# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

# CASE NO. 4883

Heard in Calgary, November 15, 2023

Concerning

**CANADIAN NATIONAL RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Remedy and Policy grievance on behalf of all Conductors in Western Canada, and specifically Conductor Thomas Kreisz (184595) of Vancouver, BC, concerning the violation of Article 75.2, 83, 83A of Agreement 4.3, and the Questions and Answers to the Union from the Company regarding Conductor Only Operations.

**THE UNION'S EXPARTE STATEMENT OF ISSUE:**

On March 9, 2021, Conductor Kreisz (the Grievor) was assigned to the 0620 Thornton Conductor Only (Yard) Transfer, assignment YNXS01. The Grievor was instructed to take control of train A417 that was staged on the River Lead; pull through track PF35 and set out the tail end portion of the train up to the mid train Distributed Power (DP). He was then instructed to set over the DP remote to the 'B' yard lead and shove the remainder of the train into track PF34. Finally, the Grievor picked up the DP remote and operated the power to the shops.

It is the Unions position that the Company has knowingly violated the provisions of Article 75.2, 83, 83A, and applicable jurisprudence regarding Conductor Only (Yard) transfers. The Grievor was not instructed to perform a transfer from a any one yard/interchange to another yard/interchange. Instead, the Grievor was ordered to complete the yarding of a road service train that had been staged at Thornton Yard.

The Grievor was also required to perform switching when the Company required him to set out and pick up the DP Remote and in manner that that did not conform to the minimum number of tracks as there are no provisions for Designated Cuts (DC) when working in yard service. The Company agreed in its response to the Union that the work performed during the Grievors tour of duty was a violation of the collective agreement.

The Union request a cease and desist be ordered to the Company compelling them to properly comply with the provisions of previously cited articles. Furthermore, an appropriate remedy be applied as per Article 121 of Agreement 4.3 for the blatant and indefensible violation of the Collective Agreement. Furthermore, an established remedy be applicable to both like and future grievances of this nature.

It is the Company's position that, without precedent or prejudice, the work performed by Conductor Kreisz exceeded the provisions outlined in Article 83A of Agreement 4.3, but that the instant matter does not command a need for a remedy payment.

**FOR THE UNION:**
**(SGD.) R. S. Donegan**
General Chairperson, CTY-W

**FOR THE COMPANY:**
**(SGD.)**

There appeared on behalf of the Company:

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| R. K. Singh | – Labour Relations Manager, Vancouver |
| D. Jansen | – Transportation Manager, Vancouver |
| S. Fusco | – Senior Manager, Labour Relations, Edmonton |
| M. Ikram | – Labour Relations Manager, Edmonton |

And on behalf of the Union:

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| K. Stuebing | – Counsel, Caley Wray, Toronto |
| R. S. Donegan | – General Chairperson, CTY-W, Saskatoon |
| J. W. Thorbjornsen | – Vice General Chairperson, CTY-W, Saskatoon |
| M. Anderson | – Vice General Chairperson, Edmonton |

## AWARD OF THE ARBITRATOR

### Background, Issue and Summary

[1] The Grievor is employed as a Conductor, working out of Vancouver. British Columbia.

[2] This Grievance relates to work performed by the Grievor on May 14, 2018, while working on a "Conductor Only" crew under Agreement 4.3 (Western Canada). A "Conductor Only" crew is a crew of two, composed of the Conductor and a Locomotive Engineer. Article 83A of Agreement 4.3 limits what types of work can be performed by Conductor Only crews.

[3] For the reasons which follow, the Grievance is allowed. I find and declare the Company breached Article 83A of Agreement 4.3 and assigned to the Grievor work that was not appropriately performed by a "Conductor Only" crew. A monetary remedy is appropriate for this breach.

### Facts

[4] The facts are not in dispute. On May 14, 2018, while working on a "Conductor Only" crew, the Grievor was given responsibility to yard Train 417, which had

arrived in the Vancouver Yard from Edmonton and been left on the River Lead. While it is the arriving crew that is normally required to yard its train[1], in this case that crew did not perform this task.

[5] This assignment was given to the Grievor in addition to the Grievor's other assigned transfer work in the Yard.

[6] Train 417 was over 8000 feet in length. It had a Distributed Power (DP) unit, which is a locomotive set in the midst of the train (rather than at the lead) to assist in powering the train. The Grievor was tasked with yarding Train 417 into tracks P35 and P34, as well as cutting out the DP unit and taking that unit and the locomotives to the Shop.

[7] I was provided with very helpful diagrams by the parties for understanding the work performed by the Grievor.

[8] It is not disputed the Grievor's work shift that day was 10 hours and 15 minutes. I am satisfied the work relating to Train 417 involved several actions and would have taken at least one to two hours of this shift. The exact time would depend on the traffic in the Yard and the delays inherent in waiting for clearances to make the required movements.

[9] In its response to the Grievance at Step Three, the Company has admitted that the work assigned to the Grievor – "performing a designated cut during a Conductor (Yard) only transfer, switching a DP power and handling cars not related to their movement do not fall under the provisions of Article 83A". The Company stated in that response that it "does not agree with the Union that the matter in dispute is the subject of a "remedy" or that a remedy is any way required or warranted". The Company also indicated its willingness to meet with the Union to "discuss Conductor (Yard) only Transfer grievances to reach an agreement."

[10] The Company's admission that it breached Article 83A of Agreement 4.3 was also repeated in its written submissions to this Office. In its Rebuttal, it agreed it should

[1] As noted in **CROA 4575**

have called in a Yard Crew to perform the tasks. No explanation was provided by the Company for why that was not done, in this case.

[11] Article 121.10 of Agreement 4.3 states:

> 121.10 When it is agreed between the Company and the General Chairperson of the Union that the reasonable intent of application of the Collective Agreement has been violated an agreed to remedy shall apply…The precise agreed to remedy, when applicable, will be agreed upon between the Company and the General Chairperson on a case-by-case basis…In the event an agreement cannot be reached between the Company and the General Chairperson as to the reasonable intent of application of the Collective Agreement and/or the necessary remedy to be applied the mater may within 60 calendar days be referred to an Arbitrator as outlined in the Collective Agreement.
>
> **Note**: A remedy is a deterrent against collective Agreement violations. **The intent is that the Collective Agreement and the provisions as contained therein are reasonable and practicable and provide operating flexibility. An agreed to remedy is intended to ensure the continued correct application of the Collective Agreement.**
>
> [emphasis added]

[12] The issue has been advanced to arbitration by the Union. I am satisfied this advancement was because the parties could not agree on what remedy would be appropriate for this breach, as apparent in the arguments made before this Office.

## Arguments

[13] The Company argued that a declaration of breach was a sufficient remedy. It argued this was not a case of "wilful and/or egregious violations, which may more readily attract a cease and desist order". It argued there are only two violations which it has acknowledged as running afoul of Article 83A and there is no larger issue at play. It also argued the Grievor had already been compensated for performing the work, even if outside of what he should have been assigned. It noted Article 3.1(2)(b)(c) pays a 12.5 mile premium if required to make a designated cut when doubling trains in a minimum number of tracks constitutes switching. It argued that any further monetary remedy would amount to a premium payment for this work, which would need to be bargained.

[14] The Union argued there is a larger, systemic issue at play. It noted there are 580 grievances filed regarding assignment of Conductor Only work in breach of Article

83A of Agreement 4.3, dating from 2011 to the present. It sought a remedy payment as a deterrent against further violations. It argued the amount of that payment should either be declared by this Arbitrator, or at the very least, remitted back to the parties for further negotiation.

**Analysis and Decision**

[15] The Union has filed this Grievance as a Policy Grievance "on behalf of all Conductors in Western Canada concerning Conductor Only Operations".

[16] I am satisfied the assignment of "Conductor Only" work is a contentious issue between the parties. The Union has stated that it has approximately 580 grievances filed which relate to the assignment of work that it alleges does not meet the requirements of the Conductor Only provisions.

[17] Some historical background is relevant to determining the appropriate remedy.

[18] The parties are sophisticated and are in a mature bargaining relationship, spanning many decades. As between these parties, there are distinct collective agreements which govern the work of Conductors in the various regions of Canada. Agreement 4.3 applies in Western Canada. It is a lengthy and detailed document.

[19] The parties are also signatories to the Agreement which formed the CROA Office[2] in 1965, as amended. This Office has produced jurisprudence over multiple decades relating to this industry. That jurisprudence provides both persuasive precedent and historical background.

[20] Historically, trains were operated by a crew consist of a locomotive engineer, a conductor and up to two other employees. Technological innovations led to the negotiation of provisions which allowed crews to perform certain work with just a Locomotive Engineer and a Conductor. These were called "Conductor Only" crews and w were smaller crew consists.

[2] Most recently amended in November 2023.

[21] The relevant agreement relating to Western Canada was negotiated as a stand-alone agreement in January of 1992 (the "Western Conductor Only Agreement"). Appended to that Agreement, were several letters from the Company clarifying how certain provisions would be interpreted. There were different provisions negotiated for employees working in "Conductor Only" roles in "road service"[3] and those working in "yard service". There were also regional differences. Over time, the provisions which impacted Conductors working in "yard" service were integrated into Article 83A of Agreement 4.3.

[22] As this was a significant change in this industry, not unexpectedly disputes arose between the parties regarding how these provisions were to be interpreted. As the Union noted, much of the precedents addressing this issue arises from the use of Conductor Only crews in road service, rather than yard service.

[23] There are six situations set out in Article 83A.1. As the Company has admitted its breach of Article 83A.1, it is not necessary to set out the specific details of Article 83A in this Award. Suffice it to say there are limitations to the work which the Company can assign to a Conductor Only crew.

[24] In view of the Company's admission, I am prepared to declare that the Company was in breach of Article 83A.1 when it assigned the work to the Grievor on May 14, 2018.

[25] The issue between the parties is remedy.

[26] I am satisfied that as an arbitrator appointed under both the CROA Memorandum of Agreement and section 60 of the *Canada Labour Code* R.S.C. 1985, c. L-2, I have been granted broad remedial jurisdiction to craft a suitable remedy which will fully resolve this issue.

[27] Article 121.10 directs that the parties are to assess remedy on a "case-by-case" basis between themselves, when it is "agreed" between them that a violation has occurred. That provision also provides for referral to arbitration where the parties are unable to agree on that remedy.

[3] Governed by Article 15.2

[28] I am satisfied the parties have tried to agree on a remedy under Article 121.10 but have been unable to do so. The matter has therefore been referred to this Office for resolution.

[29] I consider that the "Note" section of Article 121.10 is relevant and is to be considered when crafting an appropriate remedy. That Note states that the remedy is to act as a "deterrent" against future breaches. That Note also acknowledges that the parties consider the provisions to be "reasonable and practicable and provide operating flexibility" to the Company.

[30] A common theme when reviewing the jurisprudence filed by the parties, is that arbitrators have been resistant to setting an amount for monetary remedy even when the matter has reached arbitration and it is determined that a monetary remedy is appropriate. This trend can be seen in cases filed by both the Union and the Company. None of the authorities provided by either party set out a specific amount for a remedy, rather the amount of a remedy is remitted back to the parties for discussion and negotiation, or the issue is remitted to bargaining.

[31] The Union relied on: **AH606** (breach found regarding Conductor Only work, remitted to the parties "for the appropriate remedy"); **CROA 4575**, (breach found; "cease and desist" declaration made; "reserved jurisdiction on any remaining remedial questions the parties cannot resolve between themselves"); **CROA 4413,** (declaration of breach; remedy "referred to the parties for resolution"); **AH583** (arbitrator directed Union and Company to "review and discuss individual grievances in light of the findings of general principle made in this award for the purposes of establishing the appropriate remedy for each violation"); **AH560** (several examples considered; findings made of "general principles"; held it best to "'simply remit this award to the parties, who are presently at the bargaining table and therefore in the best position to discuss it's [sic] impact or any adjustments in their agreement which might be appropriate"; arbitrator also held that "any relief which either of them may seek from the adjudicated interpretation of their agreement must inevitably be a matter for their own negotiation and mutual compromise").

[32] The Company did not provide any "Conductor Only" cases, but offered **CROA 4078** (breach of rest provisions; declaration of breach; directed parties to meet; noted the matter could be "returned to this Office for the issue of remedy to be spoken to"); **AH795** (breach of rest provisions; declined to make "cease and resist" declaration; remitted to parties to "review the circumstances and identify the problems and possible solutions to minimize….The parties are free to address the issue on a wider scale during the current round of collective bargaining"); and **AH801** (failure to respond to grievances found against the Company; declaration issued; no cease and desist order; found would "redact from the parties CA" and "negotiated wording where CN did not provide a response").

[33] While it is not unusual for an arbitrator to remit the amount of a remedy back to the parties, I am satisfied that in this situation – where the parties have already set out their positions on remedy and been unable to agree, the matter is appropriately resolved by arbitration rather than by remitting the issue back for further discussion. Article 121.10 does not require that the issue be remitted to the parties *again* to discuss that issue, when they were unable to agree in earlier discussions. To remit this case to the parties for further discussion on remedy would – I expect – not be particularly helpful to either of them.

[34] The Company argued a declaration was sufficient. I cannot accept that a declaration of breach is an appropriate form of relief which would fully resolve this issue, or that it is a form of remedy which would act as a "deterrent" against future breaches, which was the parties' intention as noted in Article 121.10. I note that declarations on this issue have been made in the past, and guidance has been given to the parties from this Office and from *ad hoc* arbitrators as well. Arbitrators have also suggested the issue be addressed through bargaining. While the 580 outstanding grievances have not yet been adjudicated, their number indicates the issues surrounding Conductor Only work remain live and contentious between the parties.

[35] Neither am I persuaded this is an appropriate case for a "cease and desist" order to issue. I cannot agree with the Company's position that conduct must be

malicious or egregious to attract such an Order, however I do accept it is an extraordinary form of relief[4]. Such an Order is a significant remedy, with an ability to be enforced through the courts. For that Order to issue, it must be established that "further breaches of the collective agreement are likely to occur in the future".[5]

[36] While I accept the Union's evidence that it has grieved multiple alleged instances of misassignment of work to Conductor Only crews, the lack of remedial orders by arbitrators, as outlined above, may have contributed to the current state of affairs. In my view, the Company should be granted the opportunity to align its work assignment with the collective agreement, with some certainty of the potential remedial outcome if it does not. I am prepared to set out a remedy in this Award that will hopefully provide that certainty. While I do not by this Award foreclose the possibility of a "cease and desist" Order in the future – should breaches of this type continue even in the face of this remedial Order – that will be an issue for a future day.

[37] Turning to what would be an appropriate remedy for this Grievance, I begin from the broad general principle that contractual remedies are meant to place the parties into the position they would have been in, had the contract not been breached. Such a remedy should also provide a deterrent against future breaches, which in this case is specifically noted as the parties' intention in Article 121.10.

[38] In grievance arbitration, remedial orders can and do have financial impact. I am satisfied that a monetary remedy is appropriately ordered for this Grievance, and that such an Order would act as a deterrent against future breaches. I am not persuaded by the Company's argument that amounts already paid to the Grievor should have any impact on the amount of a remedy award, or would amount to a premium. It was the Company's own actions in contravening the agreement which caused that payment to the Grievor to occur. That cannot excuse it from

[4] As noted in M. Mitchnick and M. Etherington, *Labour Arbitration in Canada (3rd ed.),* at p. 209-210.
[5] At p. 210

payment of a remedy that would otherwise be appropriate when the underlying work assignment breached the collective agreement, even if that means it pays for the work twice. Such a consequence is part of the deterrent impact against future breaches.

[39] The Company has admitted that a Yard Crew should have been called to perform this work, to align with its contractual requirements. The Yard Crew would have been provided payment for that work, in accordance with the collective agreement.

[40] I am therefore prepared to Order that the Yard Crew who should have received a call to perform the work that the Grievor performed on May 14, 2018 be paid the compensation which they would have received, had they performed this work for two hours. If this direction results in payment for a minimum number of hours to that Yard Crew (more than the work itself would have taken), then that is to be considered a result of the remedy ordered. If it is not possible to determine who should have received that work, or if those individuals are no longer employed, then the equivalent amount is to be paid to the Union as a remedy for the breach, to distribute to its members or not, as it determines. Such amounts are also to be based on current contractual rates of pay, as part of a deterrent to future breaches.

[41] By aligning the responsibilities which the Company agreed to under Article 83A.1, with the payment that would have resulted had the contract been followed, the Union and its members are placed into the position they would have been in, had the contract not been breached. A deterrent effect should also follow.

[42] If the parties are unable to agree on any aspect of this direction, either party can request that the matter be placed back onto the CROA docket to be heard as a stand-alone issue within 90 days, at a session over which I preside. I retain jurisdiction to address any issues arising from this direction.

## Conclusion

[43] The Grievance is allowed.

[44] A declaration will issue that the Company has breached Article 83A.1 of Agreement 4.3 on May 14, 2018 in its assignment of work to the Grievor which was not Conductor Only (yard) work.

[45] The Company is to determine which Yard Crew would have received the work performed by the Grievor on May 14, 2018 and provide compensation to those individuals as if these two hours of work had been properly assigned to them. Such amounts are to be based on current contractual rates of pay.

[46] If that cannot be accomplished, the Company is to pay an equivalent amount directly to the Union for its breach, to be distributed or not, as it determines.

[47] In addition to my jurisdiction regarding remedy amounts, I retain jurisdiction to address any questions relating to the implementation of this Award and to correct any errors or omissions, to give it the intended effect.

February 9, 2024

**CHERYL YINGST BARTEL**
**ARBITRATOR**