

**IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC*
1985, c L-2.**

BETWEEN:

Teamsters Canada Rail Conference

(TCRC)

-and-

Canadian Pacific Railway Company

(CP)

Grievance Re: Buffalo ESR – Order Time for Toronto Return - Bulletin SI-049-20

Arbitrator: Graham J. Clarke
Date: December 21, 2022

Appearances:

TCRC:

K. Stuebing: Legal Counsel
W. Apsey: General Chairperson CTY East, Smiths Falls
E. Mogus: General Chairperson LE East, Oakville
J. Bishop: Vice General Chairperson LE East, Mactier
B. Baxter: Vice General Chairperson CTY East, Toronto
B. Marquette: Local Chairperson, Toronto

CP:

C. Clark: Manager Labour Relations, Calgary, AB
E. Allen: Labour Relations Officer, Calgary, AB
R. Araya: Coordinator, Labour Relations, Calgary, AB

Arbitration held via videoconference on December 13, 2022.

Award

BACKGROUND

1. On March 22, 2022, the parties signed a Memorandum of Settlement revising the arbitration process in Article 41 of their collective agreement. The arbitrator agreed to hear 4 Ad Hoc cases in 2022 and a further 8 in 2023 on the condition that the parties would plead no more than 2 cases per day.

2. This case concerns the Extended Service Run (ESR) between Toronto and Buffalo. The TCRC contested CP's Bulletin SI-049-20 (Bulletin) requiring employees, while still on their tour of duty from Toronto, to contact CP for their return trip information. The parties' Joint Statement of Issue (JSI)¹ describes the dispute:

Issuance of Bulletin SI-049-20 to employees in ESR service at the Away From Home Terminal of Buffalo, New York requesting inbound crews on train 246 contact the Hamilton Subdivision Assistant Trainmaster (ATM) before ending their tour of duty at Buffalo, New York.

3. The parties chose a representative case to provide helpful particulars:

On October 30, 2021, Engineer Richard Doxey and Conductor S. Connor Davies worked on train 246-30 to Buffalo, New York, arriving with an off duty time of 21:45. In accordance with the Bulletin and FRA regulations, this crew was advised of their order time for the return tour of duty at 0800 October 31, 2021. They did not receive a 2-hour call at 0600 on October 31, 2021.

4. The TCRC argued that CP can only call employees for work once they have completed their US statutorily mandated 10-hour rest period. It alleges the collective agreement (CA) requires CP then to provide at least a 2-hour call before the next tour of duty. The TCRC further submits that CP's Bulletin denies employees the negotiated benefit of a "courtesy call" found at article 21.02(3) of the CA.

5. CP maintained that its Bulletin respected both the CA and the U.S. Federal Railroad Administration hours of service regulations (FRA)². Nothing prevented it from advising crews of the time of their next tour of duty prior to the start of their rest period.

¹ Ex-2; Tab 1

² Ex-2; Tab 2

6. For the reasons which follow, the arbitrator concludes that the parties' CA currently contemplates CP calling crews only after their rest period and not before. The Bulletin did not respect those CA obligations.

ANALYSIS

7. The parties dispute when CP can inform the Toronto-Buffalo ESR crew of the time for their return ESR trip from Buffalo to Toronto. Can that "call" be made just prior to the end of the Toronto-Buffalo tour of duty? Or must CP make this "call" only after employees have completed their FRA mandated 10-hour rest?

8. Laypersons might initially think that an employer can advise its employees of their next shift at any time. But the railway industry makes this matter more complex since crews travel and do not return to their home each day. Both governments and the parties have created obligations relating to train crews' need for proper rest.

PRINCIPLES OF INTERPRETATION

9. The arbitrator's task is not to determine what might be the most efficient way to operate a railway. CP has that expertise. Instead, the arbitrator must determine what the parties have negotiated in their CA, keeping in mind for this case the statutory backdrop of the FRA³:

42. In this case, the arbitrator's focus is not on how best to run a railway, a subject which would clearly fall outside any presumed expertise. Instead, the arbitrator must examine the parties' binding legal agreement contained in the PER. Evidently, the greater that CN can demonstrate compliance with the PER, the higher the likelihood an arbitrator would find any TCRC refusal to consent unreasonable.

10. In AH801⁴, the arbitrator summarized various principles of interpretation when attempting to interpret an amended and contradictory collective agreement provision [Footnotes omitted; Bold in original citation]:

21. An arbitrator must interpret the words the parties used in their CA. It does not matter what a party might have intended if the words to which they agree mean something else. The parties have the ultimate responsibility to ensure the language of their contract reflects their mutual intention.

³ AH690 - [Canadian National Railway Company v Teamsters Canada Rail Conference, 2020 CanLII 6669](#)

⁴ [Teamsters Canada Rail Conference \(CTY-West\) v Canadian National Railway Company, 2022 CanLII 112672](#)

22. In CROA 4631, the arbitrator noted:

13. A rights arbitrator cannot amend the collective agreement. Article 14 of the parties' Memorandum of Agreement Establishing the CROA&DR makes this explicit:

The decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.

14. For interpretation cases, Arbitrator Moreau described the importance of evidence and the plain and ordinary meaning of negotiated provisions in CROA&DR 3601:

Arbitrators follow several presumptive rules of interpretation when construing a collective agreement. One of the lead rules is that the provisions in a collective agreement must be read according to their plain and ordinary meaning. That rule will only be set aside when it has been demonstrated, with clear and reliable evidence, that the parties have agreed to an interpretation that is different from its ordinary meaning.

15. In CROA&DR 4606, this Office described how past practice and estoppel can impact collective agreement interpretations.

23. In a non-railway case, Arbitrator Surdykowski provided a helpful summary of labour arbitrators' obligations when interpreting the parties' negotiated language:

23. A grievance arbitrator cannot rewrite the parties' agreement. In the absence of an ambiguity established or resolved by extrinsic evidence, collective agreement wording trumps all considerations other than legislation, and a grievance arbitrator must interpret the collective agreement as written. An arbitrator cannot amend or imply terms into a collective agreement because he considers it fair or appropriate to do so, or because of his view of what the parties must have or could not have intended. Although has been written about collective agreement purpose, fairness, internal anomalies, cost or administrative difficulty, or the effect on the parties or bargaining unit employees, such considerations can only come into play when the grievance arbitrator must choose between equally plausible interpretations of the collective agreement language in issue – a situation which rarely presents. The grievance arbitrator is tasked with determining what the collective agreement provides or requires, not what he thinks it should provide or require, regardless of the effect on either party or on bargaining unit employees. **The employer, the union, and bargaining unit employees are entitled to no more or less than the benefit of the bargain described by the words contained in the collective agreement.** Clear

collective agreement wording prevails over all considerations other than legislation. It is up to a party that is dissatisfied with the consequences of the collective agreement bargain as determined by a grievance arbitrator to seek a collective bargaining solution. **It is no part of a grievance arbitrator's job to save the parties or either of them from the consequences of the agreement as written by them.**

(Emphasis added)

11. In short, the arbitrator will consider this non-exhaustive list of principles when interpreting the parties' CA:

1. An arbitrator interprets not what the parties may have subjectively intended but instead the plain and ordinary meaning of the words they negotiated into their collective agreement;
2. Exceptionally, and provided certain legal preconditions are met, an ambiguity, a past practice or an estoppel may impact the collective agreement's interpretation;
3. A rights arbitrator has no authority to rewrite or otherwise amend the collective agreement⁵;
4. Parties are entitled only to the benefit of their bargain; and
5. A rights arbitrator does not determine what the parties' appropriate bargain should have been. Changes to the parties' "deal" come solely from collective bargaining.

THE KEY PROVISIONS

12. The parties agree that the FRA applies to CP employees when working in the US. The FRA includes minimum off duty hours. The arbitrator will reproduce the key FRA and CA provisions on which the parties relied in support of their positions.

The FRA

13. The FRA⁶ establishes off duty (rest) hours and limits employer communications during these hours:

- (a) IN GENERAL. Except as provided in subsection (d) of this section, **a railroad carrier and its officers and agents may not require or allow a train employee to**

...

⁵ Article 14: [Memorandum of Agreement Establishing the CROA&DR](#)

⁶ [§ 21103. Limitations on duty hours of train employees](#)

(3) remain or **go on duty unless that employee has had at least 10 consecutive hours off duty during the prior 24 hours.**

...

(e) COMMUNICATION DURING TIME OFF DUTY.

During a train employee's minimum off-duty period of 10 consecutive hours, as provided under subsection (a) or during an interim period of at least 4 consecutive hours available for rest under subsection (b)(7) or during additional off duty hours under subsection (c)(4), **a railroad carrier, and its officers and agents, shall not communicate with the train employee by telephone, by pager, or in any other manner that could reasonably be expected to disrupt the employee's rest. Nothing in this subsection shall prohibit communication necessary to notify an employee of an emergency situation, as defined by the Secretary.** The Secretary may waive the requirements of this paragraph for commuter or intercity passenger railroads if the Secretary determines that such a waiver will not reduce safety and is necessary to maintain such railroads' efficient operations and on-time performance of its train.

(Emphasis added)

The collective agreement

14. The TCRC at paragraph 43 of its Brief referenced "held away pay" under article 8 of the CA as a possible reason why CP issued the Bulletin:

43. In practice, this has resulted in the accrual of two hours' held-away pay under Article 8 after the 10 hours of FRA-mandated rest. The Union infers that it is a desire to eliminate this held-away payment that motivates the Company's actions in the instant matter.

15. Article 21.02 of the CA deals with Crew Calling:

21.02 CREW CALLING

(1) **The Company will record all incoming and outgoing telephone calls pertaining to the calling of crews and this information will be retained for a minimum of 60 days.** Accredited Union Officers shall have reasonable access to these recordings upon request to a Company Officer.

(2) In the event that specific information is requested by the Accredited Union Representative, the recording, or a transcript of the requested portion, will be retained and furnished upon request.

(3) **Employees will be afforded in thirty (30) minute increments courtesy calls at the home and away from home terminal if desired.** Any abuse of courtesy calls will result in a loss of privilege for a ninety (90) day period.

(4) When two employees are called from the spareboard for the same assignment or tour of duty, the senior employee will be given preference to the higher rated position. **Employees will be responsible for contacting the Crew Management Centre in the event they are called out of turn.**

5) **LE APPLICATION - The Company will consult with the Union prior to making a change of consequence in the calling procedure.**

(Emphasis added)

16. Article 57 of the CA governs locomotive engineer calls for road service:

ARTICLE 57 – CALLING

57.01 **Employees will be called in time to be on duty at time required by the Company. Where telephone service is available, employees will be called by telephone only, except that other means will be used in cases of telephone failure.** When the telephone rings and is not answered or when a busy signal occurs this does not indicate telephone failure. Telephone failure exists in cases where the operator advises that the call cannot be completed as dialled or the line goes dead. When a busy signal occurs the practice of repeating the call will continue. Other means may also be used when employees are accommodated in facilities provided by the Company. **Employees will be given at least a two-hour call except in cases of emergency.**

57.02 Engineer, when called, will be called for a specified time in all services.

17. Article 80 governs calls for CTY employees:

ARTICLE 80 - ROAD SERVICE – CALLING CREWS & EMPLOYEES ON REGULAR RUNS OFF DUTY

80.01 **Employees will be called in time to be on duty at time required by the Company.** Where telephone service is available, employees will be called by telephone only, except that other means will be used in cases of telephone failure when the employee resides within the applicable calling area in 1987. Other means may also be used when employees are accommodated in facilities provided by the Company. **Employees will be given at least a two-hour call except, when Trainpersons are called S.A.P. (except in cases of emergency); they will be called for a specified time.**

Parties Positions

18. The TCRC argued that CP can only “call” Toronto-Buffalo ESR employees after the FRA 10-hour rest period:

70. With Bulletin SI-049-20, CP has required that train crews inbound to Buffalo must contact their manager before going off duty, who would then give them their call back out of Buffalo in 10 hours. In so doing, CP has eliminated the mandatory 2-hour call enshrined in Articles 57 and 80 of the Collective Agreement. As noted above, Articles 57 and 80 guarantee running trade employees rights to have a two hour call by default at both the home and away from home terminals.

...

72. CP’s unilateral action is not only in breach of longstanding Collective Agreement language, but is at odds with decades of consistent practice by which train crews receive a call at least two-hours in advance of order time for any given assignment.

19. The TCRC described the Bulletin’s impact on the statutory 10-hour rest under the FRA:

79. Under the new status quo imposed by Bulletin SI-049-20, Train 246 crews are required to use part of this ten-hour period to set their alarm, wake, get food or make a lunch, have a shower and dressed all need to be undertaken in preparation of working a train—all within the 10th hour during their rest period. These activities are activities at the behest of CP, and are thus inconsistent with the concept of uninterrupted rest under the hours of service legislation as set forth in the FRA’s December 2013 Manual.

20. CP disagreed and argued nothing prevented it from advising its employees before they started their mandatory FRA rest of the time of their return trip. In its Brief, CP emphasized it had given more than 10 hours’ notice to the specific crew about their return trip:

16. On October 30, 2021, Engineer Richard Doxey and Conductor S. Connor Davies worked on train 246-30 to Buffalo, New York, arriving with an off duty time of 21:45. In accordance with the Bulletin and FRA regulations, this crew was advised of their order time for the return tour of duty at 0800 October 31, 2021.

...

63. In the example provided in the joint statement of issue, Engineer Doxey and Conductor Connor went off duty at 21:45 on October 30, 2021. They were advised they were to be on duty for 0800 on October 31, 2021.

64. This provided the Engineer and Conductor with 10 hours and 15 minutes time off duty, which was in accordance with FRA regulations. Under the provisions provided for in the TCRC Collective Agreement, Engineer Doxey and Conductor Conner could have only remained off duty for 10 hours, which would have had them on duty for 0745 on October 31, 2021.

21. CP emphasized that the CA requires at least a 2-hour call, but sets no ceiling for how early the call may be:

31. It is important to note the precise language negotiated by the parties. The language does not provide a maximum of 3, 4, 5 or even 15 hour call. It only provides for a minimum amount – which is two hours. There is no ceiling of how early you can be called for duty.

32. The language clearly states: “Employees will be given at least a two-hour call, except in cases of emergency.”

22. CP explained that when crews called the Assistant Train Master (ATM) as instructed in the Bulletin they would receive their next on duty time:

45. The intent of the communication outlined in the bulletin, was for the ATM to provide the T&E employees their next on duty time.

46. The on duty time provided by the ATM is in line with all provisions of the Collective Agreement:

- Employees were given at least two-hours’ notice of when they were required for duty;
- Employees were advised of a specified time they were required for duty;
- The call times were within the standards set by the FRA; and
- The call times never conflict with personal rest TCRC represented employees could book while at the away from home terminal per the Consolidated Collective Agreement.

Decision

23. The parties have expressly limited their dispute to the situation involving the Toronto-Buffalo ESR⁷:

The parties agree the jurisdiction of the arbitrator shall only be limited to addressing disputes and issues specifically raised by the parties in the Joint Statement of Issue.

24. The issue in this case is not whether CP's Bulletin leads to greater efficiencies. The issue the arbitrator must decide is whether CP's Bulletin respects both the FRA and the parties' CA.

25. For the following reasons, the arbitrator concludes that the FRA and the CA do not allow CP to "call" employees for their return trip when they are still on their tour of duty from Toronto to Buffalo. The arbitrator puts the term "call" in quotation marks since, under the Bulletin, CP never actually calls the employees.

26. The parties both agree that the FRA binds CP's employees. As noted above, the FRA prohibits an employer from calling employees when they are on their "minimum off-duty period of 10 consecutive hours":

...a railroad carrier, and its officers and agents, shall not communicate with the train employee by telephone, by pager, or in any other manner that could reasonably be expected to disrupt the employee's rest.

27. The FRA's goal is to avoid disrupting "the employee's rest". The arbitrator highlights that the 10 hours is an "off-duty period" designed to give employee's 10 consecutive hours of rest. The FRA equates "off-duty" with "rest". CP cannot call its employees during this period.

28. The TCRC satisfied the arbitrator that employees who are "off-duty" and enjoying "rest" during the mandated 10-hour period cannot simultaneously be preparing for work, including showering, preparing meals etc. Their preparation will only start after the end of their rest period once they receive a call.

⁷ Ex-3; Tab 1 JSI

29. Can CP “call” its employees before they even start their rest period? No. As reviewed below, the collective agreement’s wording does not support that notion.

30. For example, CP has accepted an obligation to record calls in article 21.02(1):

The Company will record all incoming and outgoing telephone calls pertaining to the calling of crews and this information will be retained for a minimum of 60 days.

31. The arbitrator does not see how CP can respect this recording obligation when the Bulletin requires employees on the Toronto-Buffalo ESR run to “contact the Hamilton Subdivision Assistant Trainmaster (ATM) before ending their tour of duty at Buffalo, New York”. Article 21.02(4) also suggests that the “Crew Management Centre”, and not an ATM, has the responsibility for crew calling⁸.

32. Article 21.02(3) further contemplates “courtesy calls” at employees’ discretion. The arbitrator understood that an employee could ask the crew-calling centre for a call shorter than the 2-hour minimum⁹. This might allow them more time to sleep.

33. The arbitrator does not see how these ESR employees can request their negotiated courtesy calls if the order time was already provided during the Toronto-Buffalo tour of duty. Article 21.02(5) does contemplate a consultation, at least for locomotive engineers, but there was no evidence of any consultation in this case.

34. Articles 57 and 80 contemplate calls to employees when they are eligible to work again. Under the FRA, this only starts after the 10-hour off duty rest period. For example, article 57 states:

Employees will be called in time to be on duty at time required by the Company.

35. Can CP respect this obligation by advising crews of their start time while still working on the Toronto-Buffalo tour of duty? A somewhat tortured interpretation of Article 57 may initially support CP’s argument. The CA requires “at least a two-hour call”:

Employees will be given **at least a two-hour call except in cases of emergency**.

⁸ See also Ex-3; CP Brief paragraphs 34-35.

⁹ Ex-3; CP Brief paragraph 34.

(Emphasis added)

36. But CP's suggested interpretation loses its persuasiveness because the parties have further agreed that an emergency allows CP to call employees with less than 2 hours' notice. CP's negotiated right to curtail the calling period for emergencies easily fits within the scenario of calling employees after they have had their rest. It does not appear consistent, however, with "calling" employees when they were still on their previous tour of duty.

37. The TCRC further suggested that its members could be disciplined if they accepted a call on the Toronto-Buffalo tour of duty, but then booked off¹⁰. Article 35.01 of the CA reads:

35.01 An employee being physically unfit for duty will report same to the crew management centre, so that the employee may not be called. The employee will not be disciplined for "booking unfit."

38. If an employee became unfit during the FRA's 10-hour off duty rest period, how would this article work? This question again demonstrates that a sounder interpretation of the CA posits that CP calls its employees only after their mandatory rest and not before.

39. The parties did not appear to dispute that, prior to the Bulletin, CP called its employees in Buffalo only after the expiration of the FRA's rest period¹¹. This practice appears consistent with certain FAQ-like documents from CP¹² and the FRA¹³.

40. Similarly, the TCRC noted that CP had tried to change the calling rules in previous rounds of collective bargaining but without success.

DISPOSITION

41. The arbitrator has considered the parties' competing interpretations of the CA. For the reasons expressed above, the CA does not contemplate CP's ESR Toronto-Buffalo employees receiving their "calls" while still on their Toronto-Buffalo tour of duty. The negotiated language fits far more comfortably within the scenario, which appears to have

¹⁰ [CROA 4524](#)

¹¹ Ex-1; TCRC Brief paragraphs 26-28.

¹² Ex-2; Tab 4: CP Job Aid: "US Hours of Service Questions".

¹³ Ex-2; Tab 3

been the status quo for years, of CP calling crews after the expiration of the FRA's 10-hour rest period.

42. While this may result in employees receiving "held away pay" under article 8 of the CA, that result alone is not sufficient to discount the parties' existing negotiated wording. A change to that scenario must come from collective bargaining rather than from a rights arbitrator.

43. The arbitrator declares that the Bulletin violates the collective agreement. The TCRC has requested various resulting remedies¹⁴. The arbitrator retains jurisdiction to hear the parties' arguments in that regard should they be unable to agree on the appropriate remedies.

SIGNED at Ottawa this 21st day of December 2022.

A handwritten signature in black ink, appearing to read "G. Clarke", written in a cursive style.

Graham J. Clarke
Arbitrator

¹⁴ Ex-1; TCRC Brief paragraphs 95-99.