different from the matter before me. In **CROA 231**, the employee was entitled to be retuned deadhead on the first available train. That was not done and therefore he lost an opportunity and was not available to respond to other calls.

[68] In the cases before me, the employees were available to accept the call, but the Company chose to bypass them on one or more occasion and assign the tour to someone else. As indicated above, each time the Company bypassed an employee, they violated the applicable Collective Agreement.

[69] Accordingly, I agree with the Union and an employee is to be compensated for each time the Company failed to call them for a tour of duty.

[14] See Brown & Beatty 8:2140 Pyramiding, *Canada Labour Arbitration (4th), supra*

Payment – Is an employee eligible for a runaround payment, lost wages or both when a TCS crew is called?

[70] Arbitrator Schmidt recently reviewed the arbitral jurisprudence regarding the payment of lost wages and runaround payments in **CROA 4295**. Arbitrator Schmidt relied on the meaning of a runaround articulated by Arbitrator Weatherill in **CROA 501** and adopted by Arbitrator Picher in **CROA 2120**. I agree with Arbitrator Schmidt's reasoning and apply it to the matter before me.

[71] Based on the reasoning found in **CROA 4295**, I find the following:

- runaround claims are to be paid when an employee is improperly missed, or "runaround" and another employee from that same group is called in for the tour.
- Lost wages shall be paid to any employee in a group who lost a tour by the assignment of such tour to a different group, list or management.

[72] I now turn to the specific examples raised in the Union's brief so that the parties can have examples to rely upon when they assess each claim.

Run Arounds Prior to CROA 4102 (under Bulletin TT00052)

[73] The Union provided the example of Trainman Christie who on January 25, 2009, had nine hours left on his regulatory clock and was not called for eight hour tours. The Company response indicated that in their view, Trainman Christie did not have enough time on his regulatory clock due to anticipated work on the tours. The actual tours took longer than the eight hours that Trainman Christie had on his regulatory clock.

[74] In these circumstances, the subsequent-event evidence confirms that the Company was correct in believing that Trainman Christie could not complete the work within the time set out in the bulletin's guideline. The claims for payment for the tours that took longer than Mr. Christie's regulatory clock are denied.

[75] The Union's second example involves Conductor Josh Allen not being called for a seven hour tour, when he had eight hours and five minutes remaining on his regulatory clock. The Company declined the claim indicating that the actual time for the tour to be completed was longer than the time that Conductor Allen had remaining on his clock.

[76] It is not entirely clear if the Company had reason to believe that the tour would take longer than the time specified in the bulletin. If the Company did not specify why they initially failed to call Conductor Allen, then they may not rely on the fact that the tour took longer than the regulatory clock. If the Company provided a specific reason why Conductor Allen was not called, then the claim is denied.

Run Arounds subsequent to CROA 4102 and prior to the December 7, 2012 Kaplan Award

[77] The Union provided the example of Engineer Mulligan who on November 26, 2012 had eight hours and five minutes left on his regulatory clock and was denied a call for a five hour tour.

[78] The Company's response to the grievance advises that the tour took ten hours to complete. Unfortunately, the Company did not specify what the conditions were at the time they made the decision not to call Engineer Mulligan. The Company in a January 27, 2014 letter indicates that they assess the operating conditions, which may affect the train(s) in question. The Company provided no specific information about why they did not call Engineer Mulligan.

[79] In my view, the generic answer of the Company fails to provide a specific and reasonable basis for not calling Engineer Mulligan. The subsequent-event evidence is not helpful in shedding any light on the Company's reasons for failing to call Engineer Mulligan. In these circumstances, Engineer Mulligan is entitled to have his claim paid.

[80] The November 20, 2012 claims of Engineer Beck and Conductor Nykolaishen are allowed for the same reasons as Engineer Mulligan.

[81] The November 30, 2012 claim of Engineer Bohonos is also allowed for the same reasons as Engineer Mulligan's claim.

Run Arounds subsequent to the Kaplan Award

[82] Earlier in this Award, I provided my reasons as to why the December 8, 2012 LOU mandates that employees will be called if they have the required amount of time left on their regulatory clocks. Applying my reasons to the Union's examples, I find each of the following employee claims are allowed as each of employees had enough time available on their regulatory clocks to meet the minimum requirement provided in the December 8, 2012 LOU:

- The September 12, 2013 claim(s) of Conductor R. Wallace.
- The August 3, 2013 claim(s) of Conductor D. Krassman.
- The June 27, 2013 claim(s) of Conductor J. Lennie.

Runarounds Subsequent to Kaplan Award where the Company imposed rest at the Home Terminal and Away from Home Terminal

[83] In my August 3, 2016 Award, I found that the ERP was an unreasonable rule and violated the Collective Agreements. Based on my earlier reasons, the following claims are allowed:

November 15, 2015 claim(s) of Conductor Clint Irwin
The February 2016 claims of Conductor Olshanoski

Crews Run Around by a TCS crew at the AFHT Lost wages

[84] The claims of Conductor Raymond are to be paid in accordance with my earlier reasons respecting the payment of either lost wages or a runaround claim.

Lost wages while held on reset and manager crew utilized

[85] The following claims are to be paid:

- May 11, 2016 claim of Engineer Katchmar for lost wages ($376.04) is to be paid.
- March 20, 2015 claim of Engineer Sydia for lost wages ($328.84) is to be paid.

Lost Wages account not allowed to work regular assignment due to mandatory rest

[86] The claim of Engineer Legare is to be paid.

CONCLUSION

[87] I am hopeful that this award, together with my August 3, 2016 Award, will provide the parties with the necessary direction to review and resolve all the outstanding claims. However, in the event that the parties cannot resolve all the outstanding claims, I am ordering the following process be implemented:

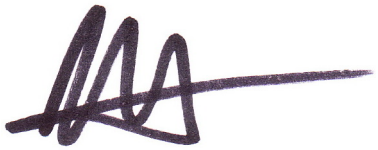
- The Union shall create an Excel spreadsheet outlining each claim, providing reference to the event, grievance and including the damages sought.
- The Union shall also indicate if the claim has been paid. If the claim has not been paid, then the Union shall briefly set out their position and the amount of the claim.
- The Union will send the Company the Excel spreadsheet and leave room for the Company's response.
- The Company shall set out their response on the Excel spread sheet.
- The parties will provide me with the completed spreadsheet and a copy of the grievance and response for any claims that remain outstanding. The parties may also provide a JSI.

- I will review the information and decide whether I need to hear further submissions. If I need to hear further submissions, then my office shall schedule a conference call or a hearing date to hear submissions, which shall be limited to the outstanding disputes identified in the spreadsheet.

- After hearing submissions, I shall issue an award outlining the final disposition of each claim.

[88] I remain seized to address any issues arising from my awards and to address any issue fairly raised by the grievances but not addressed in my awards, including but not limited to the quantum of damages for any claim.

Dated at Toronto, Ontario this 8th day of November 2016.



John Stout - Arbitrator