IN THE MATTER OF AN AD HOC ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

(The Union)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

(The Company)

DISPUTE:

Appeal of the Company's denial of up to 48-hours rest to Conductor Sean Lackey.

JOINT STATEMENT OF ISSUE:

Mr. Lackey tried to book 48 hours rest after working 119-20 on Nov 20th, 2018. Upon tying up, Mr. Lackey attempted to book 48 hours rest but the system did not allow him to do this. Mr. Lackey then contacted the CMC to inquire. Mr. Lackey was informed by the CMC that he could not book 48 hours rest as he tied up after 22:01 and that he was now in a new mileage period.

The Union maintains Mr. Lackey ought to have been permitted to book up to 48 hours rest in the circumstances whereas the Company maintains the position of the CMC.

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

UNION POSITION:

The Union asserts that the thresholds identified in the CCA Article 18.20 were met based upon the calendar date of the ticket of the employee upon tie up and are not to be denied given the following date from the tie up screen. The only exclusions contemplated were EDO's to extend 48 hours' rest and extended rest does not apply to time pools.

The calendar date has been relied upon in the rail industry for more than mileage. An example of such are statutory holidays;

- premium rates are applied based on the calendar date and not the preponderance of the tour being on a different date.

Mr. Lackey achieved the threshold as provided within Article 18.20 thus the reason for his call to the CMC and was refused the ability to book up to 48-hours rest.

The Union requests a finding that Mr. Lackey ought to have been eligible to book up to 48-hours personal rest in the circumstances.

In the alternative, the Union is also seeking any further relief the Arbitrator deems necessary in order to ensure future compliance with the award.

COMPANY POSITION:

The Company disagrees and denies the Unions requests.

The Union has not provided any evidence that supports the Grievor achieved the threshold as provided within the Consolidated Collective Agreement that would allow him the ability to book up to 48 hours of rest.

Notwithstanding the foregoing, the Company maintains that the Grievor was in a new mileage period upon tie up thus not entitled to book 48 hours of rest.

Article 18.20 of the Consolidated Collective Agreement outlines the parameters in which an employee is entitled to book up to 48 hours of rest upon tie up. The Grievor was not within these parameters due to being in a new mileage period and as such, having an accumulated miles count of 0 for his new mileage period.

It is well established that an employee's mileage period ends at 22:01 the day prior to an employee's mileage date. The Union's attempt to use "calendar date" is nowhere to be found within Article 18.20.
Based on the foregoing, the Company maintains the Grievor was not entitled to book up to 48 hours of rest. The Company requests the arbitrator be drawn to the same conclusion and deny the Union's request.

For the Union:	For the Company:
Signed	Signed
_____	_____
Wayne Apsey General Chair Person	Lauren McGinley Assistant Director Labour Relations

January 28, 2023

Hearing: February 21, 2023 - By video conference

APPEARANCES
FOR THE UNION:
Ken Stuebing, Counsel, Caley Wray
Wayne Apsey, General Chair CTY East
Dave Fulton, GC CTY West
Sean Lackey, Grievor

FOR THE COMPANY:
Allan Cake, Labour Relations Officer
Lauren McGinley, Assistant Director Labour Relations

AWARD OF THE ARBITRATOR

JURISDICTION

1. This is an Ad Hoc Expedited Arbitration pursuant to the Grievance Reduction Initiative Agreement of May 30, 2018 and Letter of Agreement dated September 7, 2021 between the parties. The protocols entered into by the parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument. The parties have agreed that I have all the powers of an Arbitrator pursuant to Section 60 of the Canada Labour Code.

BACKGROUND

2. The Grievor, Sean Lackey, is employed by the Company at Smiths Falls, Ontario. He began service on April 12th, 2004 and was promoted to Conductor on September 14th, 2004.

3. On November 20, 2018, Mr. Lackey was ordered from his Away From Home Terminal (AFHT) Montreal on Train 119-20 to his Home Terminal Smith Falls. November 20, 2018 was the last day of his mileage period. Upon arrival at Smith Falls, Mr. Lackey sought to exercise his right to book 48 hours rest.

4. Mr. Lackey contacted the Crew Dispatcher and was advised that he could not book 48 hours rest as he booked off after 22:01 November 20. The Crew Dispatcher advised Mr. Lackey that he was now in a new mileage period.

5. The Union submits that there is no language in the Collective Agreement that states the 48 hours rest must be taken within a certain mileage period. It says the language provides that employees are entitled to 48 hours rest upon reaching the chargeable miles threshold, period.

6. The Union submits that on November 20, 2018, Mr. Lackey achieved the required threshold enabling him to take advantage of the 48-hour personal rest provision upon tie up. Mr. Lackey's right to book 48 hours' rest crystallized at that time. His tie up screen was dated for the last day of his mileage period and, upon tying up, obtained sufficient miles that he may avail himself of extended rest. The Union argues that the miles could be verified by the Company by simply looking in the Grievor's personal mileage period from the previous period by the Crew Dispatcher.

7. The Union argues that CP is attempting to read in limitations on employees' access to their

right to book 48 hours consecutive rest upon reaching the qualifying threshold of miles, despite the fact that such limitations are not found in the language of the collective agreement. It says the language of Article 18.20 is silent on the mechanics of when 48 hours' rest is to be taken. The 48-hour rest is based on mileage earned, the sole qualifying criteria to accessing the right.

8. The Union maintains that only exclusions provided by Justice Adams contemplated were EDO's to extend 48 hours' rest and extended rest does not apply to time pools. It says there is no limitation that, for instance, the 48 hours' rest must be taken in the mileage period in which the qualifying miles were earned. The limitation asserted by the Company does not exist in the CCA.

9. The Union relied on AH 801and Bruce Power LP v Society of Energy Professionals, 2017 CanLII 94612 (ON LA), G. T. Surdykowski.

10. The Company maintains that the mileage period reset at 22:01when the Grievor was in a new mileage period when he booked off, although the Union has submitted that the Grievor had booked off at 23:25. In other words, the miles achieved while on train 119, were not accumulated in the prior mileage period, but in the new mileage period. Accordingly, the Grievor did not accumulate 3225 chargeable miles within his mileage period.

11. CP argues that the Union has not provided any evidence to support their claim that the Grievor in fact achieved or exceeded the mileage threshold outlined in Article 18.20 of the Consolidated Collective Agreement. The Company's position is that the merits of this case cannot be found in the Union's favor without evidence to support the Union's position.

12. CP argues that the Union is attempting to add language and application to the collectively bargained language in Article 18.20 which simply does not exist. It says the Union has not provided evidence to support the Grievor reached the mileage threshold, the Grievor tied up in a new mileage period and the Grievor did not attempt to carry-over unused rest. The Union has explicitly agreed that mileage periods reset at 22:01, consistent with the Company's brief in chief.

13. CP challenges the Union's position that Article 18.20 is silent on the mechanics of when 48 hours rest is to be taken. It argues that the language clearly states employees are eligible "Upon time (sic) up at the home terminal" and "upon reaching each of the following mileage thresholds" "for your mileage period." It argues that by the Union's own submission, the Grievor did not tie up within the mileage period in question, nor did he reach the 3225-mileage threshold within the mileage period. On all possible application of this language, the Union's argument must fail.

14. CP argues that the Union further exaggerates, saying that there is no limitation that your rest must be taken in the mileage period in which the qualifying miles were earned. This is exactly what the language states. For your mileage period, it says that the Union claiming rest had "vested" and using the words "first opportunity" is a clear expansion of the written language.

15. The Company pointed out the Union's claim that the Grievor had made 3325 miles but this is a new amount that they have not made reference to previous to this submission. The finite details of this case appear to be misrepresented. This is further example that even the Union does not know what the Grievor's mileage count was upon tie up. CP argues evidence would help make the case clear but unfortunately evidence is non-existent.

16. In support of its position on the merits of the grievance, the Company referred me to CROA 3793, 4404, & 4694, AH 145, 303 & 685.

ANALYSIS AND DECISION

17. The parties to this dispute provided and exchanged written submissions, books of documents, authorities and reply submissions in accordance with their agreed to expedited arbitration process. I have carefully read the submissions and the authorities provided by the parties.

18. The language in dispute first appeared after binding arbitration. On December 7, 2015, The Honourable George W. Adams Q.C. in an interest arbitration award, addressed 48 Hours rest providing in part:

> Up to 48 consecutive hours voluntary rest may be taken by all unassigned road service employees including spareboards each month.

19. The language was later revised. The current language of Article 18.20 is the foundation for this dispute. It now provides:

> **EXTENDED HOME TERMINAL MILEAGE REST**
> NOTE: Formerly 2018 MOS and 2015 Adams' Award.
>
> Employees working unassigned road service including spareboards shall, unconditionally, be entitled to book up to 48 hours personal rest to ensure two consecutive nights upon reaching each of the following mileage thresholds:
> Upon tie up at the Home Terminal
> - After having accumulated 1075 chargeable miles, for your mileage period.
> - After having accumulated 2150 chargeable miles, for your mileage period.
> - After having accumulated 3225 chargeable miles, for your mileage period.
>
> Employees will be allowed to revise their rest within 60 minutes of tying up.
>
> Implementation of this change shall be effective with mileage date following the first of the month following ratification.
> All other rest provisions of the Collective Agreement continue to apply.
>
> (1) The status quo restriction on booking rest prior to an EDO (24 hours) shall continue. Specifically, EDO's may not be used to extend 48 hours consecutive rest.
> (2) This award of up to 48 consecutive hours rest also applies to:
> a Belleville; and to
> b ESRs unless the applicable ESR agreement excludes it.
>
> However, the award of up to 48 consecutive hours rest does not apply to time pools.

20. The parties agree that the facts of this case are not a common occurrence. I find there are two fundamental issues in this case which do not necessarily conflict. They are:

- The start and end of an employee's mileage period.
- The Reset time to facilitate the application of 2 hour Call Times

21. I take note at this point that the current and previous collective agreement language as well as the parties submissions refers to monthly mileage, mileage date and mileage period. In this case, the grievance centres on the question of: did the Grievor meet the requirements contained in the wording in order to book 48 hours rest?

22. The Company's position in the Joint Statement of Issue sates that it is well established that an employee's mileage period ends at 22:01 the day prior to an employee's mileage date. The Union's attempt to use "calendar date" is nowhere to be found within Article 18.20.

23. I find, there is no reference to Reset of an employee's mileage period beginning the day prior to their mileage date as the Company is proposing.

24. In this case, the Grievor's mileage date is November 21st. The Company argues that it is has long been established that the mileage date Resets at 22:01 the day prior. For the reasons set out below, I find that there has been an accepted practice of allowing the Company to call employee's at 22:01 the day prior to their mileage date in order that they may report for work for assignments at 00:01 on their first day of their mileage period.

25. The Company referred me to the comments of Arbitrator Schmidt in CROA&DR 4404 summarizing the concept of ambiguity and admissibility of extrinsic evidence in supports of its position:

> Extrinsic evidence including past practice and/negotiating history is admissible as an aid to interpretation of collective agreement language if the words of the Agreements reveal either a patent or latent ambiguity. Contract language is said to be latently ambiguous when certain facts relating to its negotiation reveal a lack of clarity. In such circumstances extrinsic evidence can be used to resolve the ambiguity and also to demonstrate the ambiguity in the first place.

26. Unlike CROA 4404 supra, I do not find the language of Article 18.20 to be unclear or ambiguous. The Rest practice in this case is a Crew calling procedure, not a change of the collective agreement or the meaning of the language in Article 18.20. The Reset practice has been implemented in the crew calling procedure with no record of consultation or agreement between the parties. There is no evidence to confirm that the parties had reached a consensus on the intent and application of the Reset calling procedure in this particular set of facts and circumstances.

27. I find that this is a dispute about booking rest and the entitlement of 48 hours of rest. In that regard, the primary objective in collective agreement interpretation is to discover the mutual intention of the parties. The generally agreed guiding principles of interpretation are that the language used must be interpreted in a manner which best preserves the intent of the parties. However, it is the words that the parties have agreed to use to express their intention which are of primary importance. In this case, these parties are sophisticated. As such, they are presumed to say what they mean, mean what they say and omit words intentionally in the construct of their collective agreement.

28. While this is a long-standing relationship, the language is relatively new having its first introduction on December 7, 2015, The Honourable George W. Adams Q.C. in an interest

arbitration award. The parties have modified the language on their own during 2018 negotiations. Most significantly adding:

> Employees working unassigned road service including spareboards shall, **unconditionally, be entitled to book up to 48 hours personal rest** to ensure two consecutive nights upon reaching each of the following mileage thresholds:
> Upon tie up at the Home Terminal

29. The parties also added language providing a new threshold:

> • After having accumulated 3225 chargeable miles, for your mileage period.

30. The Union argued that the Grievor booked his entitled rest at his first opportunity after it vested. The Union's position is one that relies on calendar date. The Union believes that the Grievor was entitled to book up to 48 hours rest upon tie up on November 20th, 2018 at 23:25

31. CP argues that the Union claiming rest had "vested" and using the words "first opportunity" is a clear expansion of the written language. However, CP submitted that the Union ought to have provided a screenshot or some form of an image to support this claim. A requirement not contained in any language or guidelines. Notwithstanding the Company's argument relating to the Union's expansion of grounds, CP submitted a definition of mileage period not contained in any language providing:

> Definition of Mileage Period
>
> Notwithstanding the foregoing and without prejudice to our primary position, the Company provides as follows with respect to the definition of mileage period.
>
> The Company's position is that **22:01 the day prior to an employee's mileage date is the end of an employee's mileage period.**
>
> **Emphasis Added**

32. CP also submitted that the Company records indicated that the Grievor tied up at 23:25 on November 20th, 2018. The Grievor's mileage date was the 21st of each month. It is the Company's position that upon tie up at 23:25 on November 20th, 2018, the employee was in a new mileage period and thus his mileage count was reset to zero.

33. I find no basis for the Company's definition and position that an employee's mileage Resets two hours before the new mileage date.

34. The Company maintains it does not have any record of the Grievor achieving or exceeding 3225 miles. The Company argues it is without any proof of any mileage screen or exact mileage count of the Grievor. CP submitted that if in fact, these miles could be verified by looking in the Grievor's personal mileage period, the Union ought to have provided a screenshot or some form of an image to support this claim.

35. I have difficulty with the Company's position regarding the Definition, the Reset and the Union's onus. I find that the language does not support the Company's argument. I find no evidence in support of the Company's proposed definition or the Reset as CP proposed. I have not been provided to evidence that the Grievor or any employee has been required to copy or make

screen shots of Company crew data information in order to book any form of rest.

36. The tie up screens referred to by the parties are those contained in the Company's electronic Crew Management system. It is an electronic system into which employees submit required trip information to establish such things as miles traveled, time involved and wages. I was presented with no rule, guideline or suggestion that employees take screen shots to establish proof of filing that information. Indeed, the Company identifies the system as an Honour System under which Employees are held accountable for false claims. There is no allegation of a false claim in this case or argument that an audit of the system revealed any misinformation provided by the Grievor. There is also no evidence that the Grievor or any other employee has been asked to provide screen shots to substantiate or as a precondition to being entitled to the rest thresholds of Article 18.20.

37. With the greatest of respect, to the thoughtful submissions of both parties, the intention of the language of 18.20 is clear on a plain reading of the collective agreement.

38. I am satisfied that on the balance of probabilities and the evidence before me that the Grievor reached his 3225 miles threshold qualification for the entitlement to 48 hours rest beginning at 23:25 on November 20. He was therefore entitled to 48 hours rest and continuing until 23:25 on November 22. The Company submitted that its records indicated he was off duty at 23:25 on November 20. I find that his new mileage month or period began the following day at 00:01 November 21, not on a Reset time the day before.

39. The evidence established that the Extended Home Terminal rest language first appeared in the collective agreement in 2015 and was renegotiated in 2018. I find that the Definition proposed by CP is not found in or contemplated in the language. The Reset is not a provision negotiated by the parties but rather a process which has been implemented for some undefined time to address the impact of Extended Home Terminal Rest on crew calling procedures. I find the Reset is actually a two-hour Call Time accommodation period. The impact of the Reset practice clearly does not have a regular negative impact to the extent it did with Mr. Lackey's specific situation. I find the 22:01 Reset is clearly to allow both parties to benefit from a two-hour Call Time on the last day of the employee's mileage month or period.

40. I find that the 22:01 Reset or Call Time accommodation, while not stated in the language, is clearly a crew calling process which allows employees who were off on rest on the last day of their mileage month to accept a 2 hour call on that day in order to work a train ordered for 00:01 on the first day of their mileage month or period. It does not prohibit an employee from booking rest in that period as occurred in this situation. It facilitates a benefit for both parties. To have it any other way would require the employee to take his two-hour call at 00:01 for on duty at 02:00. It would deprive the Company of the employee's availability for service, and the employee of his work entitlement for two hours between 00:01 and 02:00 on that first day. I find the Reset at 22:01 is advantageous to both employee and Company. That said, it should not prohibit the right of affected employees to book rest on the last day of their mileage period or month between 22:01 and 23:59 based on the facts and circumstances of this grievance. I find the Reset is actually a two-hour call time practice not intended to change the ability of an employee to book rest.

41. In these circumstances, the Grievor was entitled to book rest as he did between 22:01 and 23:59 on November 20. 2019. I find that to do otherwise would violate the clear language and intent of the Extended Home Terminal Rest provision. I also find there is no evidence that an employee is required to take screen shots of Company data screens to establish proof of his entitlement to the rest contemplated. Employees are subject to possible discipline for willful

falsification of such claims.

42. In summary, Article 18.20 applies as follows:

> Employees who attain their 3225-mileage threshold on the last day of their mileage period are entitled to book 48 hours rest up to 23:59 on that day.

Determination

43. The grievance is therefore allowed, to the extent as set out above.

44. I declare that Article 18.20 applies in the manner I have determined in this Award.

45. I order that Article 18.20 be applied in a manner consistent with this Award.

46. I shall remain seized for the purposes of rectification, and to deal with any issues concerning the implementation or application of this Award.

DATED at Niagara-on-the-Lake, this 8th, day of April, 2023.

Tom Hodges

Arbitrator