Federal Court Cour fédérale

Date: 20230606

Docket: T-608-18

Citation: 2023 FC 796

Ottawa, Ontario, June 6, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE

Plaintiff

and

CANADIAN PACIFIC RAILWAY COMPANY

Defendant

ORDER AND REASONS

I. Overview

[1] Teamsters Canada Rail Conference [TCRC or the Union] is a trade union as defined in the *Canada Labour Code*, RSC 1985, c L-2, who represents employees in the railway sector. On this contempt of Court Motion, TCRC alleges Canadian Pacific Railway Company [CP] has acted in violation of the award made by the Labour Arbitrator, Graham Clarke, on March 23,

2018 [Clarke Award]. The Clarke Award found that CP violated the ‘rest provisions’ of two collective agreements and ordered CP to cease and desist.

[2] The Clarke Award was filed with the Federal Court on March 28, 2018, making it an Order of this Court.

[3] For the reasons that follow, I find CP is guilty of contempt of Court with respect to certain incidents. In those instances, I am satisfied the evidence establishes beyond a reasonable doubt that CP has failed to comply with the cease and desist provisions of the Clarke Award. CP is guilty of contempt of Court in the following incidents:

- Incident 9, February 21, 2019;
- Incident 12, April 18, 2019;
- Incident 15, January 21, 2019;
- Incident 16, January 23, 2019;
- Incident 18, April 6, 2019;
- Incident 20, June 14, 2018;
- Incident 22, February 15, 2019;
- Incident 23, January 26, 2019;
- Incident 24, March 17, 2019;
- Incident 25, February 19, 2019;
- Incident 26, February 28, 2019; and
- Incidents 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 38, which all occurred on September 1, 2018.

II. Background

[4] The CP railway network runs from Vancouver to Montréal. The evidence is that CP has approximately 250,000 train crew starts each year. Train crews typically consist of an engineer and a conductor, who would both be members of the Union.

[5] The relationship between CP and the TCRC train crews are governed by several collective agreements. The relevant provisions, which are outlined below, address specific circumstances when CP is required to relieve a train crew from duty. The collective agreements outline some exceptions to the requirement to relieve a crew within 10 hours.

[6] In general, when a train crew provides notice within the first 5 hours of their shift (referred to as a 'tour of duty') that it wishes to be off duty within 10 hours, CP must make arrangements to ensure the crew is off duty on time. For the purposes of these Reasons, situations where a train crew who requested rest was not off duty within 10 hours are referred to as "Over 10" incidents.

[7] If the train will reach the "outer main track switch" [OMTS] boundary at the destination terminal within the 10 hours, CP can require the train crew to "yard" their own train even if it means they go over 10 hours on duty. Yarding a train is the process of parking and securing the train, which can require multiple steps depending on the terminal location.

[8] If the train will not reach the OMTS within 10 hours, CP is required to take steps to have the train crew relieved on route. A crew is still considered "on duty" while in a taxi, after they have been relieved from the train itself.

[9] Where the train crew does not provide notice of rest, the crew may work up to a maximum of 12 hours in a tour of duty. This 12-hour cap is set by Transport Canada, not the

collective agreements between the parties. Situations where a crew has gone over 12 hours on duty are referred to as “Over 12” incidents.

[10] Train movement ‘over the road’, or between terminals, is managed by CP through its Crew Management Centre, located in Calgary, Alberta. The Crew Management Centre consists of the Rail Traffic Control Centre [RTCC] and the Crew Planning Department [CPD]. Once a train leaves a terminal, the RTCC is responsible for managing and directing the train, including adjusting the trip plan to account for unplanned delays or issues. RTCC dispatchers are responsible for ensuring all safety protocols and regulations are followed during a tour of duty.

[11] When a RTCC dispatcher determines a train crew will not reach their destination terminal under 10 hours, the dispatcher contacts their director. The RTCC then coordinates with the CPD, who are responsible for ordering relief crews and arranging for crew transportation, such as taxis.

[12] In addition to the Crew Management Centre, each train terminal has a local management team that oversees train movements within the terminal, including managing arriving crews once the train enters the terminal’s outer boundary. The local management team is responsible for determining if and how a train should be yarded and for expediting yarding to get an arriving crew off duty if they have already exceeded their 10 hours on duty. This local management team consists of, in order of seniority: assistant trainmasters, trainmasters, assistant superintendents, and a superintendent. The superintendent has general and overall responsibility for operations within a terminal, whereas the assistant trainmasters and trainmasters have direct contact with and provide directions to arriving crews.

A. *Collective Agreements*

[13] The relevant collective agreements between TCRC and CP are the *Conductors, Trainspersons and Yardpersons Agreement* [CTY Agreement] and the *Locomotive Engineers Agreement* [the LE Agreement].

[14] After the Clarke Award, TCRC and CP consolidated the collective agreements into one document called the Consolidated Collective Agreement. The wording of the 'rest provisions' contained in the Consolidated Collective Agreement that apply to the matters at issue in this contempt of Court proceeding have not changed.

[15] Transport Canada regulates hours of work for train crews and article 18 of the Consolidated Collective Agreement addresses the 'rest provisions'. Article 27 of the LE Agreement and article 29 of the CTY Agreement contain virtually the same wording with respect to the right to book rest. I will therefore only reproduce the provisions the LE Agreement.

[16] Article 27 of the LE Agreement provides:

> 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.
>
> 27.04 Employees desiring rest en route will give their notice within the first 5 hours on duty to the Rail 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.
>
> …

> 27.05 (4) Employees who do not provide notice of rest within the first 5 hours are subject to work up to 12 hours. These employees will have the option of booking rest at the objective terminal.

[17] These 'rest provisions' have been the subject of numerous grievances. In January 2012, Arbitrator Michel Picher found that CP had failed to honour the requirements of the collective agreements, and ordered the parties to meet and attempt to resolve the issues. When the parties were unable to resolve the issues, Arbitrator Picher issued a Supplemental Award on April 14, 2014.

[18] In 2017, CP and TCRC agreed to proceed to an arbitration before Arbitrator Clarke on a number of issues as identified in a joint statement of issues.

B. *The Clarke Award*

[19] On March 23, 2018, Arbitrator Clarke issued a 57-page Award. Relevant to this contempt of Court proceeding is the portion of the Clarke Award relating to the right of employees who give notice to be "in and off work within 10 hours" [10 Rule].

[20] Arbitrator Clarke explained the 10 Rule's application as follows:

> 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.

[21] Arbitrator Clarke rejected CP's position that the failure to have crews in and off duty within 10 hours can be caused by many issues – including "'Under powered train'; 'Excessive train tonnage'; and 'Variance from plan'". Arbitrator Clarke noted these "appear to be foreseeable situations occurring during a railway's normal operations."

[22] Arbitrator Clarke also noted:

> 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.…
>
> 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.

[23] On the issue of yarding a train, Arbitrator Clarke outlined a series of questions to be asked to determine if having employees yard a train after arriving at the terminal – when the employees have arrived at the OMTS under 10 hours, but exceed 10 hours on duty within the terminal – violates the collective agreements. Those questions are as follows:

> 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?

[24] With respect to the requirement that employees who do not give notice of rest are required to be off duty within 12 hours, Arbitrator Clarke noted "[t]his 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." 'Acts of God' and unexpected circumstances wholly outside of CP's control are the only exceptions that apply to the 12-hour limit.

[25] Arbitrator Clarke went on to note at paragraph 219 that CP's own evidence was 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."

[26] Arbitrator Clarke concluded:

> 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.

[27] CP did not seek judicial review of the Clarke Award.

C. *Show Cause Order*

[28] On March 28, 2018, TCRC filed the Clarke Award with the Federal Court. Pursuant to subsection 66(2) of the *Canada Labour Code*, the Clarke Award became an Order of the Court.

[29] On August 9, 2018, TCRC advised CP that if violations of the Clarke Award continued, the Union would pursue remedies, including contempt of Court proceedings.

[30] On June 25, 2019, TCRC filed a show cause motion pursuant to Rule 467 of the *Federal Courts Rules*, SOR/98-106 [*Rules*].

[31] On June 26, 2019, Prothonotary Milczynski (as she was then) issued an *ex parte* show cause order that stated:

> 1. The Respondent, Canadian Pacific Railway Company shall:
>
> i. appear before a Judge of the Federal Court in Calgary, Alberta at 9:30am on August 19, 2019 and
>
> ii. shall be prepared to hear proof of the Applicant's allegations that the Respondent is guilty of contempt of court, as set out in the Notice of Motion attached as Appendix "A" to this Order; and,
>
> iii. shall be prepared to present any defence that the Respondent may have to the allegations.

[32] The August 2019 hearing date referenced in the show cause order was adjourned on consent. The rescheduled hearing date in February 2021 was adjourned due to the COVID-19 pandemic.

[33] The hearing of this contempt Motion proceeded in-person on the following dates: November 8, 9, 10, and 12, 2021, April 25 and 26, 2022, June 21, 22, and 23, 2022, August 23 and 24, 2022, and January 16 and 17, 2023.

III. The Evidence

[34] In assessing the evidence, I make the following general observations. While the parties agreed to proceed with 38 identified violations of the Clarke Award, there were significant objections, on both sides, to the documents received into evidence. Both sides accused the other of failing to disclose potentially relevant documents.

[35] Witnesses on both sides gave evidence in a representative capacity and were largely lacking "first-hand involvement" in any of the 38 incidents. Any issues with the reliability of the oral evidence applies equally to both sides. Therefore, where there is a discrepancy between the oral testimony and the documentary evidence, I prefer the documentary evidence.

A. *Agreed Statement of Facts*

[36] Although TCRC submits there are violations numbering in the thousands, for the purpose of the contempt hearing, the parties agreed to proceed with 38 identified violations of the Clarke

Award between June 2018 and April 2019 and the only evidence considered relates to these incidents.

[37] The parties entered an Agreed Statement of Facts in relation to the 38 incidents. The details surrounding these 38 incidents, including the date and location of the incident, are outlined in the document that was marked as Exhibit 2.

B. *Witnesses – TCRC*

[38] Mr. Dave Fulton is a senior officer of TCRC and the Western General Chairman for the Conductors, Trainspersons and Yardpersons bargaining unit at CP. He has many years of experience in the railway sector. As the senior officer with the Union, he signs the collective agreements on behalf of the Union members.

[39] Mr. Fulton's Affidavit, sworn June 5, 2019, in support of the show cause motion, was accepted into evidence as Exhibit 3. The exhibits attached to the Affidavit were excluded and were not entered as evidence.

[40] Mr. Fulton explained what happened following the Clarke Award and the steps taken by CP. Those steps included daily and then bi-weekly "Over Hours" reports and bi-weekly calls between the Union representatives and CP management to discuss the Over Hours incidents. "Over Hours" is a term used by the parties to refer to any time a train crew goes over their set working hours on duty, whether 10 or 12 hours depending if rest was requested, and is not restricted to the 38 identified incidents at issue in this contempt Motion.

[41] Mr. Fulton was taken through the documentary evidence on the Over Hours reports. These reports were prepared from information entered into CP's Crew Management Application, which is a program used to track a train crew's tour of duty.

[42] While many of the 38 incidents relate to yarding, Mr. Fulton confirmed there is no definition of "yarding" in the Consolidated Collective Agreement.

[43] Mr. Fulton provided helpful evidence, albeit largely in a representative capacity, which is not uncommon in the collective bargaining process. I note that much of the information and many of the documents relied upon by TCRC were not prepared by Mr. Fulton and he did not have any personal involvement with any of the incidents. I do not say this to discredit his evidence, but to recognize that he lacks first-hand knowledge of many of the incidents relied upon to support the allegations of contempt of Court.

[44] TCRC also called evidence from Mr. Greg Edwards, who is the General Chairman for Locomotive Engineers West in Vancouver. He started working with CP as a brakeman in 1981 and worked in various locations in British Columbia. Mr. Edwards moved to a union position in 1992 and he assumed his current role in 2014.

[45] Mr. Edwards' Affidavit, sworn June 12, 2019, in support of the show cause motion, was entered into evidence as Exhibit 41. The exhibits attached to the Affidavit were excluded and were not entered as evidence.

[46] Mr. Edwards' evidence provided some contextual background on the Over Hours issues and the collective bargaining that had taken place, including the consolidation of the various collective agreements, and adjustments to the language of the Consolidated Collective Agreement with respect to crew transit times.

[47] Mr. Edwards also testified about phone calls he had with representatives from CP regarding Over Hours issues. Mr. Edwards discussed the issue of taxi shortages in some cities, which frequently resulted in crews being over 10 hours on duty. He explained that taxis are provided by Halcon, which is a company that CP has contracted to provide this service across Canada.

[48] Mr. Edwards also testified about issues with: (1) congestion due to multiple rail companies sharing the same tracks and (2) poor planning. For example, Mr. Edwards identified an incident in which a crew could not complete the work required in under 10 hours due to the distance the train had to travel between terminals, despite other options being available to CP. Mr. Edwards also noted there tended to be seasonal improvements in compliance with the Clarke Award during the summer months. However, Mr. Edwards also stated that winter weather conditions can be planned for and should not be an excuse for failing to comply with the Clarke Award.

[49] Mr. Edwards identified two documents showing Alberta and Saskatchewan transit times (Exhibits 42 and 43, respectively), which were prepared by local union representatives and managers at specific terminals. These transit times indicate at what point a crew would need to

be relieved to be in and off duty within 10 hours, taking into account taxi time and the time needed to tie-up the train.

[50] Mr. Edwards identified incidents in the Over Hours reports provided by CP, in which CP took responsibility for the Over 10 incidents. However, on cross-examination, Mr. Edwards confirmed he had no direct knowledge of the incidents contained in the Over Hours reports.

C. *Witnesses – CP*

[51] Mr. David Guerin is currently the Managing Director of Labour Relations at CP. He has been with CP for 42 years in various roles. Following receipt of the Clarke Award, on March 28, 2018, Mr. Guerin prepared an executive summary of the Award (Exhibit 53) which was distributed within CP. He explained that meetings were held with CP managers to discuss the Clarke Award and to answer any questions arising from this executive summary.

[52] Mr. John Bell is the General Manager, Operations, Pacific Region for CP. He identified Exhibit 53 and testified that there was a strong message from CP management on the need to comply with the Clarke Award. He explained that the executive summary was provided to all managers and he held meetings to explain the importance of compliance with the Clarke Award.

[53] Mr. Bell explained some of the challenges with different rail yards and getting crews in under10 hours. He also spoke about the steps that CP had taken to comply with the Clarke Award – but noted that humans make mistakes. Mr. Bell also spoke about daily network calls, which occur for each CP region. These calls include everyone involved in train operations, from

the assistant trainmasters up to the vice president for the region and are an opportunity to discuss issues or problems in the region. These daily network calls were an attempt to comply with the Clarke Award, as were the meetings and bi-weekly calls with Union representatives.

[54] Mr. Bell was taken through the various incidents and asked if he agreed, based upon his understanding of the circumstances, with the reasons listed for the Over Hours incidents.

[55] Mr. Bell has extensive knowledge of the rail business and the various factors that can cause delays. He was honest and forthright in his evidence and openly disagreed with some of the steps taken by CP. However, his evidence on the core issues of this contempt Motion was limited, as he did not have direct first-hand knowledge of the 38 incidents. In any event, he acknowledged that CP knows the factors that cause the delays, even if those factors are not entirely controllable.

[56] Mr. Gurprit Parmar is the Assistant General Manager of the Crew Management Centre and Workforce Planning at CP. The Crew Management Centre is where crew plans are made. Mr. Parmar explained the two main aspects of the Centre – the CPD and the RTCC. He has significant working knowledge of the Centre and the challenges of crew management.

[57] Mr. Parmar testified that he became aware of the Clarke Award a few hours after it was issued. He also testified that he received a copy of the executive summary, but that he was not involved in the preparation of the document. He reviewed the summary and understood that he was responsible for providing this information to his department.

[58] It is clear from Mr. Parmar's evidence that CP took significant and meaningful steps to comply with the Clarke Award. He described the evolution of the daily and then bi-weekly reports generated by CP to track performance. These reports were started in December 2018 and are still ongoing. Mr. Parmar testified that the information in these reports has evolved and improved. He also testified about the bi-weekly calls with the Union, which he chairs, to discuss Over Hours issues.

IV. Issues

[59] On this contempt Motion, the following are the issues for determination:

A. What is the applicable test for contempt of Court?

B. Did CP intentionally carry out the acts the Clarke Award prohibits?

C. Is there evidence, beyond a reasonable doubt, that CP is in contempt of the Clarke Award?

V. Analysis

A. *What is the Applicable Test for Contempt of Court?*

[60] The Supreme Court of Canada confirmed in *Carey v Laiken*, 2015 SCC 17 [*Carey*] that to establish civil contempt, the party alleging the contempt bears the burden of establishing three elements beyond a reasonable doubt: (1) the order or judgment that is alleged to have been breached must state clearly and unequivocally what should be done or not done; (2) the alleged

contemnor must have had actual knowledge of the order or judgment; and (3) the alleged contemnor must have intentionally done or omitted to do the act compelled by the order or judgment (*Carey* at paras 32-35; *Rules*, Rule 469).

[61] *Carey* also notes that "[t]he contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders" (at para 36).

[62] CP concedes the first two elements of the test are satisfied here. In other words, there is no dispute that CP had knowledge of and understood the Clarke Award. In fact, the evidence of Mr. Guerin is that he spent a significant amount of time studying the Clarke Award and preparing a summary for CP of the key findings that required compliance. The internal communications he prepared for CP were clear and to the point. CP knew the terms of the Clarke Award and understood its obligation to comply. In fact, the evidence establishes that CP took active steps to track their compliance by producing the Over Hours reports.

[63] Based upon the evidence, I am satisfied beyond a reasonable doubt that the terms of the Clarke Award were clear and that CP had the requisite knowledge of the Clarke Award.

B. *Did CP Intentionally Carry Out the Acts the Clarke Award Prohibits?*

[64] Although the parties agree that the *Carey* three-part test is applicable to this contempt of Court proceeding, they disagree on the third part of the test–namely what the "intentional" part of the test requires.

(1) Reasonable Steps

[65] CP argues that when assessing the concept of intention against a corporate defendant, the Court must consider the reasonable efforts the corporation took to comply with the Clarke Award. CP argues that 100% compliance with the Clarke Award is not possible because of the factual realities of train operations and circumstances beyond its control. It argues that the railway business presents a "highly complex operating environment" and the scale of CP's operations must be factored into the analysis. It points to mechanical failures, foreign tracks, congestion, and human error as matters beyond its control.

[66] CP relies on *Envacon Inc v 829693 Alberta Ltd*, 2018 ABCA 313 at paragraph 19 [*Envacon Inc*] for the proposition:

> When "someone is ordered by the court to do something, he or she must use a sufficient degree of diligence to perform, or to have the act performed:" *Michel v Lafrentz*, 1998 ABCA 231 at para 21, 219 AR 192. In *Free (Estate) v Jones*, 2004 ABQB 486, 364 AR 384 the court described due diligence as requiring a respondent "to do everything within its power to comply with a court order" at para 28.

[67] CP submits that the Clarke Award in this case is akin to a mandatory order. It argues that in assessing compliance with a mandatory order, the relevant question is whether CP took all reasonable steps to achieve compliance with the Clarke Award. CP cites *Doucette v Morin*, 2015 SKQB 259 [*Doucette*], where the Saskatchewan Court held:

> [37] Where the contempt alleged is failure to comply with a court order, it is not enough to prove that the respondents were aware of an order and failed to comply. The law is clear that where the complainant is unable to prove the requisite intent beyond a reasonable doubt, the offence is not made out. Where the contempt

> in question relates to the more common prohibitory order, proof of knowledge and breach of the order may well be sufficient to permit the Court to draw the inference or conclusion that the breach was deliberate or reckless. That same inference is not so easily drawn when the contempt alleged is of a mandatory order. Where an individual or organization is ordered to perform a specific duty or act, a myriad of circumstances might prevent a person or organization from doing what they have been ordered to do. I have concluded above that evidence of frustration of efforts to comply or impossibility of compliance is properly to be considered when deciding whether the alleged contemnor(s) intentionally or deliberately failed to do as ordered.
>
> [38] There is no burden of proof on the respondents. The evidentiary burden lies on the applicant throughout to prove the elements of contempt beyond a reasonable doubt. It necessarily follows that I must consider all relevant circumstances in deciding whether the respondents acted deliberately or recklessly in not complying with my order. To adopt the applicant's view that the only reasonable inference to draw from the fact that the respondents, as the majority faction within the PMC, with full knowledge of what the April 6 order required them to do, failed to schedule a PMC before June 19, 2015, would be to treat failure to comply as a strict liability offence. The law is clear it is not. I must be satisfied beyond a reasonable doubt that the specific intent of deliberate or reckless failure to comply was present.

[68] CP alleges the question of reasonable steps is particularly relevant where the court order requires the alleged contemnor to control the actions of another person. CP cites *Morrow, Power v Newfoundland Telephone Co*, (1994), 121 Nfld & PEIR 334 (Nfld CA) [*Morrow*], *N-Krypt International Corp v Zillacomm Canada Inc et al*, 2016 ONSC 3317 [*N-Krypt*], *Godard v Godard*, 2015 ONCA 568 [*Godard*], and *Godin v Godin*, 2012 NSCA 54 [*Godin*] as examples where reasonable steps to control another person's behaviour were accepted as justification for non-compliance with a court order.

[69] Based upon the above-noted cases, CP argues the Court must consider the "reasonable steps" (*Envacon Inc)* taken by CP and it argues that it acted with a sufficient degree of "due diligence" *(Morrow)* in complying with the Clarke Award. CP further argues that it did not act in a "deliberate or reckless manner" (*Doucette*).

[70] I accept that it is not enough for TCRC to simply establish Over Hours incidents occurred to prove beyond a reasonable doubt that CP is in contempt of the Clarke Award. Contempt of Court is not a strict liability offence (*Canadian Private Copying Collective v Fuzion Technology Corp*, 2009 FC 800 at para 57).

[71] However, I do not agree with the nuances of the *Carey* test advanced by CP. Nor do I read the cases relied upon by CP as somehow creating a distinctive category giving separate considerations for a corporate defendant in contempt of court proceedings. The cases relied upon by CP in support of this argument are distinguishable.

[72] *Envacon Inc* was decided under rule 10.52(3) of the *Alberta Rules of Court,* Alta Reg 124/2010, which states the court may find a person in contempt where they have failed to comply with an order "without reasonable excuse". The Alberta Court of Appeal's discussion about whether *Carey* changed the law regarding 'reasonable excuse' is in the context of rule 10.52(3), which had previously been interpreted as an additional element of the test for contempt in Alberta. The applicable Federal Court *Rules* do not have this language.

[73] *Doucette* can also be distinguished. In that case, both the Applicant and the Respondents were members of the Provincial Métis Council. The Provincial Métis Council was ordered to schedule a meeting of the Métis Nation Legislative Assembly on or before June 19, 2015. The Saskatchewan Court found Mr. Doucette, in his role as President of the Métis Nation of Saskatchewan, had frustrated the efforts of the Respondents to schedule the required meeting.

[74] Further, *Godard* and *Godin* deal with custody and visitation orders in the family law context. In *Godin*, the child refused to attend the court ordered visitation and in *Godard*, the children refused to live with the custodial parent. The question before the court in both cases was whether the alleged contemnor parent had taken reasonable steps to make their children comply with the court order.

[75] In *Morrow*, the order in question prohibited the distribution of certain phonebooks issued by the Newfoundland Telephone Company. A number of these phonebooks were delivered to residential houses by a courier after the order was issued. The phonebooks had been delivered to a courier prior to the court issuing the cease and desist order. As the phonebooks were already out of Newfoundland Telephone Company's control when the order was issued, the company was not held in contempt of the order.

[76] Lastly, in *N-Krypt*, the alleged contemnor relied on the court's discretion to decline to make a finding of contempt where good faith efforts had been made. The contemnor did not dispute that it had not complied with the order, but argued it could not control the third party

auditor's schedule. *N-Krypt* applied *Carey* and found that, in the circumstances, the alleged contemnor had acted in good faith.

[77] These cases all involved true third parties, who were not bound by the order in question. These relationships, being parent-child in *Godard* and *Godin*, or with a contractor as in *Morrow*, are fundamentally different from an employer-employee relationship where the employer is a party to the order.

(2) Directing Mind

[78] This leads to CP's second argument on the intention portion of the contempt test. In its closing submissions, CP urges the Court to consider a "directing mind" exception to the test for contempt in the corporate context. In other words, where there is evidence of an Over Hours incident, CP argues a finding of contempt cannot follow if the "directing minds" of CP did not intend for there to be a breach of the Clarke Award.

[79] CP's position is that the top levels of management did everything in their power to ensure compliance with the Clarke Award, but in some instances, frontline staff made errors. CP argues that these errors should not be relied upon to make a finding of contempt of Court.

[80] The problem with the position advanced by CP is that there is no such "exemption" in the relevant case law. In *Tele-Director (Publications) Inc v Canadian Business Online Inc*, (1998) 151 FTR 271 (FCTD) [*Tele-Director*], Justice Teitelbaum stated:

> 81. A court injunction will often enjoin not only the parties named in the action but also their employees, servants, brokers, agents, mandataries and assigns and all those over whom they exercise control. It follows that the defendant against whom such an injunction is pronounced is enjoined from committing the prohibited acts whatever be the method he may use in committing them. The defendant will be in breach of the injunction pronounced against him not only if he himself contravenes the order of the court but also if the order is breached by his agent, workman, servant or another person acting for him.
>
> - *Valmet Oy v. Beloit Canada Ltd.* (1988) 20 C.P.R. (3d) 1 at 11 (F.C.A.)

Tele-Director was quoted with approval in *1395047 Ontario Inc v 1548951 Ontario Ltd*, 2006 FC 855 at paragraph 7. See also *Baster Travenol Laboratories v Cutter (Canada) Ltd*, [1986] 1 FC 497 (FCTD) at p 509:

> …In matters of civil contempt the liability of a corporate body is dependent on the vicarious liability principle. A corporation is liable for its servants when they, in the course of duty, contravene an order of the court. It has been held that it is no defence for a company to show that its officers were unaware of the terms of a court order, or that they failed to realize that they were in breach of the order. [Footnotes omitted.]

(3) Conclusion: Applicable Test

[81] In my view, *Carey* provides the Court with sufficient direction on the assessment of the "intentional" part of the contempt test. As noted in *Carey*, "where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt" and a judge may "decline to impose a contempt finding where it would work an injustice in the circumstances of the case" (at para 37).

[82] Ultimately, the analysis comes down to a consideration of the evidence. I say this noting the evidentiary burden is high and the burden is on the party alleging contempt of Court. The alleged contemnor gets the benefit of any doubt that arises from the evidence. In addition, the Court always retains discretion to decline to make a finding of contempt.

C. *Is There Evidence, Beyond a Reasonable Doubt, that CP is in Contempt of the Clarke Award?*

[83] Based upon the foregoing and having considered the evidence by reference to the incidents in Exhibit 2, my findings for each of the 38 incidents are as follows:

Incident Number	**Date**	**Terminal Location**	**Contempt Finding**
1	February 24, 2019	Sutherland, SK	No
2	October 8, 2018	Sutherland, SK	No
3	February 20, 2019	Regina, SK	No
4	October 3, 2018	Sutherland, SK	No
5	October 8, 2018	Wilkie, SK	No
6	December 10, 2018	Sutherland, SK	No
7	January 20, 2019	Sutherland, SK	No
8	February 1, 2019	Regina, SK	No
9	February 21, 2019	Regina, SK	Yes
10	January 1, 2019	Port Coquitlam, BC	No
11	March 12, 2019	Vancouver, BC	No
12	April 18, 2019	Vancouver, BC	Yes
13	January 16, 2019	Roberts Bank, BC	No
14	January 17, 2019	Port Coquitlam, BC	No
15	January 21, 2019	Port Coquitlam, BC	Yes
16	January 23, 2019	Port Coquitlam, BC	Yes
17	April 7, 2019	Roberts Bank, BC	No
18	April 6, 2019	North Bend, BC	Yes
19	March 21, 2019	Roberts Bank, BC	No
20	June 14, 2018	Lethbridge, AB	Yes
21	July 30, 2018	Lethbridge, AB	No
22	February 15, 2019	Calgary, AB	Yes
23	January 26, 2019	Calgary, AB	Yes
24	March 17, 2019	Calgary, AB	Yes
25	February 19, 2019	Swift Current, SK	Yes

26	February 28, 2019	Unknown	Yes
27	September 1, 2018	Calgary Alyth Yard, AB	Yes
28	September 1, 2018	Calgary Alyth Yard, AB	Yes
29	September 1, 2018	Calgary Alyth Yard, AB	Yes
30	September 1, 2018	Calgary Alyth Yard, AB	Yes
31	September 1, 2018	Calgary Alyth Yard, AB	Yes
32	September 1, 2018	Calgary Alyth Yard, AB	Yes
33	September 1, 2018	Calgary Alyth Yard, AB	Yes
34	September 1, 2018	Calgary Alyth Yard, AB	Yes
35	September 1, 2018	Calgary Alyth Yard, AB	Yes
36	September 1, 2018	Calgary Alyth Yard, AB	Yes
37	September 1, 2018	Calgary Alyth Yard, AB	No
38	September 1, 2018	Calgary Alyth Yard, AB	Yes

There are 22 out of 38 incidents that are in contempt of Court.

(1) Not Contempt of Court

[84] In the incidents outlined below, I have concluded that TCRC has not provided evidence beyond a reasonable doubt to support a finding of contempt of Court.

[85] For incidents 5, 6, 7, 10, and 21 there is a lack of evidence to make a conclusive finding.

[86] With respect to situations where there were external factors which caused the violation of the Clarke Award, I do not find contempt of Court. In particular, in incident 3 (taxi trip took longer than anticipated) and incident 37 (the taxi got a flat tire), the taxi issue was a significant contributing factor to the violation. While I acknowledge TCRC's position that CP can control the parties it contracts with, that is not a sufficient relationship so as to give CP control over the third party's actions.

[87] Further, in incidents 13 and 14, CP's lack of control over foreign territory cannot support a finding of contempt of Court.

[88] Additionally, unexpected mechanical failures, such as incident 8 (a broken down train blocked the only entrance to the yard), incident 17 (the coal dumpster broke), and incident 19 (two major unplanned mechanical failures) do not support a finding of contempt of Court.

[89] There is disagreement between the parties on the issue of "yarding". Further, I note the Clarke Award poses a series of questions that must be answered to assess whether a "yarding" breach occurred. There was insufficient evidence as to whether the yarding directive outlined in the Clarke Award was followed and, therefore, whether a breach of the Award occurred. In the circumstances, the evidence does not satisfy me, beyond a reasonable doubt, that yarding incidents 1, 2, 4, and 11 can support a finding of contempt of Court.

(2) Contempt of Court

[90] I find the following incidents were within CP's control and therefore amount to contempt of Court: 9, 12, 15, 16, 18, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 38.

[91] Incidents 27 through 38, inclusive, took place in or around the Calgary Alyth yard on the night of August 31 to September 1, 2018. With the exception of incident 37, as addressed above, I am satisfied CP violated the Clarke Award and contempt of Court has been established beyond a reasonable doubt for the September 1, 2018 incidents (incidents 27-36 and 38).

[92] The September 1 incidents arose due to a series of bad decisions by inexperienced managers that resulted in the Calgary yard becoming overwhelmed. The scheduled assistant trainmaster, who is the person responsible for train movements in and out of the trainyard, called in sick prior to the start of their shift. The assistant superintendent assigned an individual who had never previously worked as an assistant trainmaster to cover that position for the evening. This individual had some training, but no experience with respect to the duties of assistant trainmaster. Mr. Guerin confirmed the assistant superintendent allowed someone who was not properly trained to be the manager for the trainyard that evening.

[93] Over the course of the evening, the Calgary yard got severely congested, with numerous trains arriving at the yard at the same time. As trains started to fall behind schedule, lines were blocked, more trains arrived at the yard, and plans to get crews in and off duty failed. The Assistant Vice President of CP, Operations West Region concluded "poor planning was the cause." Mr. Guerin also testified that the "escalation triggers" CP had in place to avoid circumstances that might impact operations and customer service requirements were not followed. Similarly, the superintendent of the Calgary yard noted, in reviewing the Over Hours events, "We should have never had that many testers or trains converging on Alyth and it should have been escalated real time and was not."

[94] The person assigned to work as the assistant trainmaster in the Calgary yard on the night of September 1 was not a frontline employee, but was a manager in the operations management training program. Further, the assistant superintendent, who made the decision of placing an untrained employee in the position of assistant trainmaster that evening, was also not a frontline

employee. The assistant superintendent was the manager on duty on the night of September 1, 2018, and was responsible for supervising the assistant trainmaster that evening.

[95] While this September 1 event may well have been a "perfect storm," it was not outside CP's control. The documentary and witness evidence confirms that the protocols and processes to prevent such predictable and routine issues were not followed by at least two levels of management. Further, placing an untrained individual in a position of assistant trainmaster – essential to maintain compliance with the Clarke Award – was a decision made by the Calgary yard manager that evening, who is not a frontline worker.

[96] I would also note that incidents 27 and 28 were both Over 10 and Over 12 incidents. In both of these incidents, the crews were significantly over 12 hours on duty. In incident 27, the crew was on duty for 12 hours and 50 minutes, and in incident 28, the crew was on duty for 13 hours and 10 minutes. Additionally, incidents 29 and 34 list the crew on duty for exactly 12 hours, and incident 38 lists the crew on duty for 11 hours and 45 minutes.

[97] I note that CP itself "accepts responsibility" for a number of instances including incidents 9, 12, 15, 16, 18, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 34, and 36, but argues the instances are "unintended technical contraventions" of the Clarke Award. Incidents 27-30, 32, 34, and 36 were addressed above and the remainder are addressed below.

[98] For incidents 9, 12, 18, 22, 23, 24, and 25, CP expressly accepted responsibility for the contraventions and acknowledged that these tours of duty were not properly managed. The details of these incidents are as follows:

- Incident 9 – the train crew was held outside the Regina terminal's outer limit for 5 hours due to congestion in the yard. No arrangements were made by CP to relieve this crew.

- Incident 12 – this was an Over 10 and Over 12 incident. The train crew reached the OMTS 9 hours and 26 minutes into their tour of duty. The train was sent to the grain terminal in Vancouver, and then back to Port Coquitlam with the locomotive. This is approximately a 2-hour journey, roundtrip.

- Incident 18 – this was an Over 10 and Over 12 incident. The train was delayed for nearly 7 hours before departing from the Port Coquitlam yard due to serious congestion. Mr. Bell described the tour of duty as "a failure from the beginning."

- Incident 22 – the train was held within the OMTS limits of the Calgary yard for approximately 6 hours before the crew was off duty. The delay was caused by congestion in the Calgary yard.

- Incident 23 – the train was held within the OMTS limits of the Calgary yard for approximately 4 hours and 46 minutes before the train was yarded and the crew was off duty. The delay was caused by congestion in the Calgary yard.

- Incident 24 – this was an Over 10 and Over 12 incident. This crew was used to assist in making room for other trains to prevent other crews from going Over Hours.

- Incident 25 – the train was delayed due to congestion at the Moose Jaw terminal and the weather conditions created issues for switching tracks. The crew departed Moose Jaw with less than 3 hours left in their 10-hour tour of duty. The crew was relieved en route at Boharm and then travelled to Swift Current by taxi. CP acknowledged that it would have been considerably faster to send the crew back to Moose Jaw, rather than to Swift Current, based on the agreed taxi transit times (per Exhibit 43). The taxi trip to Moose Jaw would have taken about 35 minutes, while the drive to Swift Current was about 2 hours and 15 minutes.

[99] For incidents 15 and 16, CP admitted an error of judgment occurred, as the RTCC thought the crew would arrive at the OMTS in under 10 hours, but the crew arrived just over the 10-hour mark. For incident 15, the crew arrived at the OMTS at 10 hours and 5 minutes on duty, but was required to yard their train. For incident 16, the crew arrived at the OMTS at 10 hours and 8 minutes, and was required to yard their train.

[100] Further, for incidents 20 and 26, CP acknowledged that relief should have been called or alternative transport arrangements should have been made. In incident 20, one bus was ordered to pick up two crews at Coutts, as both crews were returning to Lethbridge. The second crew was delayed and the crew bus waited almost 2 hours for them, rather than taking the first crew back to Lethbridge. CP had ordered a taxi to transport the second crew back to Lethbridge. The

bus operator was not advised about the taxi and waited for the second crew before departing for Lethbridge. The first crew went over 10 hours on duty on the drive back to Lethbridge. In incident 26, CP acknowledged relief should have been ordered, but was not. On incident 26, the crew was on duty for 11 hours and 50 minutes.

[101] I accept that compliance with the Clarke Award is a complex undertaking. Adjudicator Clarke recognized that 100% compliance with the 'rest provisions' of the collective agreements was not always possible. At paragraph 103, Arbitrator Clarke concluded, "[t]he 10 Rule, while constituting the overriding principle to which the parties have agreed, is not absolute" and then outlined the exemptions provided for in the collective agreements. On uncontrollable circumstances, Adjudicator Clarke found:

> 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.

[102] The backdrop to this dispute is the collective agreements between CP and TCRC, the terms of which are negotiated between the parties, arising out of the collective bargaining process. In agreeing to the 10 Rule, CP assumed the contractual obligation to comply with the terms of the Consolidated Collective Agreement or face the consequences of non-compliance. It is not a persuasive defence to the allegation of contempt of Court that CP, by its own conduct, essentially concedes it has not strictly complied with the Clarke Award.

[103] The issue before the Court is not whether it is impossible for CP to comply with the Clarke Award – that is an argument that could and should have been made in another forum, such as the collective bargaining process. To the extent that CP argues the Clarke Award is impossible to comply with, I agree with TCRC that this amounts to a collateral attack on the Clarke Award and this Motion is not the proper forum.

[104] Further, the evidence shows compliance with the Clarke Award is possible. Exhibit 38 is a letter from Mr. Guerin to Mr. Edwards and Mr. Fulton, dated August 20, 2018. The letter states that "CP has achieved an average compliance rate [with the Clarke Award] of 99.4% since April 9, 2018." The attached chart to his letter shows that CP was very successful in complying with the 10 Rule in the weeks immediately following the issuance of the Clarke Award, including a week in May 2018 where compliance was at 99.7%.

[105] Exhibit 82, which shows a year over year monthly comparison of train starts where Over Hours incidents occurred between January 2017 and July 2019, similarly demonstrates compliance with the Clarke Award was highest in May and June 2018, with over 99% compliance. However, Exhibit 82 also shows that after June 2018, the compliance rate began to drop again, reaching a low of 94.91% in February 2019.

[106] The evidence demonstrates that CP can achieve 99% compliance with the Clark Award. While I acknowledge the complex operating environment, the obligation on CP was not just to communicate the Clarke Award, but to also continually manage ongoing compliance.

VI. Conclusion

[107] For the above reasons, I am satisfied that TCRC has demonstrated with evidence beyond a reasonable doubt that CP is guilty of contempt of Court for failing to comply with the Clarke Award of March 23, 2018 in relation to incidents 9, 12, 15, 16, 18, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 38.

[108] The Court will proceed to a hearing on an appropriate penalty for the established instances of contempt of Court, as well as the appropriate disposition of costs resulting from this proceeding.

ORDER IN T-608-18

THIS COURT ORDERS that:

1. Canadian Pacific Railway Company is guilty of contempt of Court in incidents 9, 12, 15, 16, 18, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 38, having been found beyond a reasonable doubt to have failed to cease and desist in violating the 'rest provisions' of two collective agreements, having actual knowledge and understanding of the Award of Arbitrator Clarke dated March 23, 2018, filed and registered in the Federal Court pursuant to section 66 of the *Canada Labour Code*, RSC 1985, c L-2;

2. The parties shall contact the Federal Court Judicial Administrator to schedule a date for a hearing on penalty. In doing so, the parties shall propose a timeline for the service and filing of any written submissions; and

3. Costs shall be addressed at the hearing on penalty.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-608-18
STYLE OF CAUSE:	TEAMSTERS CANADA RAIL CONFERENCE v CANADIAN PACIFIC RAILWAY COMPANY
PLACE OF HEARING:	CALGARY, ALBERTA TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 8, 9, 10, AND 12, 2021 APRIL 25 AND 26, 2022 JUNE 21, 22, AND 23, 2022 AUGUST 23, AND 24, 2022 JANUARY 16 AND 17, 2023
ORDER AND REASONS:	MCDONALD J.
DATED:	JUNE 6, 2023

APPEARANCES:

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Timothy Law Christopher J. Rae Ian Campbell	FOR THE DEFENDANT

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