Ad Hoc 657

IN THE MATTER OF A DISPUTE

BETWEEN:

Teamsters Canada Rail Conference ("TCRC")

-**and**-

Canadian Pacific Railway ("CP")

RE: Over Hours Disputes

Arbitrator: Graham J. Clarke

Appearances for TCRC:

Ken Stuebing	— Counsel
Dave Fulton	— General Chairman, CTW-W, Calgary
Greg Edwards	— General Chairman, LE-W, Calgary
Wayne Apsey	— General Chairman, CTY-E, Smiths Falls
John Campbell	— General Chairman, LE-E, Peterborough
Doug Edward	— Sr. Vice General Chairman, CTY-W, Medicine Hat
Harvey Makoski	— Sr. Vice General Chairman, LE-W, Winnipeg

Appearances for CP:

John Bairaktaris	— Director, Labour Relations, Calgary
Nizam Hasham	— Legal Counsel, Labour and Litigation, Toronto
Myron Becker	— Assistant Vice-President, Labour Relations
Dave Guerin	— Senior Director, Labour Relations, Calgary
Jason M. Ross	— Assistant Vice President, Operations, Calgary
Gurprit Parmar	— Asst. General Manager, CP Operations Centre, Calgary
Wendy Zhu	— Legal Counsel

Hearings took place in Montreal on April 14, 2017; July 19-20, 2017 and on September 25-26, 2017. Hearings concluded in Toronto on November 7-8, 2017. The parties filed their final written submissions on Monday, November 13, 2017.

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AWARD[1]

NATURE OF THE DISPUTE

1. CP and the TCRC jointly retained the arbitrator to examine 10 Items which arise from a longstanding dispute about booking rest. Over 1000 grievances[2] remain pending concerning locomotive engineers' (LE) and conductors' (CTY) right to be in and off duty in 10 hours. That right is subject to providing proper notice within the first five (5) hours of a tour of duty. The parties use the term "Over Hours" to refer to these disputes.

2. The parties chose a few representative grievances for each Item to provide context.

3. The LE (article 27) and CTY (article 29) collective agreements contain virtually identical wording[3] when it comes to employees' right to book rest. The parties further negotiated Appendix 9 as part of a 2007 Memorandum of Settlement (2007 MOS) to deal with en route Over Hours issues.

4. Some of the parties' differences arose from varying interpretations of two previous Over Hours decisions from Arbitrator Michel Picher.

5. For the reasons which follow, the arbitrator has concluded that neither party's position is entirely meritorious. The parties' current collective agreement language does not deal, at least explicitly, with some of the issues separating them.

6. One challenge in this case resulted from the fact that the parties negotiated an $80.00 premium payment which was conditional on 10 hours expiring **before** a crew reached the Outer Main Track Switch (OMTS)[4]. The parties did not negotiate anything

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[1] These reasons must be read together with the extensive record which contains the parties' detailed written briefs and numerous exhibits: Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), [2011] 3 SCR 708, 2011 SCC 62.

[2] A TCRC Over Hours grievance many encompass many alleged violations

[3] The parties advised that the sole difference is in article 29.02 which is not relevant to this decision. To avoid duplication, the arbitrator will cite from article 27 in this decision.

[4] The collective agreement uses the phrase "OMTS or designated point of the objective terminal". This decision will use the term "OMTS" to refer to this concept.

comparable for situations where the crew passed the OMTS before 10 hours had expired, but then remained on duty beyond 10 hours.

7. While it would have been desirable for this award to resolve all 10 Items definitively, and concurrently resolve over 1000 grievances, the facts of each individual case remain relevant to whether a defence exists to a grievance and what the appropriate remedy might be in cases where a violation occurred.

8. The TCRC did not persuade the arbitrator that the negotiated language entitled its members to an $80.00 premium payment whenever a tour of duty exceeded 10 hours. The parties negotiated that entitlement based on the time when a crew reached the OMTS.

9. However, the TCRC did persuade the arbitrator, even if one considers only CP's evidence, that a cease and desist order should issue. The right to book rest does not exist only for tours of duty which proceed perfectly. However, since the analysis in this decision identifies some limited defences which CP could raise, some grievances may remain unresolved.

10. The parties are currently in collective bargaining which provides them with an opportunity to clarify their respective rights and obligations. Due to other priorities, the parties did not submit the Over Hours issue as part of either the December 2012 Kaplan or December 2015 Adams interest arbitration proceedings. But the parties did agree they would be dealing with Over Hours issues in arbitration. The arbitrator finds that both parties were diligent in pursuing these Over Hours matters and have not lost their entitlement to having their issues decided on the merits.

11. This award will address the 10 Items by focusing on the language the parties negotiated in their collective agreement.

BACKGROUND

The Picher Awards

12. In his January 16, 2012 decision in CROA&DR 4078 (4078), Arbitrator Picher examined a grievance about article 27's booking of rest. Arbitrator Picher concluded that CP had "failed to fully honour the requirements" of the rest articles but ordered the parties to meet and resolve the myriad issues which arose from the booking of rest. The parties were unable to resolve their differences.

13. On April 14, 2014, Arbitrator Picher issued CROA&DR 4078S (4078S), a short supplemental award which provided a partial remedy to TCRC. Despite these decisions, the parties have continued to disagree on how to apply articles 27 and 29.

CROA&DR 4541

14. In CROA&DR 4541, the TCRC brought a policy grievance regarding the remedies ordered by Arbitrator Picher in 4078S. The TCRC's ex parte statement referred, in part, to Arbitrator Picher's award in CROA 4078:

> The Union seeks a finding that the Company has breached the Collective Agreement and the Arbitrator's orders in CROA Case No. 4078, seeks an order that the Company cease and desist its ongoing breaches of Articles 29.06 and 27.05 and that the Company be directed to provide the $80.00 premium payment in all instances of employees working beyond the ten hour limit. The Union seeks a direction that all employees subject to the group grievance be ordered whole and that their $80.00 claims be paid.

15. CP asked Arbitrator Richard Hornung to adjourn the case due to a different pending case related to 4078 and 4078S:

> The Employer raised a preliminary objection to proceeding with the present case until its current application for a Supplemental Decision on file no. 4078 is determined. The Employer advises that a decision on the 4078 (Supplemental) will be determinative of the issues in this case.

16. Arbitrator Hornung granted the adjournment, but retained jurisdiction for the merits of the matter:

> Having regard to the circumstances herein, and the material filed, it is apparent to me that both the interests of the parties, and labour relations considerations, are best served by adjourning the merits aspect of the present case until a decision is arrived at in 4078 (Supplemental).
>
> While the Union has the right to set the cases for CROA hearings, I am advised that with the consent of both parties the 4078 (Supplemental) application can be scheduled for the Montreal hearings in April 2017.
>
> Accordingly, the preliminary objection is granted and a hearing on the merits of this matter will be adjourned to a date following a decision in CROA 4078 (Supplemental)
>
> I will remain seized with jurisdiction on the present file and am prepared to accommodate the parties with a hearing - as soon as possible after the April 2017 CROA hearings - to address the merits of this case.

April 2017 CROA Hearings

17. During CROA's April 2017 monthly hearings, the parties brought the case to which Arbitrator Hornung referred before the current arbitrator regarding 4078S. Arbitrator Picher had retired and was no longer available to consider the issues.

18. During that CROA expedited arbitration hearing, it became obvious that a different forum would be required to resolve the myriad issues about which the parties disagreed. The arbitrator noted he had no authority to sit in appeal of, or to reconsider, Arbitrator Picher's decisions. The parties agreed to proceed by way of the current Ad Hoc process.

Expedited Ad Hoc Process

19. The parties made significant efforts to expedite this matter. They negotiated a 5-page Joint Statement of Issue (JSI)[5] identifying 10 Items for which they sought determinations. They further agreed to exchange their numerous written briefs, in advance, with both each other and the arbitrator.

20. This award will first review Arbitrator Picher's awards in 4078 and 4078S, since the parties remain divided on the scope and impact of his decisions. This decision will then examine the most important factor in this case: the language the parties negotiated in their collective agreement. As a rights arbitrator, rather than an interest arbitrator, the arbitrator has no authority to modify or amend the parties' collective agreement.

21. Finally, after interpreting the parties' language, the arbitrator will then address the 10 Items in the parties' JSI.

THE PICHER DECISIONS

The CROA Process

22. The parties (and others) have negotiated a special regime for the cases they plead before the Canadian Railway Office of Arbitration and Dispute Resolution (CROA). CROA members, pursuant to their Memorandum of Agreement Establishing the CROA&DR (MOA), have agreed to resolve their collective agreement differences through an expedited arbitration system. The arbitrators CROA members retain are tasked with deciding grievances within the MOA's parameters. It is the parties' agreed-upon process; arbitrators must adapt to it.

23. The cornerstone of the parties' expedited arbitration system is the JSI which "shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated" (MOA, article 10). Ex parte statements may also initiate the process, if the parties fail to agree on a JSI.

[5] The parties' JSI is appended to this decision.

24. Regular labour arbitrations often take place over numerous hearing days. They resemble at times civil trials, though more informal. Regular arbitrations have, *inter alia*, opening statements, sometimes lengthy sworn evidence and final legal argument.

25. By contrast, CROA schedules 21 arbitration cases per month, with one hour being set aside for each case. The assigned arbitrator sits for three consecutive days each month, except August. The parties successfully resolve many of the scheduled cases as the hearing dates approach. Arbitrators often draft between 6 and 12 awards each month, though a single award may sometimes involve multiple grievances for the same employee.

26. The parties plead their cases by way of written brief (MOA, article 11). Arbitrators issue their awards within 30 days and cannot "add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement" (MOA, article 14).

27. The CROA regime has operated successfully for over 50 years; its party-negotiated process is fundamental in understanding the context under which arbitrators issue their awards. The parties' MOA implicitly rejected an arbitration model which required the holding of multiple days of hearing for every grievance.

28. The CROA process has resulted in well over 6000 awards which provide a solid jurisprudential foundation for subsequent cases. Ideally, the pleading of a case and the resulting award should be brief. Arbitrator Picher's remedial decision in 4078S, for example, comprises just 6 paragraphs.

29. A small number of cases require greater resources and time than CROA's monthly expedited system permits. The parties retain a CROA arbitrator privately, at their own expense, for what they call an Ad Hoc arbitration. The parties' MOA continues to apply to the process and the arbitrator. The matter still proceeds by way of written brief.

30. The scope of the instant case demonstrates, but only with the benefit of hindsight, that the occasional CROA matter requires a longer hearing. This Ad Hoc took 6 hearing days, the rough equivalent of two CROA hearing months under the longstanding expedited process. The parties accepted that this decision would not be issued within the 30-day deliberation period the MOA requires for the monthly CROA process.

CROA 4078

31. Arbitrator Picher heard the parties' arguments on January 11, 2012 and issued his award in CROA&DR 4078 5 days later. The award speaks for itself and resulted in several key points concerning employees' right to be off duty within 10 hours:

- CP did not attain 100% compliance with its obligations under articles 27 and 29;

- Both parties acknowledged that CP's obligations were "not always going to be met", as illustrated by the addition of Appendix 9 to the collective agreement in 2007;

- Arbitrator Picher dismissed CP's argument that no collective agreement violations had occurred;

- "the position of neither party is ultimately compelling";

- "the granting of a cease and desist order is, at least at this stage, questionable";

- Arbitrator Picher accepted the TCRC's argument that "there has been a failure to fully honour the requirements of these articles";

- "I cannot accept the implicit suggestion in the position of the Company that the payment of the penalty provided for under Appendix 9 of both collective agreements is tantamount to a licence to violate the substantive requirement of these articles with impunity";

- Arbitrator Picher urged the parties to resolve the issue themselves "through the process of negotiation, whether that occurs at the current bargaining table or through collateral discussions, possibly in the context of a specially established joint committee";

- The TCRC's grievance was granted in part: "I find and declare that the Company has failed, on numerous occasions, to honour the requirements of articles 29 and 27 of the collective agreements of Conductors and Locomotive Engineers, respectively";

- The parties were directed to meet to identify "possible solutions to minimize, if not eliminate, the number of occasions in which train assignments are compelled to exceed the ten hour on duty time contemplated under articles 29 and 27 of the collective agreements";

- The parties retained the right to bring the matter back before Arbitrator Picher: "Should the parties, after serious and extensive efforts, be unable to reach any

such resolution, the matter may be returned to this Office for the issue of remedy to be spoken to".

CROA 4078S

32. The parties could not resolve their ongoing differences. In 2014, they returned before Arbitrator Picher to speak to remedy. The hearing took place on April 10, 2014; Arbitrator Picher issued his 6-paragraph award on April 14. The award speaks for itself and notes:

- the arbitrator agreed with CP that the issues between the parties were "confined to the locations of Medicine Hat, Moose Jaw, and Saskatoon";

- the arbitrator noted he had no jurisdiction "to issue a blanket declaration that employees are entitled to cease work when an alleged violation of the collective agreement is identified";

- Arbitrator Picher noted "for reasons they best appreciate, the parties have negotiated the payment of a premium of eighty dollars in certain circumstances where crews are required to work beyond ten hours";

- the award denied the TCRC's request for additional rest opportunities for violations: "…it is not the role of the Arbitrator to affectively amend the collective agreement or assume the role of an interest Arbitrator to establish two new terms that the parties themselves have not agreed upon" (sic);

- the award provided the TCRC with relief "in relation to the payment of the eighty dollar premium which, it appears, has recently been denied to employees required to work beyond ten hours at the Medicine Hat terminal";

- Arbitrator Picher further commented in relation to remedy: "I hereby find and declare that employees who are required to work over ten hours, having given the requisite notice to book rest at five hours, are entitled to the premium payment of eighty dollars, regardless of the work they may be required to perform beyond the ten hour limit. That direction, in my view, merely enforces the agreed to provisions found in Articles 29.12 and 29.13 of the collective agreement";

- the award reiterated in its closing sentence that "The Arbitrator finds and declares that employees required to work over ten hours, having given the requisite notice to book rest at five hours, are entitled to the premium payment of eighty dollars contemplated within articles 29.12 and 29.13 of the collective agreement".

33. The current arbitrator does not sit in appeal of a different CROA arbitrator's award. Indeed, while another arbitrator can read the same briefs, the original arbitrator will usually have heard additional evidence and representations at the actual hearing. For example, both CP and the TCRC referred to comments of a Mr. Guido Deciccio during the 4078/4078S hearings. Evidently, such evidence and representations can impact the later decision.

34. The parties disputed whether switching was at issue in the decisions before Arbitrator Picher. CP argued the cases involved employees doing switching which they accepted was contrary to the collective agreement. The TCRC noted that neither 4078 nor 4078s referred to switching.

35. As noted in CROA&DR 4541, Arbitrator Hornung remains seized with Arbitrator Picher's remedial orders. The retirement of a CROA arbitrator does not impact a party's right to return to CROA to ask for the enforcement of a remedy. But this differs from a situation, such as that which occurred at the April 2017 CROA session, where a party asked a different CROA arbitrator in effect to "reconsider" a different arbitrator's earlier award. There is no reconsideration process at CROA, unlike those which exist at certain administrative tribunals, including labour boards[6].

36. The TCRC argued forcefully that 4078 and 4078S should bind the current arbitrator in this arbitration (U-6; TCRC Brief; Paragraphs 250-286). Moreover, since CP never sought judicial review of Arbitrator Picher's decisions, the TCRC alleged CP missed its chance to contest his interpretation of the collective agreement.

37. The arbitrator respectfully disagrees with this argument. Context distinguishes Arbitrator Picher's two decisions from the 10 Items raised in the instant case.

38. Arbitrator Picher, within CROA's monthly expedited system, explicitly fashioned a remedy for a situation at three specific locations. He accepted CP's submissions that the original ex parte Statement of Issue limited itself to three geographic locations (see paragraphs 2-4 of CP's April 10, 2014 Brief). Arbitrator Picher made this finding even though the TCRC had filed evidence covering many other locations (TCRC April 14, 2014 Brief at paragraphs 30-31).

[6] See, for example, section 18 of the Canada Labour Code.

39. Similarly, Arbitrator Picher received additional oral representations at his hearings on which he may have relied in fashioning a local remedy. But Arbitrator Picher clearly did not intend for his local remedial decision to apply on a system wide basis, as evidenced by his request in 4078 that the parties meet to resolve the local issues which gave rise to the dispute:

> I direct the parties to meet, whether at the current bargaining table for the renewal of their collective agreements, or in a separate forum with an established joint committee, **to identify the problems particular to these two western subdivisions** and possible solutions to minimize, if not eliminate, the number of occasions in which train assignments are compelled to exceed the ten hour on duty time contemplated under articles 29 and 27 of the collective agreements.
>
> (emphasis added)

40. Arbitrator Picher also mentioned explicitly that a rights arbitrator has no authority to amend the parties' negotiated language in the collective agreement.

41. Accordingly, the task is not to apply Arbitrator Picher's local remedial order on a system-wide basis, but rather to determine what the parties' negotiated language in the collective agreement means and how it impacts the 10 Items described in the parties' JSI.

42. Had a system wide decision been required, Arbitrator Picher would no doubt have had the benefit of a comparable 6-day hearing process as occurred in the instant case. He would also have had at his disposal the detailed briefs the parties prepared.

43. As the TCRC candidly pointed out, the doctrine of *stare decisis* does not apply in labour arbitration (U-6; TCRC Brief; Paragraph 276). If Arbitrator Picher had had the benefit of the current hearing, and then examined the collective agreement articles in depth, then of course another arbitrator should not lightly interfere in any resulting interpretation. Certainty is important for the parties. But Arbitrator Picher did not decide a system-wide case, but instead issued a six-paragraph remedial decision designed to address a discrete matter at a specific geographic location.

44. Arbitrator Picher's decisions are clearly relevant. But the instant case is one impacting the entire network and is the first, as far as the arbitrator is aware, to review the

parties' negotiated language in detail. The arbitrator cannot answer the parties' 10 Items without conducting that interpretation exercise.

PARTIES DIFFERENCES OF OPINION ARISING FROM THE PICHER DECISIONS

Escalating Differences

45. The TCRC has filed many grievances alleging Over Hours violations.

46. The TCRC argued, *inter alia*, that 4078 and 4078S entitled its members to the $80 premium payment whenever they gave proper notice under the collective agreement, but CP failed to have them off duty within 10 hours. The TCRC suggested that Arbitrator Picher had "clarified" the proper interpretation of article 27.

47. CP, *inter alia*, argued 4078 and 4078S explicitly applied to a situation at a particular geographic location and that the wording of the collective agreement governed when employees earned an entitlement to the $80 premium payment.

48. Beyond the issue of the $80 premium payment, both parties' evidence showed numerous examples where employees were not off duty within 10 hours, despite giving the requisite notice within 5 hours of the start of their tour of duty.

COLLECTIVE AGREEMENT LANGUAGE

Guiding Principles of Interpretation

49. Both parties agreed on the key principles which guide a rights arbitrator when interpreting a collective agreement. Beyond the restriction on CROA arbitrators in article 14 of the MOA, *supra*, they agreed with the comments found 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.

50. The arbitrator has applied these principles when interpreting the parties' collective agreements.

Article 27 (Rest)

51. The arbitrator has no illusions that this interpretation exercise will answer all the parties' questions. Arbitrator Picher advised the parties back in 2012 to clarify their negotiated language. Time has not changed that sound observation.

52. The arbitrator notes that the concept of employees going off duty while away from home is not unique to CP and the TCRC. Other railways and transportation undertakings face this issue as well. The language they have negotiated, and the arbitral awards interpreting it, might provide helpful guidance.

53. For example, in AH558, Arbitrator Picher commented in 2004 on CN employees' right to be in and off duty under their collective agreement. The TCRC correctly noted that AH558 predated the negotiation of Appendix 9, *infra*, and involved a predecessor trade union, the UTU. It also arose from a mediated settlement. This extract from AH558 evidently does not interpret CP and the TCRC's negotiated language, but does illustrate the various problematic issues which require negotiation:

> Article 51 of Agreement 4.16 provides that train service employees, who have been on duty ten hours or more (or 11 or 12 hours where the assignment falls within Article 51.16), are entitled to book rest where the employee provides the dispatcher not less than three hour's notification. As provided in a January 15, 1986 internal document clarifying the application of Article 51 (the "1986 Interpretation") and as quoted in CROA 3280:
>
> "It is incumbent upon the Company to ensure that trainmen, who give proper notice of the desire to book rest, are relieved of duty either at a location where accommodations can be provided or at the home or away-from-home terminal by the time rest booked is due to commence, and even then, as soon as possible. In order to make the necessary arrangements to fulfill this requirement, a minimum of three hours' notice is required."

At the time a train service employee, en route, notifies the RTC of his or her desire to book rest, the RTC supervisor or dispatcher must make a bona fide and informed assessment of whether the employee should reasonably be able to make it to his or her objective terminal and complete the yarding of his or her train by the time rest booked is due to commence. The assessment is made roughly three hours prior to the time rest is due to commence; the RTC cannot be expected to make that assessment at the time the employee begins his or her assignment. If, in good faith, the supervisor or dispatcher determines that the employee cannot complete those tasks prior to the time rest booked is due to commence, the Company must make arrangements to relieve the employee from duty at the time rest booked is due to commence. Where the RTC dispatcher or supervisor makes a good faith assessment about the crew's ability to reach the objective terminal and to yard the relevant train by the time rest booked is due to commence, the Company will not be held in violation of the collective agreement merely because that assessment proves inaccurate or where the employee in question does not make a good faith effort to complete his or her assignment consistent with the RTC's assessment.

For the purposes of clarity, it is not sufficient for the Company to merely attempt to have the employee to the outer switch by the time rest booked is due to commence; rather, the supervisor's or dispatcher's assessment must include the time it should take for the employee to yard his or her train at the objective terminal. In making the initial assessment, the Company must include a reasonable estimate of the time that will be needed for yarding the employee's train. It must ensure as far as is reasonably possible, that the employee will be "in and off duty" before his or her scheduled rest begins. If that cannot reasonably be done, arrangements must be made for relief of the employee at the time his or her booked rest is due to commence.

However, consistent with the language and intent with Article 51 and the 1986 Interpretation, it will not generally be a violation of the collective agreement for the Company to require train service employees to complete the yarding of their trains before going off on rest, so long as the employee reaches the outer switch before rest is due to commence. In other words, once the employee has commenced yarding his or her train, the employee must complete yarding the train before going off duty on rest. Indeed, the 1986 Interpretation states, at page 16:

"Q. WHEN TRAINMEN COMMENCE THE YARDING OF THEIR TRAIN AT THE OBJECTIVE TERMINAL PRIOR TO THE TIME REST BOOKED IS DUE TO COMMENCE BUT ARE STILL IN THE PROCESS OF YARDNG THE TRAIN AT THE TIME REST BOOKED IS DUE TO COMMENCE, WILL THEY BE RELIEVED UPON REQUEST:

A. No. Trainmen will complete the yarding of their train."

Where the yarding of an employee's train is/will be delayed, the employee will be relieved by a yard employee. However, where no yard service employees

are available, the train service employee must complete the yarding of his or her train before going on rest. The 1986 Interpretation provides the following guidance:

"Similarly, if there are no yard assignments on duty, trainmen will yard their train whether they are delayed or not on the basis that they are required to clear trains before taking rest.

A note of caution is introduced. Notwithstanding the provisions of sub-paragraph 51.7(d) it is the responsibility of the Company to relieve trainmen by time rest booked is due to commence except where circumstances make this impossible. Thus, trains can no longer be run in the hope that the final terminal can be reached by the time rest booked is due to commence only to find that the train must sit at the outer switch for an extended period waiting for a clear track in which to yard."

In summary, consistent with the language of Article 85 and the 1986 Interpretation, where an employee has given proper notice of his or her desire to book rest in accordance with Article 51, the employee is entitled to be off on rest by the time rest booked is due to commence, except in circumstances beyond the Company's control or where the Company lawfully compels the employee to complete the yarding of his or her train. The fact that an employee reaches the outer switch by the time rest booked is due to commence does not entitle the Company to require the employee to perform work in the yard that is not related to the yarding of the train.

The Union acknowledge that if, on occasion, a crew should work some limited minutes (i.e. five or ten minutes) beyond their booked rest time to complete the yarding of their train, that will not constitute a violation of article 51 of the collective agreement. The Arbitrator confirms, however, that where crews are held on duty yarding their trains for a substantial period of time beyond their booked rest time, in circumstances that were reasonably predictable at the time rest was booked, a violation of Article 51 of the collective agreement will be disclosed.

54. Regardless of what negotiated language or practice may exist elsewhere, the task in this case involves interpreting the terms that CP and the TCRC negotiated. Given their expertise in their industry, the parties' detailed comments on their negotiated collective agreement wording is essential in any such exercise.

55. During the hearing, the parties filed a few exhibits which they argued contradicted the other's position. For example, CP referred to TCRC forms which emphasized the time employees arrived at the OMTS. The TCRC referred to certain CP memos which allegedly contradicted CP's position, such as for Item 10 (dressed and ready for work).

The arbitrator did not find these few documents determinative, given the need to focus on the parties' negotiated language.

Article 27.01

56. Article 27.01 describes employees' standard entitlement to book rest:

> 27.01 Employees will have the right to book up to 24 hours rest at home terminals and up to 8 hours rest at away from home terminals if desired. **Such rest must be booked upon tie up**. Employees will not be required to leave the terminal until they have had the amount of rest booked.
>
> (emphasis added)

57. This provision sets out employees' general rest entitlements. It is also references the "tie up" which involves employees' final paperwork and notifications to CP as they finish their tour of duty. CP determines the location where employees can complete their tie up, *infra*.

Article 27.03

58. Article 27.03 establishes the right for employees to book rest after 10 hours:

> 27.03 Employees, being the judge of their own condition, may book rest after being on duty 10 hours, or 11 hours when two or more Brakepersons are employed on a crew in addition to the conductor.

59. The parties have accepted that employees on a tour of duty can best judge their "own condition". Based on this judgment about their "own condition", employees "may book rest after being on duty 10 hours". Article 27.04 sets out the procedure to book this rest.

Article 27.04

60. Despite article 27.03's wording, employees do not book rest only after being on duty for 10 hours. Rather, article 27.04 contemplates CP's need for planning and requires employees to provide notice within the first 5 hours of being on duty:

> 27.04 Employees desiring rest en route will give their notice **within the first 5 hours on duty** to the Railway Traffic Controller or other designated Company employee. Notice will include the amount of rest required, 8 hours considered maximum at other than home terminal, except in extreme cases.
>
> (emphasis added)

61. This notice allows CP to prepare if the employees' may not be able to complete their tour of duty within 10 hours. Employees who do not give notice can work up to 12 hours on a tour of duty. Employees are generally paid based on established mileage rather than hourly. They will receive the same remuneration even if their tour finishes prior to the 10 or 12-hour mark.

Article 27.05

62. Article 27.05 describes the types of arrangements which may be made to respect employees' notice of rest. If an employee does not provide notice, then he or she may work up to the maximum 12 hours in a tour of duty.

> 27.05 Where it becomes necessary, arrangements will be made to have a reduced or Conductor-Only crew complete their tour of duty within 10 hours on duty which may require the discontinuance of work en route, changing meets and the prompt yarding of the train. When such arrangements are made, the RTC will so advise all other employees having authority over the operation of the train, i.e. yard personnel at objective terminal, other RTC, etc. **When, notwithstanding this arrangement, the reduced crew is unable to complete their tour of duty within 10 hours, the members of the crew may book rest after 10 hours on duty.**
>
> This provision will be applied as follows:
>
> (1) Employees must provide notice of rest within the first 5 hours on duty. The amount of rest desired to apply after 10 hours. **In such cases the Company**

> **has the existing obligation to have them into the objective or home terminal and off duty in 10 hours.**
>
> (2) Employees who reach their objective terminal and are off duty in less than 10 hours will not be bound by the notice of rest given previously. Employees will then have the option of booking rest.
>
> (3) **Employees who are more than 10 hours on duty will be bound by the amount of rest booked. Other Regulatory requirements remain in effect.**
>
> (4) Employees who do not provide notice of rest within the first 5 hours are subject to work up to 12 hours. The employees will have the option of booking rest at the objective terminal.
>
> (emphasis added)

63. The parties agree that if employees provide notice within the first 5 hours on duty, then CP has "the existing obligation to have them into the objective or home terminal and off duty in 10 hours".

64. But the parties also negotiated wording which foresees that some employees may not be off within 10 hours. Article 27.05's introductory paragraph contemplates this possibility when describing employees' right to book rest: "When, notwithstanding this arrangement, the reduced crew is unable to complete their tour of duty within 10 hours, the members of the crew may book rest after 10 hours on duty". Point #3 in article 27.05 echoes this sentiment: "Employees who are more than 10 hours on duty will be bound by the amount of rest booked…".

65. Given this wording, the focus in any dispute is on the arrangements CP made in order to respect the employees' notice.

Article 27.06

66. Article 27.06, which reiterates that an employee who provides notice has the right to be off duty within 10 hours, also provides CP with the option of relieving just that employee or the entire crew:

> 27.06 When an employee on a crew gives notice to book rest **the Company will make arrangements to ensure the employee is off duty within 10 hours**. The Company may, at its option, relieve a single employee or it may

> require that all members of the crew be relieved. **This may result in the Company requiring that rest be taken prior to the expiration of 10 hours** and/or that the crew be relieved prior to 10 hours on duty, or 11 hours where applicable.
>
> (emphasis added)

67. The parties agree on the fundamental principle that if an employee gives proper notice: "…the Company will make arrangements to ensure the employee is off duty within 10 hours". Rest may have to be taken if CP relieves an employee or the entire crew prior to the 10-hour mark. Arbitrator Picher at pages 7-8 in 4078 noted the parties "acknowledge that the requirements of articles 29 and 27 are not always going to be met by the Company". This explained in part the need to negotiate Appendix 9, *infra*.

Article 27.07

68. This article deals with employee transportation if they book rest en route:

> 27.07 Employees who book rest en route will, in all instances, be transported to their objective or home terminal in a vehicle provided by the Company, or on their own or another train, unless the circumstances in Clause 27.08 below are applicable. For the purpose of this Clause, an intermediate point in work train service, as described in Clause 9.11, will be considered as an objective terminal.

69. The parties later negotiated Appendix 9 in the 2007 MOS to add further clarity to situations where CP relieves employees en route.

Article 27.08

70. Article 27.07 obligates CP to transport employees who book rest to their objective or home terminal, except in circumstances to which Article 27.08 applies. Article 27.08 applies to situations where rest must be taken en route due to circumstances beyond CP's control. One example of such circumstances is impassable road conditions. This article specifies that rest will commence when employees reach their accommodation:

> 27.08 **When, due to circumstances beyond the Company's control, such as impassable road conditions, it becomes necessary to take rest en route**, arrangements will be made by the Company for the necessary accommodation, including eating facilities, at the location at which rest is taken or employees will be transported to the nearest location where necessary accommodation and eating facilities can be provided. **Rest will commence when accommodation is reached.** Upon expiry of rest, if unable to complete their tour of duty on their own train or another train tied up at that location where their train was left, employees will be deadheaded to the objective or home terminal.
>
> (Emphasis added)

71. The parties have addressed a specific situation where circumstances beyond CP's control requires rest to be taken en route. They have not negotiated similar language for all situations which may make it challenging to have employees off within 10 hours.

Article 27.10

72. Article 27.10 suggests, for "employees taking rest en route", that there may be abnormal circumstances involving the need to "clear trains" which impact employees' entitlement to be off duty within 10 hours, despite having provided notice:

> 27.10 Employees taking rest en route must first clear trains, which could otherwise be unable to proceed. Under normal circumstances, this should not require employees to work beyond the time rest is due to commence.

Article 27.11

73. Article 27.11 contains the parties' negotiated language regarding the $80.00 premium payment and the explicit mention of the OMTS (Outer Main Track Switch). Article 27.11 focuses on employees who "are working on their train beyond 10 hours at a point short of the OMTS". A crew is considered "to be working until deadheading commences":

> 27.11 **Employees who have given notice to book rest, and are working on their train beyond 10 hours at a point short of the OMTS or designated point of the objective terminal**, will receive a premium payment of $80.00 as

> outlined in Clause 27.12 below. For the purposes of this Clause, **a crew is considered to be working until deadheading commences**. Deadheading commences once the crew is physically in the mode of transportation to be used, or in the case where deadheading is to take place on the train, when a relief crew has taken control of the train.
>
> (Emphasis added)

74. Appendix 9 also expands on situations where a crew can earn the $80.00 premium payment.

Article 27.12

75. As noted in articles 27.04 and 27.05, employees who do not give notice within the first 5 hours of their tour "are subject to work up to 12 hours". Article 27.12 sets out the parties' agreement for the $80 premium payment for employees in this situation:

> 27.12 **Employees who have not requested rest** in accordance with Clause 27.04 **may, at the discretion of the Company, be required to work up to 12 hours in order to complete their tour of duty**. In these circumstances, **a crew who works in excess of 10 hours prior to reaching the OMTS or designated point of the objective terminal**, will be entitled to a premium payment of $80.00 in addition to all other earnings for their tour of duty.
>
> (Emphasis added)

76. This article notes that employees may have to work up to 12 hours "in order to complete their tour of duty". The article also parallels the requirement that a premium payment is owing if 10 hours has been exceeded prior to the crew "reaching the OMTS or designated point of the objective terminal".

77. The Work/Rest Rules, *infra*, can also have an impact on situations involving maximum hours of work.

Article 27.13

78. Article 27.13 limits eligibility for premium payments, *inter alia*, to "unassigned straightaway, turnaround and combination service on territories where fixed mileage rates have been established":

> 27.13 The premium payment referred to in Clause 27.11 and Clause 27.12 applies to unassigned straightaway, turnaround and combination service on territories where fixed mileage rates have been established. These Clauses will also apply to assigned service or other territory, if mutually agreed to, by the General Chairman and the General Manager. These Clauses will apply to the Revelstoke/Golden Agreement, Sparwood Run-through Agreement, and Roadrailer Agreements. The premium payment does not apply to Turnaround Combination Service (TCS).

79. The article contemplates that the parties can negotiate a larger scope for premium payments. The parties in their representations disputed the scope of this provision.

Article 27.14

80. Article 27.14 deals with situations where a crew reaches the OMTS **prior** to 10 hours. This contrasts with crews who reach the OMTS **after** working for 10 hours, a situation which entitles them to an $80.00 premium payment. The parties differed whether a crew could be required to perform yarding:

> 27.14 **Crews who arrive at the OMTS or designated point prior to 10 hours**, and subsequently reach 10 hours on duty within the terminal will not be required to perform switching. Arrangements will be made to expedite the yarding of their train. Where other crews are on duty and available to assist, they will be used to yard the train.
>
> (emphasis added)

81. This article foresees, subject to certain conditions, that a crew may have to yard their train if they arrive at the OMTS prior to 10 hours.

82. The TCRC referred to the Picher awards 4078 and 4078s and pleaded that yarding work, if done after 10 hours, still breaches the collective agreement (U-6; TCRC Brief; Paragraphs 62-63):

> 62. The Union notes that the Company's argument then – which may well be mirrored in the Company's argument today – that so long as a crew reaches the outer main track switch (OMTS) within 10 hours, there is no breach of Articles 29 and 27, is plainly incorrect. By no means is a crew that is required to perform any portion of yarding its train after 10 hours "off duty".
>
> 63. Article 29.15 does not mean that the crew is in and off duty at the 10 hour mark, which what (sic) Articles 29.06 and 27.05 plainly require. Article 29.15 means that the yarding work that is in itself a breach of Article 29.06 and 27.05 will not be compounded with additional or gratuitous switching requirements.

83. Arbitrator Picher in a different award appeared to accept that crews arriving at the OMTS prior to 10 hours on duty may be required to yard their train: CROA&DR 4180. The arbitrator is satisfied that article 27.14 does not define whether employees are on or off duty. But its plain meaning, which also contains important preconditions, creates a negotiated modification to the right to be in and off duty within 10 hours, *infra*.

Appendix 9 (In and Off in 10 Hours – Penalty)

84. In their 2007 MOS[7], due to continuing disputes about the right to be off within 10 hours, CP and TCRC negotiated Appendix 9. There is currently no single document containing the parties' collective agreement. The parties advised they are endeavouring to create a complete collective agreement which would incorporate items like the 2007 MOS, as well as further changes resulting from both the Kaplan (2012) and Adams (2015) interest arbitration awards.

85. Appendix 9, signed on December 5, 2007, added additional remedies for Over Hours situations. Appendix 9 addressed situations where a crew was relieved en route rather than at the objective terminal. It took into consideration crew transit times, usually by way of taxi. If the negotiated conditions were satisfied, Appendix 9 provided employees with an $80.00 premium payment, as well as additional rest.

[7] The parties' 2007 Memorandum of Settlement (MOS) also included Appendix 7 on train lineups which alludes to "10 hour violations".

86. In Appendix 9, CP acknowledged Over Hours violations were occurring and committed itself to working with TCRC:

> During this round of negotiations the parties discussed the application of the rest articles as they apply to rest enroute. During these discussions the Company reaffirmed that when employees provide notice of rest enroute in accordance with the provisions of the collective agreement, the intent is to have employees in and off within 10 hours on duty.
>
> As discussed, **the Company is committed to work with the Union with a view of eliminating over hours violations**. In addition, to address its concerns, **the following will apply in the event employees are not in and off within the 10 hours as specified in the collective agreement**.
>
> (Emphasis added)

87. In Appendix 9, the parties deal explicitly with the $80 premium payment for employees who had not yet arrived at the objective terminal within 10 hours. They then enumerated 6 points to provide additional clarity, including illustrations.

88. In Point #1, they agreed to establish "transit times" to determine when employees being transported to the objective terminal would be entitled to the $80.00 premium payment:

> 1. $80.00 Penalty Payment
>
> When employees provide proper notice of rest to be in and off in 10 hours specified in the collective agreement **and have not arrived at the objective terminal within 10 hours**, the $80.00 penalty payment is paid based on the following:
>
> - the company, in consultation with the Union, will establish a time (a relief time), from locations where crews are commonly relieved on a subdivision, based on the normal transit time by taxi, from that location **to the off duty point at the objective terminal**;
>
> - it is recognized that the transit times may differ depending upon the seasons and will be based upon changes in operations, routes, weather conditions, congestion, etc.
>
> - **the employees, who have given proper notice of rest, and who have not departed the relief point to facilitate being in and off within 10 hours,**

within the transit times designated above will be entitled to an $80.00 penalty payment.

- the transit times will be based on the departure time of the taxi **from the relief point to arrival time at the off duty point at the objective terminal and includes a standard tie up time.**

(Emphasis added)

89. In Point #1, the parties refer on two occasions to the "off duty point at the objective terminal". They also refer, as they do in the collective agreement, to the $80.00 payment being available for employees who "have not arrived at the objective terminal within 10 hours". This is comparable to the language in articles 27 and 29 which refers to the OMTS.

90. The parties have further negotiated in Appendix 9 language which references a "standard tie up time" at the objective terminal. There is a certain elegance to negotiating standard times for travel and tie up, though this may be easier for crews being relieved en route.

91. In Point #2, CP and TCRC also agreed that employees who gave proper notice, but were not off within 10 hours, would have the right to book additional "penalty rest" once they had returned to their home terminal:

2. Employees who give proper notice of rest to be in and off in 10 hours will be able to book additional rest over 24 hours upon returning to the home terminal. **The additional penalty rest will equal three times the amount of time they are over 10 hours on duty, with a minimum of 1 hour.**

(emphasis added)

92. In Point #3 the parties also dealt with situations where employees arrived at their objective terminal before 10 hours, but subsequently were not off within 10 hours:

3. Employees arriving at the objective terminal on their train and are subsequently over their 10 hours on duty will be provided the additional rest in the same manner as outlined in Item No. 2 of this Appendix.

93. As noted earlier for article 27.05, the parties appear to contemplate situations where employees may be on duty for over 10 hours, despite providing notice.

94. The parties further agreed in Point #4 that this additional rest would not harm other employees:

> 4. The additional rest provided for in Items No. 2 and 3 will not be used to reduce the spareboard guarantee or MBRs.

95. Point #5 of Appendix 9 confirmed that the $80.00 payment was in addition to all other earnings for the tour of duty. Point #6 confirmed to whom Appendix 9 applied:

> 6. For clarity this applies to crews called in straightaway and turnaround service but does not apply to Turnaround Combination Service (TCS). This applies to crews in road service (assigned, unassigned and work train). This does not apply to crews in Yard, passenger or commuter service.

96. The parties confirmed their agreed changes, which were designed to improve Over Hours compliance, would come into force 30 days following ratification and that future issues at a location would be elevated to the appropriate AVP Operations:

> The additional rest provisions will be implemented within 30 days of ratification, subject to CMA programming changes.
>
> **It was further noted during our conversations that these changes are designed to improve compliance to "in and off in 10 hours" as specified in the Collective Agreement**. It is also understood that should there remain issues at a given location regarding crews, who have given notice for rest and are not in and off duty within 10 hours, will be immediately escalated to the appropriate AVP-Operations by the respective General Chairs for resolution.
>
> (Emphasis added)

97. CP and the TCRC signed Appendix 9 to "improve compliance" for employees being "in and off in 10 hours".

Summary

98. The parties' negotiated wording in article 27 and Appendix 9 governs their rights and obligations. A rights arbitrator must apply it. The parties' wording leads to several general observations before examining specifically the parties' 10 Items in the JSI.

The 10 Rule

99. CP has accepted the obligation that where an employee gives proper notice it "will make arrangements **to ensure** the employee is off work within 10 hours" (article 27.06). This "10 Rule" is the overriding principle. The parties' language in article 27 and Appendix 9 contemplates, however, that limited nuances may exist.

Conditions for the $80 premium payment

100. The parties chose language which placed great importance on the OMTS or designated point of the objective terminal when determining eligibility for $80 premium payments. Employees "working on their train **beyond 10 hours at a point short of the OMTS** or the designated point of the objective terminal" receive the payment (see article 27.11).

101. The parties' agreement focuses on whether employees pass the 10 hours while working on their train before reaching the OMTS. The language also indicates that a crew remains "working until deadheading commences" (article 27.11).

102. Point #1 of Appendix 9 similarly refers to employees who have not "arrived at the objective terminal within 10 hours".

Nuances for the 10 Rule

103. The 10 Rule, while constituting the overriding principle to which the parties have agreed, is not absolute. The parties have addressed some situations where CP may not be able to meet its obligations.

104. For example, article 27.08 references “circumstances beyond the Company’s control” which may require rest en route. Article 27.10 deals with abnormal situations where a crew must “clear trains”. Article 27.14 references conditions where a crew may have to yard its train.

105. But beyond these negotiated situations, and subject perhaps to arguments of force majeure, CP and the TCRC have agreed that employees may exercise a right to be off duty within 10 hours. It is certainly foreseeable that things may not always proceed exactly as planned at a railway. Beyond the examples above, the parties have included no wording in the collective agreement that employees lose their right to be off within 10 hours whenever something unexpected comes up during their tour of duty.

106. The parties evidently can negotiate additional clarifying wording in this regard, as they have done for situations falling within Appendix 9, but nothing else currently exists in the collective agreement.

107. The arbitrator mentions this since CP’s evidence suggested that many cases exist where employees are not in and of duty despite providing the requisite notice. The right to be off duty, given the collective agreement’s language, is not the same thing as having earned an entitlement to the $80.00 premium payment. CP noted how often it succeeded in respecting employees’ notice and having them off in under 10 hours. Similarly, many employees worked tours far shorter than 10 hours, but still received their full mileage payment.

108. But the focus is not on how often things go according to plan or how quickly some runs may be completed. If employees showed up for duty on time 97% of the time, an employer would still focus on the 3% of the times when they did not. That is what the TCRC is doing in this case for the 10 Rule.

109. Even on CP’s statistics as set out in its detailed Brief (C-5; Paragraphs 81-99), there are thousands of situations where employees work over 10 hours, despite having given notice. CP did not argue that all these cases fall within the limited negotiated exceptions found in the collective agreements or Appendix 9. The number of such incidents also appear to be increasing year over year.

110. CP’s evidence in July for partial year 2017 (YTD) demonstrated thousands of situations where employees giving notice were not off duty in under 10 hours (C-5; CP Brief; Paragraph 93):

> 93. Moreover, the preceding charts show that, when employees who have given notice and then indicate a duty time over 10 hours, the most common total duty times fall in the 10:01-10:15 range (4009 events in 2017 YTD). The next most common group of duty times falls in the 10:16-10:30 range (3111 events in 2017) and the third most common is 10:31-10:45 range. Together, these top three most common events account for 67% of all over 10 events in 2017 where notice was given.

111. CP alleged the TCRC accepted that employees could go over the 10 hours by up to 30 minutes. The TCRC disputed this position (U-24; TCRC Brief; Paragraphs 30-34).

112. The TCRC argued persuasively that many of the reasons put forward by CP did not justify its failure to have crews in and off duty within 10 hours. Some of those reasons included: “Under powered train”; “Excessive train tonnage”; and “Variance from plan” (U-6; TCRC Brief; Paragraph 213). Article 27 makes no reference to such situations constituting an exception to the 10 Rule. They appear to be foreseeable situations occurring during a railway’s normal operations.

THE JSI’S TEN ITEMS

113. The parties raised 10 Items in their Joint Statement of Issue. The arbitrator will deal with each one in order.

Item 1: If a crew reaches the OMTS before ten hours on duty and yards their train over ten hours on duty are they entitled to the $80.00 payment?

114. The TCRC summarized its argument at paragraph 120 of its Brief (U-6):

> 120. This is a recurring form of an over hours violation. The essential question posed at this juncture is, if a crew reaches the Outer Main Track Switch (OMTS) before ten hours on duty and is required to yard their train, consequently being over ten hours on duty, are they entitled to the $80 payment?

115. In one of the representative grievances, the TCRC noted that the crew arrived at the OMTS prior to 10 hours but continued past 10 hours when they were required to work for nearly two additional hours afterwards.

116. The TCRC argued that this scenario entitled the crew to the $80 premium payment (U-6; TCRC Brief, Paragraph 136):

> 136. In the Union's respectful submission, this is the type of circumstance that Mr. Picher addressed with his remedial order in CROA 4078S. These crews are had given notice of rest and had performed work beyond 10 hours. The Company is in further breach of Appendix 9 of the 2007 MOS, because this crew should have been relieved. In accordance with the remedy that Mr. Picher deemed appropriate, the $80.00 premium payment should apply in these circumstances. (sic)

117. The arbitrator agrees with the TCRC that, except in limited circumstances, CP has agreed to ensure crews will be off duty in 10 hours if they have given proper notice. But the parties' negotiated language includes a key condition for the $80 payment. The crew must have gone over 10 hours prior to reaching the OMTS. As discussed above, Arbitrator Picher's decisions did not, and could not, amend this key condition in the collective agreements.

118. Article 27.11 states that the $80 premium payment is owing if the crew gives notice within 5 hours and has exceeded their 10 hours **before** reaching the OMTS.

119. The $80.00 premium payment is distinct from the 10 Rule. The arbitrator cannot disregard the OMTS reference without rewriting the collective agreement. A rights arbitrator is prohibited from doing that.

Item 2: If a crew performs work in the final terminal after arriving at the OMTS prior to ten hours on duty and is subsequently over ten hours, is the crew entitled to the $80 premium payment?

120. The TCRC commented on this Item at paragraph 137 of its Brief (U-6):

> 137. This is a recurring form of over hours violation. The essential question posed at the juncture is, if a crew reaches the Outer Main Track Switch (OMTS) before ten hours on duty, performs work in the yard and yards their train over ten hours on duty are they entitled to the $80 payment?

121. The TCRC relied on Arbitrator Picher's remedial award in 4078S in support of its claim to the $80.00 payment (U-6; TCRC Brief; Paragraph 149):

> 149. For the same reasons that Mr. Picher ordered the $80 premium payment remedy in respect of the Medicine Hat over hours violation, the Union submits that the same remedy ought to apply to the analogous circumstances of each of the above circumstances of work being required in the yard, putting the crews in question over their ten hour rest mark.

122. The arbitrator sees no difference in the answer for Items 1 and 2, since in both cases the crew reached the OMTS before being on duty for 10 hours. That does not meet the express requirement the parties included in their collective agreement for payment of the $80 premium payment.

Item 3: Are employees in assigned road service who give notice of rest entitled to the $80 payment when relieved within the terminal but not in time to be in and off duty within 10 hours?

123. This item deals with "assigned road service". These employees have the same start times and days off every week. They generally work within a 30-mile radius of their terminal, unlike employees in "unassigned road service" who take trains from one city/terminal to another.

124. The answer to this Item depends on location. The TCRC referred to Vancouver in describing this Item (paragraph 152), but there are representative grievances from both the East and West.

125. The TCRC argued that CP failed to respect the rest provisions in Appendix 9 and has further failed to pay the $80 premium payment. The TCRC described its position at paragraphs 152 and 160 of its Brief (U-6):

> 152. This set of circumstances specifically engages the rest protections negotiated in Appendix 9. This item involves the Assigned Rest Service crews in Vancouver arriving at relief points within 10 hours on duty, but are not relieved in time to be in and off-duty prior to the 10th hour. In the foregoing overview the union highlighted language in Appendix 9 which governs the Company's obligation to provide additional rest opportunities in this type of situation. The union also asserts that the crew is entitled to the $80.00 premium in the circumstances.
>
> …
>
> 160. The Company is in plain breach of Article 27, 29 and Appendix 9 in these circumstances. The breach of the Collective Agreements here further involves the Company's failure to adhere to the transit and relief times that had been negotiated in respect of Vancouver terminal under Appendix 9 to address this very circumstance. Vancouver expanded on the transit time provision provided in Appendix 9, establishing transit time within the Vancouver terminal itself – see Tabs 33 and 34. A remedy is warranted in respect of these breaches.

126. CP in its brief described the grievances from both the East and the West and disputed the TCRC's interpretation (C-5; CP Brief; Page 92):

> Articles 27 and 29 do not apply to road switcher assignments per 27.13 and 29.14. Additionally, Appendix 9 of the MOS clearly stipulates (in Item 1 of that rule) that one of the necessary conditions for the $80.00 payment is that the crew "have not arrived at the objective terminal within 10 hours…". This condition alone (there are others) is not established in any of the associated grievances.

127. If this situation were governed solely by articles 27.13, 29.14 or Appendix 9, then CP might well have a defensible position given the collective agreement's specific language. Articles 27 and 29 do not appear to apply to road switcher service. Furthermore, Appendix 9, just like articles 27 and 29, focuses on the time at which a crew reaches the OMTS or objective terminal when determining entitlement to the $80.00 premium payment.

128. However, there is something unique regarding the Vancouver Terminal. The TCRC filed an August 26, 2013 Information Bulletin which described a Local Agreement (U-9; Tab 33) the parties had negotiated specifically for the Vancouver Terminal. The introductory paragraphs of that Bulletin read:

> Please be advised the Company and Union have reached an Agreement in regards to the transit times being applied to Road switcher Crews who give notice and are being relieved within the Vancouver terminal and are subsequently on duty over 10 hours.
>
> The Company has agreed to honor the $80.00 NG claims if crews are being relieved inside the Vancouver terminal and are on duty over 10 hours with these established transit times under the following conditions:
>
> The following 3 conditions must ALL be met to trigger the NG $80.00 claim:
>
> **1) Crew gives notice of rest**
>
> **AND**
>
> **2) Taxi (or any other mode of transportation) departs later than the designated time based on the published transit times**
>
> **AND**
>
> **3) Crew is in and off duty over 10 hours**
>
> **In Summary**:
>
> - Crews that report off duty in 10 hours or less DO Not qualify for the $80.00 NG claim.
>
> - $80.00 NG claims DO apply when a crew is relieved beyond the 10th hour
>
> (Emphasis in original)

129. The Local Agreement expressly notes that any payments are made on a without prejudice basis, since they otherwise would fall outside the provisions of Appendix 9:

> These claims will be paid without precedent and prejudice as they fall outside the provisions of the MOS appendix 9 clause.

130. The Information Bulletin contains a series of Q&As to further assist in clarifying employees' entitlements, including:

> Q. If we (crew) has completed our work prior to the 10 hours and walk into the yard office, perform our de-briefing and are eventually over our 10 hours, are we entitled to the $80 payment?

A. No

Q. If I am not transported and walk from the locomotives to the yard office and by the time I arrive into the yard office I am over my 10 hours, does this entitle me to the payment?

A. No. Once you have completed your work and are in the vicinity whereas you are able to walk to the yard office, you are still on overtime, but the NG claim does not apply.

Q. If I am still working (yarding a train into L28 for example) and I am not finished yarding the train until after the 10th hour, am I entitled to the NG claim even though I walked in from L28?

A. Yes, if you are still working beyond the 10th hour, you are entitled to the claim, regardless if you walked to the office or not.

131. The TCRC satisfied the arbitrator that it negotiated a Local Agreement to govern whether road switcher crews relieved within the Vancouver Terminal would be entitled to an $80 premium payment. That Local Agreement is distinct from articles 27, 29 and Appendix 9 and has an independent application. Indeed, the Local Agreement expressly notes that the claims fall outside Appendix 9. All Vancouver Terminal employees who meet the Local Agreement's express conditions may be entitled to the $80 payment.

132. However, CP alleged that it had cancelled the Local Agreement in 2015 and that it did not form part of the collective agreement (C-11; CP Brief; Paragraph 58). Moreover, CP argued that the parties had never included this scenario in the Items they set out in their JSI (C-11; CP Brief; Paragraph 58). Ultimately, a separate arbitration would be needed to examine the status of that Local Agreement and any employee entitlements.

Item 4: Are employees in assigned road service who give notice of rest entitled to the $80 payment when relieved within the terminal after 10 hours?

133. This issue is similar to Item #3. The slight difference is that employees under this item are relieved after the 10-hour mark. Grievances from both the East and West were included as examples.

134. Both the TCRC and CP reiterated their positions from Item #3.

135. The arbitrator arrives at the same conclusions. Articles 27 and 29 do not appear to apply to assigned road service. Moreover, the text of those articles and Appendix 9 make the $80 premium payment conditional on having worked over 10 hours prior to reaching the OMTS or objective terminal. The entitlement to additional rest under Appendix 9 is not subject to this condition for employees to which it applies.

136. Special arrangements have been negotiated for the Vancouver Terminal which may, exceptionally, provide employees with the $80.00 premium payment if they meet the specific conditions set out in the Local Agreement.

Item 5: Road Employees, who have given notice of rest within 5 hours, arriving at the final terminal over 10 hours on duty and required to yard their train.

137. Article 27.14 mentions “yarding” for situations where a crew arrives at the OMTS prior to 10 hours:

> 27.14 **Crews who arrive at the OMTS or designated point prior to 10 hours**, and subsequently reach 10 hours on duty within the terminal will not be required to perform switching. Arrangements will be made to expedite the yarding of their train. Where other crews are on duty and available to assist, they will be used to yard the train.
>
> (Emphasis added)

138. The highlighted text confirms that article 27.14 addresses situations where crews arrive at the OMTS prior to 10 hours and thus have no entitlement to the $80.00 payment. The interpretation of this article involves pre-conditions which may be summarized as:

> A) Did the crew arrive at the OMTS or designated point prior to 10 hours?
>
> B) Did the crew subsequently reach 10 hours on duty within the terminal in which case no switching will be required?
>
> C) If conditions A and B were met, did CP make arrangements to expedite the yarding of the train?
>
> D) Were other crews both on duty and available in which case they would yard the crew’s train?

139. An arbitrator would have to examine these questions to make a finding for a specific grievance.

140. But Item 5 as drafted addresses a different situation. What happens when a crew arrives at the OMTS after 10 hours and has earned an entitlement to the $80.00 premium payment? Does article 27.14 apply to them, despite the explicit reference to crews arriving at the OMTS prior to 10 hours?

141. The TCRC described its position at paragraph 175 (U-6; TCRC Brief):

> 175. This Item involves breaches of Articles 27, 29 and Appendix 9, including failure to provide the $80.00 premium payment and failure to provide appropriate relief as required by the Collective Agreement. The question is, are crews required to yard their train after giving notice of rest and hitting the switch after 10 hours on duty. The Union's view is that employees' mandatory rest rights in those circumstances – hitting OMTS after 10 hour on duty – compel the Company to relieve the crew immediately.

142. The TCRC provided an example of a crew who gave notice and arrived at North Portal after they had already exceeded their 10 hours on duty. They alleged that 3 other crews were available in North Portal to provide relief. Instead, the original crew was obliged to deliver their train through US customs. The 2 crew members ended up working 11 hrs and 40 minutes and 12 hrs 00 minutes respectively.

143. CP commented further on the facts at page 95 (C-5; CP Brief):

> The West has provided the example of Engineer Young and Conductor McPherson for this scenario. This crew was called for train 496-15 from Moose Jaw to North Portal on November 15th, 2014. They were on duty at 23.45. They gave their notice of rest and arrived at the OMTS at 10:00 and were off duty at 11:45. **The crew had been on duty for 10:15 when they arrived at the OMTS** and were ultimately on duty for 12:00… (Emphasis added).

144. CP acknowledged the crew had been on duty over 10 hours when they arrived at the OMTS and then worked up to 12 hours, despite giving the requisite 5-hour notice.

However, it suggested that articles 27.14 and 29.15 applied since no crew was on duty to assist (page 95):

> In this case, the crew had arrived at an Away From Home Terminal where there was no other crews on duty available to assist. It so happens that this Away from Home Terminal is crew change off location at the international border and, as such, the southbound train had to be yarded in order to be advanced to the US crew who was there to receive it. (sic).

145. CP did not persuade the arbitrator that article 27.14 provided it with a defence in this scenario. The debate under article 27.14 about whether crews were on duty and available to assist only applies if the crew had arrived "at the OMTS or designated point **prior to 10 hours**". The TCRC and CP both agreed the crew arrived at the OMTS **after** 10 hours.

146. Just as the arrival time at the OMTS is crucial in determining the entitlement to the $80.00 premium payment, so too is it essential when applying article 27.14 as a limited exception to the negotiated 10 Rule.

147. The parties' negotiated language does not set out what obligations crews have if they have qualified for the $80.00 premium payment ie arrived at the OMTS **after** 10 hours. While the arbitrator agrees with Arbitrator Picher in 4078s that a crew cannot just abandon its train, CP did not negotiate yarding obligations for employees who reach the OMTS after 10 hours.

148. The arbitrator agrees with the TCRC that CP had an obligation to relieve the crew. The employees' 5-hour notice provided CP with the time to make those arrangements.

Item 6: If a crew reaches the Outer Main Track Switch (OMTS) before ten hours on duty and yards their train over ten hours, is this a violation of the Collective Agreement?

149. This Item raises article 27.14 again (see analysis for Item #5).

150. The TCRC argued that this Item is *res judicata*, on the basis that CP argued it before Arbitrator Picher and lost the point (U-6; TCRC Brief; Paragraph 185):

> 185. The Arbitrator will presumably hear the Company argue that there is nothing wrong with having the crew arrive at the OMTS prior to ten hours and subsequently go over ten hours yarding their train. The Company argued this very point before Mr. Picher in 2012 (see paras 51-52 of its submissions). The Company was unsuccessful in convincing the Arbitrator to endorse its position. The issue has already been decided.

151. Paragraph 51 of CP's 2012 Brief cites article 29.15 (which is identical to 27.14). Paragraph 52 of that Brief then referred, *inter alia*, to "…the affected employees do not qualify for the premium payment and, according to the straightforward language of the collective agreements, there is absolutely nothing wrong with this operating standard".

152. CP in its Brief referred expressly to articles 27.14 and 29.15 and argued the answer to Item #6 is literally found within the text of these articles (C-5; Page 96).

153. The arbitrator has already commented about the impact of Arbitrator Picher's decisions on this arbitration, *supra*. Moreover, the arbitrator has been unable to find any express finding in CROA&DR 4078 which dealt with Item #6. The TCRC argued at paragraph 14 of its April 10, 2014 Brief in 4078S that:

> 14. In its submissions to the arbitrator, the Company did not deny that employees were not always able to be in and off duty within ten hours, notwithstanding giving notice of rest. The Company argued that, since there was a penalty clause and that employees were paid this "premium payment", there was no violation of the Collective Agreements.

154. The TCRC wrote at paragraph 15 of that same brief that Arbitrator Picher had found in 2012 that CP had not fully honoured the collective agreement. Arbitrator Picher wrote in CROA& DR 4078 that the availability of a premium payment did not mean that CP could violate the TCRC's members' rights with impunity:

> On the other hand, I am compelled to accept the submission of the Union that there has been a failure to fully honour the requirements of these articles. I cannot accept the implicit suggestion in the position of the Company that the payment of the penalty provided for under Appendix 9 of both collective agreements is tantamount to a licence to violate the substantive requirement of

> these articles with impunity. To dismiss the grievance would be to effectively countenance that view.

155. But 4078 did not address explicitly the situation of a crew arriving at the OMTS before 10 hours and being required to yard their train thereafter. The arbitrator has already enumerated for Item #5 article 27.14's pre-conditions which apply to this scenario. Those pre-conditions will determine whether CP violated the collective agreement when requiring a crew to yard their train. It appears Arbitrator Picher came to the same conclusion about yarding in a different case: CROA&DR 4180, *supra*.

Item 7: Road Employees who have not given notice of rest and not been in and off duty within 12 hours

156. The Work/Rest Rules, *infra*, are also relevant to any examination of 12-hour tours of duty.

157. The parties negotiated language in article 27.12 to address the entitlements of employees who have not given notice and who may be required to work up to 12 hours:

> 27.12 **Employees who have not requested rest** in accordance with Clause 27.04 may, at the discretion of the Company, be required to work up to 12 hours **in order to complete their tour of duty**. In these circumstances, **a crew who works in excess of 10 hours prior to reaching the OMTS or designated point of the objective terminal**, will be entitled to a premium payment of $80.00 in addition to all other earnings for their tour of duty.
>
> (Emphasis added)

158. The TCRC provided examples of its members working beyond 12 hours. It summarized its position in referencing article 29.13, which is identical to article 27.12:

> 191. Article 29.13 provides that crews are only to work up to the 12th hour. It also provides $80.00 payment in these circumstances.

159. CP made several arguments to address situations where employees had gone beyond 12 hours. For grievance #319-525, they noted the employees had been on duty

for 8 hours and 20 minutes when they arrived at the relief point and stopped operating equipment. CP suggested deadheading was not included in the 12 hours. An equipment failure and late taxi caused their total duty time to be 13:25. CP compensated the crew and noted that the locomotive mechanical failure and the late taxi were unforeseen events.

160. CP argued that federal regulations prevented employees from operating trains or otherwise being involved in the movement of trains beyond 12 hours, except in emergencies and for work train service. CP suggested (C-5; CP Brief; Page 98):

> …While there are some examples of crews reporting off duty after 12 hours, usually involving situations of force majeure, mechanical failure, etc. none of them have been compelled or permitted to work after 12 hours. It would be an offense for the employee to do so outside of the parameters of work/rest regulations for railway employees.

161. Article 27.12 retains the concept used elsewhere that the $80 premium payment is conditional on employees working "in excess of 10 hours **prior** to reaching the OMTS".

162. The parties' negotiated language does not support CP's argument that the focus is solely on whether employees worked on a train for up to 12 hours. CP's discretion to have employees work "up to 12 hours" is provided "in order to complete their tour of duty". The negotiated language does not support an argument that employees may work up to 12 hours and then complete their tour of duty at some later time.

163. The wording of Article 27.12 establishes that the maximum 12 hours of work, and the completion of employees' tour of duty, occur at the same time. If the 12 hours of work CP can require does not result in employees completing their tour of duty, then CP must make other arrangements during the crew's 12-hour tour to ensure they go off duty.

164. The TCRC accepted that perfect compliance is impossible. It recognized that "Acts of God" or rare, unexpected circumstances wholly outside CP's control may impact the interpretation of the collective agreement (U-6; TCRC brief; Paragraph 232). The arbitrator would add that any negotiated leeway in the collective agreement must also be considered when evaluating compliance.

165. But subject to exceptional situations, employees are entitled to their rest entitlements as negotiated into the collective agreements. Article 27.12 allows employees to work, but only up to 12 hours at which time they must also have completed their tour of duty. This obligation does not have the same types of exceptions, such as for yarding, which applied for employees who provided notice to be in and off duty within 10 hours.

Item 8: Are employees who are transported by the Company to a designated rest facility at the end of a tour of duty on duty until:

- arrival at the Away From Home Terminal when train yarded/relieved of responsibility) or;

- when the employee arrives at the booking in facility, as designated by the company, at the Away From Home Terminal or;

- when the employee arrives at the accommodations provided by the Company or;

- until the employee is tied up at the rest facility

Introduction

166. This introductory discussion will apply to Items 8-10. These Items raise issues about when an employee is considered "on duty" and "off duty" for the purposes of the collective agreement. This obviously impacts the application of article 27 and the 2007 MOS. Article 27.06 contains the phrase "…the Company will make arrangements to ensure the employee is off duty within 10 hours" which, subject to the parties' negotiated language, *supra*, demonstrates the importance of being off duty at the 10-hour mark.

167. The TCRC argued that employees are always on duty when they are subject to the company's direction (U-18; TCRC Brief; Paragraph 97):

> 97. The foregoing case law confirms that a variety of non-operational duties are nonetheless considered "on duty" work because the employees are subject to the company's direction and accountable for their actions during this time. Employees in the running trades are only "off duty" when they are at home or at a designate rest facility and not subject to their employer's control.

168. The arbitrator will summarize the parties' arguments on the relevance of the Work/Rest Rules before answering Items 8-10.

Work/Rest Rules for Railway Operating Employees

169. Section 19 of the Railway Safety Act (RSA) allows the Minister of Transport to require a railway to formulate Rules concerning, *inter alia*, employee "hours of work and rest periods". The RSA requires a railway to consult with the relevant "association or organization" (the TCRC in this case) which is likely to be affected by the Rules.

170. This process has resulted in the current Work/Rest Rules (WRR) that CP must apply. Both parties relied on portions of the WRR to support their arguments about when an employee is on or off duty.

171. Initially, the TCRC suggested that the purpose of the WRR was not "to consider when an employee is on or off duty for the purposes of the collective agreement, pay or other considerations" (U-18; TCRC Brief; Paragraphs 25 and 44). The TCRC did add, however, that the WRR "sets out to accurately define and track on-duty and off-duty times in order to ensure employees are properly rested…".

172. CP suggested that the WRR exist mainly for regulatory purposes and do not govern interpretations of the collective agreement (C-10; CP Brief):

> 14. The Work Rest Rules, while setting out minimum regulatory standards, are not, however, directly written into the Collective Agreements. Instead, the Work Rest Rules, in many cases, set out minimum standards that the parties have improved upon through their collective agreement. In other cases, the objective of the Work Rest Rule may be to measure "on duty" time that an employee operates a train whereas the Collective Agreements measure all of the inputs that go into determining the compensation the employee is owed pursuant to the Collective Agreement.

173. The arbitrator might have unintentionally added unneeded complexity by inquiring whether an analogy existed between the WRR's possible impact on a collective agreement and employment standards legislation which creates a floor below which no collective agreement can go.

174. The TCRC in its subsequent reply brief (U-25; Paragraphs 5 and 8) argued that the WRR determines employees' on duty time:

> 5. The Union respectfully submits that the answer to your question is plainly in the affirmative. The Work/Rest Rules must be applied as mandatory minimum terms governing employees' hours on duty.
>
> …
>
> 8. It is evident from the foregoing award [CROA&DR 2906] that there can be no provision in the collective agreement that is inconsistent with the mandatory provisions of the Work/Rest Rules.

175. CP had a different answer to the arbitrator's question (C-12; CP Brief; Paragraph 52):

> 52. To answer the question you had asked, on whether Work Rest Rules set out a floor much like employment standards legislation, the answer is both "YES" and "No". What you will see is that when compared, the Work Rest Rules are not always minimum standards. For example, in Section 5.1.1 of the Work Rest Rules, an employee can be kept working up to 12 hours. We know, however, from several days of this hearing that there are collective agreement provisions, which in certain circumstances allow an employee to work for 10 or 11 hours.

176. Must the arbitrator apply the WRR to any interpretation of the parties' collective agreement? Doing so would echo somewhat the principle that legislation must be interpreted in accordance with the Charter: Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron, 2018 SCC 3.

177. Alternatively, where the parties in their collective agreement have already negotiated language about when an employee will be considered on or off duty, in situations which do not place employees over any WRR thresholds, must a rights arbitrator simply give effect to the parties' language?

178. CP tracks significant information for WRR purposes. The issue is whether those requirements, including tracking what the WRR considers as on duty time, must be applied to the parties' collective agreement.

179. The arbitrator has not been satisfied that the parties intended to apply the WRR when interpreting their negotiated language for employees' entitlements, such as those under article 27. The WRR is designed to calculate employees' hours of work and rest entitlements. The WRR gives direction on how to the calculate these hours for regulatory purposes.

180. But the WRR does not create a minimum standard against which the parties' 10 Rule must be measured. It may become relevant where employees approach the 12-hour mark, but the main dispute in this case between the parties concerns the negotiated right to be in and off duty within 10 hours if employees give proper notice within 5 hours.

181. The WRR creates a ceiling that CP must respect i.e. the collective agreement cannot ignore the statutory limits which have been imposed. But the parties remain free to negotiate other regimes and benefits, as long as they do not violate that ceiling.

182. In CROA&DR 2906, Arbitrator Picher expressed a similar view:

> The Council submits that the Company could not depart from the first-in first-out principle contained within the collective agreement for the purposes of calling the grievor, as provided in article 26(a) and article 5(b)(7) of the collective agreement, in the circumstances disclosed. The Arbitrator cannot agree. **It is well established that the parties to a collective agreement cannot negotiate terms in their collective agreement, or apply and administer such terms, in a manner that is inconsistent with public law, be it statute or regulations. In the case at hand it is obvious that the first-in first-out calling provisions of the collective agreement must be rationalized and applied in a manner that is consistent with the federal regulations in respect of mandatory limits on duty, which the Company has undertaken to apply.** It is, moreover, significant that the Council, which obviously has an equal interest in seeing reasonable rest provisions enforced for the protection of its members, apparently took no exception to the Company's bulletin of February 18, 1994 which indicated that employees are not to be called should they have insufficient time remaining on their on duty clocks to be able to handle the assignment in question.
>
> (emphasis added)

183. Arbitrator Stout[8] similarly commented on the interplay between the parties' collective agreement and any statutory or other requirements. Arbitrator Stout concluded that CP could not ignore collective agreement entitlements in situations where those entitlements did not violate a statute or cross any WRR thresholds:

> 84. **However, this case is very different from the facts in CROA 2906. In CROA 2906 the context was Company guidelines, not agreed upon subdivision run times. In addition, the facts in CROA 2906 demonstrated a situation where a Locomotive Engineer did not have enough time on their 18-hour clock to complete the runtime afforded in the Company guidelines. This is much different from the matter before me, where employees are being forced to rest in situations where they have more than enough time on their 18-hour clock to perform the agreed upon subdivision runtime.**
>
> 85. I do not see how the language in the Collective Agreements, including the first-in and first-out provisions and the December 8, 2012 subdivision runtimes, violate any statute, so long as the maximum times in Transport Canada's Work/Rest Rules are honoured. Furthermore, there is no evidence before me to suggest that the ERP is necessary to comply with any legislative requirement, including Transport Canada's Work/Rest Rules.
>
> 86. **It would appear that the Company seeks to implement a more stringent rule or policy (the ERP), relying only on their general duty to provide a safe workplace. However, the duty to provide a safe workplace does not provide the Company with the legal authority to violate specific terms of the Collective Agreements, which on their face do not violate any statute.**
>
> 87. The Company was unable to point me to any decision where the general duty to provide a safe workplace was found to permit an employer to violate specific provisions of a collective agreement. In my view, the ERP goes much further than is required by any federal statute or regulation. In addition, the Company has not proven that ERP is reasonable and necessary to provide a safe workplace.
>
> (emphasis added)

184. The collective agreement language accordingly governs the parties' entitlements, unless its application would violate public law, as was the case in CROA&DR 2906.

[8] Canadian Pacific Railway v Teamsters Canada Rail Conference, 2016 CanLII 53073

On and Off Duty Under the Collective Agreement

185. CP referenced the parties' 2007 MOS in support of its argument that "off duty" means something different for collective agreement purposes compared to the WRR. At page 13 of the 2007 MOS, the parties negotiated language regarding bunkhouses and referenced where employees go on and off duty. In note 4, the parties included this language (Vol 4; TCRC Exhibits; Tab 5):

> 4) The Company may elect to provide suitable sleeping accommodation in a hotel, motel or other suitable place located convenient to the point where employees regularly go on and off duty…

186. Similar language was used for temporary accommodations:

> "…The Company may elect to provide suitable temporary accommodation in a hotel, motel or other suitable place located convenient to the point where employees regularly go on and off duty…"

187. Appendix 9 also demonstrates the parties have agreed in certain situations where employees go off duty for purposes of the 10 Rule. On two occasions, they refer to the "off duty point at the objective terminal". The parties further agree that "the transit times will be based on the departure time of the taxi from the relief point to arrival time at the off duty point at the objective terminal and includes a standard tie up time".

188. In certain situations over which CP has control, the arbitrator does find persuasive the TCRC's argument that an employee cannot be "off duty" when he/she still has mandatory duties to complete. For example, CP obliges employees to complete a "tie up", a process which involves either entering information into a CP CMA terminal or phoning the Crew Management Centre (TCRC exhibits; Vol 4; Tab 15).

189. CP controls where employees do their tie up. In certain situations, Appendix 9 identifies when employees go off duty for purposes of the 10 Rule through agreed upon tie up times.

190. Appendix 10 from the 2007 MOS, entitled "In and Off in 10 Hours – Tracking" also refers to the importance of the "tie up". The second paragraph of that letter reads:

> To better track this issue it was agreed that the tie up screens would be modified so that employees would not be able to tie up without providing an indication whether or not proper notice of rest had been provided.

191. Challenges may arise when the tie up is not performed at the same location where employees have yarded their train. Employees cannot be "off duty" when CP still requires them to perform further duties: CROA&DR 4362.

192. The arbitrator finds persuasive the suggestion in CROA&DR 4300, albeit in a situation involving a different employer and collective agreement, that employees being transported to and from work are not usually "on duty" as that expression would normally be understood:

> I have some difficulty in accepting that the concept of the "report for duty" contemplated within the language of Article 60.1 refers to the point in time in which an employee boards a taxi to be transported to the place of active duty. **While, as noted above, it may be that the employee is under a qualified obligation towards the employer while riding in a taxi, it is far from clear to the Arbitrator that that situation corresponds to the "report for duty" contemplated under Article 60.1 of the collective agreement.** In my view the better interpretation would be that the time required to report for duty refers to the time at which an employee reports for his or her on duty train time. Logic would suggest that the call period established in the collective agreement would relate to the commencement of active work, and not to periods of transportation whether in a taxi or otherwise. The foregoing interpretation is, moreover, consistent with the intention of the parties as reflected in article 82.5, whereby the travel to and from accommodations is not to be considered as on duty time. On an examination of all of these provisions I am satisfied that it is train time, and not taxi time, which must be looked to for the purposes of establishing the calling periods agreed to between the parties.
>
> (Emphasis added)

193. As a result, the WRR does not determine what time is "on duty" time for collective agreement purposes, except in cases of statutory maximums. Similarly, reasonable travel time to and from accommodations is not "on duty" time if the tie up has already taken place. But if CP requires employees to travel first, before tying up, then they only go off duty after completing their tie up.

Item 9: Are employees who are transported from a designated rest facility to the reporting location on duty:

- at the rest facility if the employee receives work documents there or;

- when the employee enters the transportation provided by the Company or;

- when the employee arrives at the reporting location or (sic);

194. The parties differed whether being transported from a rest facility constituted on duty time for the purposes of the collective agreement. If it does, then this impacts the application of the 10 Rule.

195. The TCRC, in addition to its WRR arguments, referred to various awards of this Office to support its position that travel time must be on duty time. The TCRC argued, *inter alia*, that if CP can discipline employees for things which occur during this travel time, then employees must be "on duty". The same concept applies for things an employee may do when "subject to duty".

196. CP referred to the 2007 MOS in support of its position that the parties have already agreed where employees were required to report for duty (Vol 4; TCRC Exhibits; Tab 5):

> 9) Lockers and report location
>
> a) In order to complete clean up of bunkhouse language, move and modify existing clause (Article 33.01 (8) and (10) Trainpersons East and West regarding lockers and report location to a new article.
>
> - Establish as new clause within the appropriate Consolidated Collective Agreement article (currently Article 27 Trainman East and West, Article 25 Engineer East and West), as amended:
>
> (x) Employees will be supplied with an individual locker at the home terminal located conveniently to the point where they usually go on and off duty.
>
> (x) At the home terminal, employees will report for duty at the time ordered for at their locker unless otherwise agreed upon between the Local Chairperson and Superintendent. **At the away-from-home terminal such employees will report for duty at the times ordered for at the same place which may be at the yard office, station or train order office as designated by bulletin or**

> **such other place as may be agreed upon between the Local Chairperson and the Designated Company Officer.**
>
> (emphasis added)

197. CP also referred to the "Designated On Duty Locations" it had established for both home terminals and away from home terminals (C-10; CP Brief; Tab 20-22).

198. The arbitrator is satisfied that the parties' use of the expression "report for duty" in the 2007 MOS, whether at the home or away-from-home terminal, means that employees go on duty at the terminal for purposes of the 10 Rule.

199. The arbitrator does not agree that CP employees must always be on duty when being transported. Railway employees differ from employees who return to their home every night after work. The Canadian Railway Operating Rules (CROR) at Rule G impose obligations for employees who are "subject to duty", as well as "on duty". These obligations refer to the use of drugs, narcotics, mood altering agents etc. Discipline cases involving Rule G do not demonstrate that employees were at all times on duty if CP disciplined them for an alleged Rule G violation.

200. Similarly, given the parties' negotiated language, the arbitrator finds persuasive Arbitrator Picher's comments that employees may have a "qualified obligation" during travel to work, but this does not mean that they are officially on duty when the collective agreement indicates otherwise: CROA&DR 4300, *supra*.

201. The arbitrator does agree with the TCRC that exceptional travel situations, such as that described by Arbitrator George Adams in *Canadian National Railway v. Canadian Telecommunications Union*, [1978] O.L.A.A., would receive different treatment. In that case, Arbitrator Adams contrasted the usual with the unusual:

> While, generally speaking, an employee is not "at work" until he actually arrives at his office, plant or job site, we accept that **time spent travelling to an unusual and distant location at the employer's request** falls within the ordinary and accepted meaning of the term "work".
>
> (emphasis added)

202. The employer in that case had asked the employee to make an exceptional 5-hour drive on a statutory holiday for work purposes. It was not the employee's usual travel associated with his railway work.

Item 10: Are employees entitled by Collective Agreement provisions to report for duty at their lockers and prepare themselves for a tour of duty or are they obliged to be "dressed and ready" for work at their lockers.

203. The parties disagreed whether employees should be ready for work at the start of their tour of duty, or whether they should have time at the beginning of their tour to prepare themselves, particularly given the demands of working in winter.

204. The 2007 MOS language from Section 9 regarding employee lockers and report location is again relevant to this issue (Vol 4; TCRC Exhibits; Tab 5):

> 9) Lockers and report location
>
> a) In order to complete clean up of bunkhouse language, move and modify existing clause (Article 33.01 (8) and (10) Trainpersons East and West regarding lockers and report location to a new article.
>
> - Establish as new clause within the appropriate Consolidated Collective Agreement article (currently Article 27 Trainman East and West, Article 25 Engineer East and West), as amended:
>
> (x) Employees will be supplied with an individual locker at the home terminal located conveniently to the point where they usually go on and off duty.
>
> (x) At the home terminal, **employees will report for duty at the time ordered for at their locker** unless otherwise agreed upon between the Local Chairperson and Superintendent. At the away-from-home terminal such **employees will report for duty at the times ordered for at the same place which may be at the yard office, station or train order office as designated by bulletin** or such other place as may be agreed upon between the Local Chairperson and the Designated Company Officer.
>
> (emphasis added)

205. The TCRC did not suggest that employees should be paid if they require time to dress properly for the conditions prior to the start of their tour. Rather, the TCRC argued

that the 2007 MOS obligates members to report for duty at their locker. The MOS then implicitly includes time following that reporting time during which they can prepare for their tour of duty (TCRC exhibits; Vol 4; Tab 18).

206. The TCRC referred to a 2012 Southern Ontario Region bulletin (TCRC exhibits; Vol 4; Tab 19) which suggested road crews would have 5 minutes following their reporting time to get dressed for duty. The TCRC does not concede that members have only 5 minutes but relies on the bulletin to demonstrate that CP accepts that employees start getting ready at their locker after arriving for duty.

207. The TCRC also suggested that a long time historical practice existed between the parties (U-25; TCRC Brief; Paragraph 42). Given the length and scope of this hearing, this decision does not determine the TCRC's past practice argument, which is something CROA can examine on occasion: CROR&DR 4606.

208. CP argued that employees' obligation to report for duty means that employees will be ready for work at the time ordered. It referenced other articles the parties had negotiated, such as section 46(2)(a) and (b) in the CTY West collective agreement for yard employees, which showed the parties can negotiate paid preparation time:

> 46(2) Preparatory and Final Time:
>
> (a) Yard Forepersons and Yard Helpers will be required to report for duty 10 minutes prior to the starting time of their shift for which 10 minutes will be paid at the applicable pro rata rate of pay. Time paid will be for performing duties in connection with registering, reading bulletins, checking watch, picking up radios etc., and being prepared to commence work as the starting time of their shift.
>
> (b) Yard Forepersons and Yard Helpers, upon completion of their shift will be allowed 5 minutes at the applicable pro rata rate of pay. Time paid will be for performing duties in connection with completing reports, reporting car control data, returning radios, registering etc.

209. The TCRC distinguished this negotiated language on the basis that it obliged employees to show up 10 minutes prior to their start time and to stay 5 minutes after the end of their shift. CP reminded the arbitrator that road employees were not paid an hourly wage like yard employees. Rather their remuneration was based on predetermined miles for the routes to which they will be assigned.

210. The arbitrator is satisfied that any leeway for preparation time at the start of a tour of duty is a matter for negotiations. Otherwise, employees need to be ready for their tour of duty at their reporting time. In section 9 of the 2007 MOS, the parties did not negotiate language which read “report to prepare for duty” or “report to get dressed for duty”. Instead, they agreed employees would “report for duty”.

211. Absent other language, this persuades the arbitrator that employees need to be ready to perform their duties at their report time. This appears consistent with the findings of other CROA arbitrators: CROA&DR 4178. Employees could not be ready for their duties if they then took 5 minutes or more to prepare themselves.

212. This conclusion is subject to any local practices, as may have occurred in Southern Ontario, and without prejudice to the TCRC’s right to plead a past practice argument.

REMEDY

213. The answers to the 10 Items above demonstrate that the TCRC is entitled to certain remedial relief. However, CP also successfully demonstrated that the TCRC is not entitled to the full scope of its remedial requests (U-6; TCRC Brief; Paragraph 299).

214. The parties filed further submissions on remedy at the arbitrator’s request. The TCRC suggested new remedies which had not previously been requested. CP argued the arbitrator should not order an expansive remedy for what is described as a “Case of First Instance”. Given the breadth of this decision, the arbitrator has limited the remedies ordered. This does not prevent a future arbitrator from ordering additional remedies for individual cases following the issuing of these reasons.

215. This case clearly cannot resolve every grievance.

216. For the reasons set out above, the parties’ negotiated language does not entitle employees to an $80.00 premium payment whenever they have given proper notice and remain on duty for over 10 hours. That payment is instead conditional on the time employees reach the OMTS or objective terminal. An arbitral award cannot change this negotiated language.

217. CP has negotiated some flexibility, such as for yarding a train, so employees who provide notice may still have to work beyond 10 hours. Absent clear wording in the collective agreement, Arbitrator Picher refused to issue a declaration in 4078s that "employees are entitled to cease work when an alleged violation of the collective agreement is identified".

218. But the TCRC has satisfied the arbitrator that CP has treated the 10 Rule as applying only when everything works according to plan during a tour of duty. There is no language in the collective agreement creating such a large exception to the 10 Rule. Rather, the employees' notice gives CP 5 hours to find ways to relieve them, especially when things have not turned out as expected. Clearly, the collective agreement does not address all the challenges arising from article 27 and Appendix 9. The parties need to address this lack of clarity.

219. CP's own evidence indicated that thousands of situations continue to occur annually where employees are not off within 10 hours. CP did not argue that all of these situations fall under the available collective agreement exceptions.

220. Arbitrators can also apply the concept of force majeure in certain limited situations. The TCRC accepted that "acts of God" and rare unexpected circumstances fully beyond CP's control may impact the 10 Rule (U-6; TCRC Brief; Paragraph 232). But "unforeseen circumstances" arising during a tour of duty differ from force majeure, especially considering the context in which a railway operates.

221. The arbitrator accordingly declares that CP has violated the collective agreement.

222. The TCRC has further convinced the arbitrator to issue a cease and desist order given the high number of examples, even using CP's own numbers and explanations, when employees' right to be off duty within 10 hours has not been respected. This cease and desist order applies as well to those employees who are entitled to be in and off duty within 12 hours.

223. The arbitrator reserves jurisdiction on certain other remedial requests. For example, the TCRC requested an abeyance code. The parties may have already come to an agreement on that issue (C-11; CP Brief; Paragraph 71/Tab 10).

224. The TCRC also briefly referred to article 71.04 of the collective agreement and CP's alleged failure to respond to certain $80.00 premium payment grievances (U-24; TCRC Brief; Paragraph 77). Since article 71.04 contains potentially significant negative consequences for both the TCRC's ability to progress a grievance, and to CP's ability to dispute a wage claim, a hearing on this specific issue would be required if it remains live following the issuing of these reasons.

225. The TCRC also referred to the convening of local discussion groups under Appendix 9 (U-6; TCRC Brief; Paragraph 85). It was unclear if this was a remedial request.

226. The arbitrator reserves jurisdiction generally given the scope of this award.

227. As noted above, this award cannot resolve every one of the outstanding grievances. But these reasons may allow the parties to categorize those which remain in dispute.

228. Given that the parties are currently in collective bargaining, they may prefer to address this entire Over Hours issue in their renewal agreement. The arbitrator agrees with what Arbitrator Picher noted back in 2012 that proper language addressing all the issues separating the parties, whether achieved consensually or through interest arbitration, would provide a better resolution than arbitration. The negotiated language used at other transportation undertakings can only be helpful in that regard.

Dated at Ottawa this 23rd day of March 2018.

Graham J. Clarke
Arbitrator

IN THE MATTER OF A DISPUTE

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

(The "Company")

- And -

TEAMSTERS CANADA RAIL CONFERENCE

(The "Union")

JOINT STATEMENT OF ISSUE

DISPUTE:

1. Grievances in response to the Company's alleged ongoing breaches of Article 29 (Conductors' Agreement) and Article 27 (Locomotive Engineers' Agreement) across Canada.

2. Employees' entitlement to claim a premium payment of $80.00 when employees give notice of rest within the first five hours of service and are on duty greater than 10 hours.

3. Are employees obliged to be to be dressed and ready for work when they show up for work at their locker?

STATEMENT OF ISSUE:

Since January 11, 2012, the Union has alleged that its members have experienced ongoing violations of Article 27 (LE) and 29 (CTY) (rest provisions) of the respective agreements. In the preponderance of cases, road crews have provided proper notice of rest within the first five hours of service, but are not in and off duty in ten hours.

In other cases, the Union alleges that road crews did not provide notice to be off duty within 10 hours yet are not relieved in order that they be in and off duty within 12 hours.

Arbitrator Michel Picher rendered two arbitration awards (*CROA Case Nos. 4078* and *4078S*) with respect to the application of rest provisions for Train and Engine employees.

The Union has advanced a series of grievances on behalf of employees based in terminals across Canada whose employment is governed by either the Conductors' Agreement or the Locomotive Engineers' Agreement.

The Union's grievances contend that the Company has continued to systematically breach Article 29 (CTY) and Article 27 (LE) in respect of employees' right to book rest. The Union claims that the frequency of these violations has increased since January 2012. These individual grievances are subsumed within the instant group grievance.

In addition, the Union has filed grievances and the parties remain in disagreement over the interpretation of *CROA 4078S* as it applies to the payment of the $80 premium payment under the terms of the Collective Agreements. The Union further claims that Arbitrator's rulings in CROA 4078S now apply or in the alternative ought to apply to all other terminals in Canada, The Company denies such a position..

The parties agree the Arbitrator has the jurisdiction to determine Eastern and Western Canadian employees' entitlement to claim the $80 premium payment in the following circumstances:

1. If a crew reaches the OMTS before ten hours on duty and yards their train over ten hours on duty are they entitled to the $80 payment?
2. If a crew performs work in the final terminal after arriving at the OMTS prior to ten hours on duty and is subsequently over ten hours, is the crew entitled to the $80 premium payment?
3. Are employees in assigned road service who give notice of rest entitled to the $80 payment when relieved within the terminal but not in time to be in and off duty within 10 hours?
4. Are employees in assigned road service who give notice of rest entitled to the $80 payment when relieved within the terminal after 10 hours?

The parties agree the Arbitrator has the jurisdiction to determine Eastern and Western Canadian employees' rights under the Collective Agreement and any request for appropriate remedies in the following scenarios.

5. Road Employees, who have given notice of rest within 5 hours, arriving at the final terminal over 10 hours on duty and required to yard their train.
6. If a crew reaches the Outer Main Track Switch (OMTS) before ten hours on duty and yards their train over ten hours, is this a violation of the Collective Agreement?
7. Road Employees who have not given notice of rest and not been in and off duty within 12 hours.
8. Are employees who are transported by the Company to a designated rest facility at the end of a tour of duty on duty until:
    - arrival at the Away From Home Terminal when train yarded / relieved of responsibility) or;
    - when the employee arrives at the booking in facility, as designated by the Company, at the Away From Home Terminal or;
    - when the employee arrives at the accommodations provided by the Company or ;
    - until the employee is tied up at the rest facility.
9. Are employees who are transported from a designated rest facility to the reporting location on duty:
    - at the rest facility if the employee receives work documents there or;
    - when the employees enters the transportation provided by the Company or;
    - when the employee arrives at the reporting location or;

10. Are employees entitled by Collective Agreement provisions to report for duty at their lockers and prepare themselves for a tour of duty or are they obliged to "dressed and ready" for work at their lockers.

UNION POSITION:

It is the Union's view that, in spite of the Company's obligations as set out in Article 27 (CTY), Article 29 (LE) and Appendix 9 of the 2007 MOS, there remain issues of "in and off in 10 hours" compliance across Canada. Article 29.06 (Conductors' Agreement) and Article 27.05 (Locomotive Engineers' Agreement), respectively, provide employees the right to be off duty at the objective terminal in 10 hours when 5 hours' notice is properly provided to the Company by employees. If no notice is provided, employees have the right to be off duty at the objective terminal within 12 hours.

It is the Union's position that the Company has failed to ensure that employees are able to be off duty within 10 hours (or 12 hours as the case may be) in violation of the protections and procedures set out in articles 29.06 and 27.05.

The Union contends that the Company has failed to ensure that employees' rest entitlements and hours of service protections set out in these provisions are meaningfully applied in practice. The Union contends that the Company's ongoing, systematic violations of these substantive provisions are entirely unjustified and unwarranted.

The Union claims that the Company is estopped and barred by the principles of *Res Judicata* from arguing that a crew reaches the Outer Main Track Switch (OMTS) before ten hours on duty and yarding their train over ten hours is not a violation of the Collective Agreement.

The Union seeks a finding from the Arbitrator that the Company has been in ongoing breach of Article 27 (CTY), Article 29 (LE) and Appendix 9. The Union seeks an order from the Arbitrator that the Company cease and desist its ongoing breaches of Article 27 (CTY), Article 29 (LE) and Appendix 9. The Union seeks an order that the Company comply with its substantive rest obligations in Article 27 (CTY), Article 29 (LE) and Appendix 9. In addition the Union requests such other relief that the Arbitrator deems necessary in order to ensure future compliance with these rest rights enshrined in the Collective Agreement.

Further, it is the Union's position that employees are required to work over 10 hours (after giving the requisite notice at 5 hours) are entitled to the premium payment, regardless of what work they are required to perform beyond the 10 hour limit. The Union contends that this is consistent with the remedial order granted by Arbitrator Picher in his decision in *CROA Case No. 4078 Supplemental*. In that decision, Arbitrator Picher granted a remedial order that the Union had expressly requested in its submissions. Arbitrator Picher held that this direction merely enforces the agreed to provisions found in Article 29.12 and 29.13 (CTY) and the corresponding language of Article 27 of the LE Collective Agreement." The Union maintains that, in view of the unabated violations of Article 27 and 29 of the Collective Agreement, Mr. Picher's remedy must apply system-wide.

In cases where the Company has failed to respond to the Union's grievances in accordance with the Collective Agreements it is the Union's position that grievances must be allowed in accordance with CTY Article 71.04 and LE Article 22.04. The Company positions is that these types of grievances with respect to the payment of $80.00 are not covered by these provisions of the Collective Bargaining Agreements.

The Union requests an Order confirming that in the application of Article 29 (CTY) and 27 (LE) employees are entitled to the $80 premium payment in all instances of employees being on duty beyond the ten hour limit (i.e., in each of the seven sets of circumstances set out above).

The Union contends that on-duty time ceases at an away from terminal once the employees is tied up at the designated rest facility. The Union also contends that the on-duty time of an employee at a designated rest facility would commence once the employee either receives work documents for the train or enters the transportation provided by the Company. The Union's position with respect to on-duty off-duty times is consistent with the Collective Agreement, the RAC Work Rest rules and the practice of the parties.

COMPANY POSITION:

With respect to the Eastern and Western Canada group grievances regarding ongoing violations of Articles 27 and 29, the Company disagrees with the Union's position and denies the Union's contentions

The Company contends that the Union has not pursued all available procedures outlined in the Collective Agreements to address any perceived systematic problems with respect to overhours incidents with management and are estopped from doing given the passage of time that has occurred since Mr. Picher's last decision in 2014 was rendered and round of collective bargaining that since followed.

The Company also contends that the Union has significantly modified its original position that Mr. Picher "clarified' the application of rest provisions in CROA 4078S following his 2014 decision with respect to premium payments to that of a wholesale "remedy" that applies to every instance where an employee is not off duty in ten hours "regardless of what work they are required to perform beyond the 10 hour limit."

In any event, regarding the Union's expanded claim of entitlement to $80.00 premium payments since April, 2014 it is the position of Company that CROA Case No. 4078 Supplemental is restricted to the locations clearly outlined in the award, namely, Medicine Hat, Moose Jaw, and Saskatoon.

It is also the position of the Company that CROA 4078S did not alter the existing language of the Collective Agreement nor the application of the language accepted by the parties and clearly understood by the Union for many years it has been in effect. Rather, it is the position of the Company that award CROA 4078S was directing the Company to pay the $80 payment specifically as it related to Medicine Hat crews and switching performed.

The Company also contends that, with the exception of Extended Service Runs (ESR) the Collective Agreement provides that the rest provisions and calculation of time on/off duty in Articles 27 (LE) , 29 (CTY) and 2007 MOS, including established transit times for purposes of relieving crews, start and end at the terminal and not at designated rest facilities.

The Company further contends that not every instance of a crew giving notice to be off or being "over hours" incidents there is by its very nature, a violation of the Collective Agreement.

FOR THE UNION:

Greg Edwards
General Chairman, LE West

Dave Fulton
General Chairman, CTY West

John Campbell
General Chairman, LE East

Wayne Apsey
General Chairman, CTY East

FOR THE COMPANY

David. E. Guerin
Senior Director, Labour Relations

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