CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1620

Heard at Montreal, Wednesday, February 11, 1987
Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS

DISPUTE:

Time claim on behalf of Foreman Mechanic E. G. Delong of Brampton claiming the difference in rates of pay between a Foreman Mechanic and a Mechanic "A" when he worked an overtime shift, as a Mechanic "A" on April 20, 1985.

JOINT STATEMENT OF ISSUE:

On April 20, 1985 Mr. Delong was called to work an overtime shift on a rest day of his regular assignment. At the time he was called, Mr. Delong was advised that the overtime assignment to be work was that of a Mechanic "A". Mr. Delong accepted the call and was compensated at the Mechanic "A" rate of pay.

The Brotherhood's contention is that Mr. Delong should have been compensated at the rate of pay of his regular Foreman Mechanic's position under the provisions of paragraph 5.8, Article 5, Agreement 5.1.

The Company denied the Brotherhood's contention and declined payment of the time claim.

FOR THE BROTHERHOOD:

(SGD.) TOM McGRATH
National Vice-President

FOR THE COMPANY:

(SGD.) JUNE PATRICIA GREEN
FOR: Assistant
Vice-President
Labour Relations

There appeared on behalf of the Company:
M.M. Boyle - System Labour Relations Officer, CNR, Montreal
W.W. Wilson - Manager Labour Relations, CNR, Montreal
S.F. McConville - System Labour Relations Officer, CNR, Montreal
R.J. Boyko - Carload Supervisor, MacMillan Yard, CNR, Toronto

And on behalf of the Brotherhood:
B. Gee - Representative, CBRT&GW, Toronto

AWARD OF THE ARBITRATOR

The issue at hand is the interpretation of Article 5.8 of the

Collective Agreement, which provides as follows:

> 5.8 Employees required to work on their assigned rest days shall be paid at one and one-half times their hourly rate with a minimum of three hours for which three hours service may be required, except:
>
> (a) as otherwise provided under Article 6;
>
> (b) where such work is performed by an employee moving from one assignment to another in the application of seniority or as locally arranged.

The Union submits that the words "their hourly rate" appearing in the foregoing Article refer to the rate of the position regularly occupied by the employee, and not to the rate of the job to which he or she is assigned on an overtime basis, as maintained by the Company.

The positions advanced by the parties reflect two competing views of the purpose of overtime rates. One theory is that having worked a full work week at regular rates, an employee ought not to be required to work on his or her day off without some substantial monetary compensation. It is common ground that if the interpretation of the Company prevails, an employee could earn overtime rates in a lower rated position which would amount to little more than that individual's straight time rates in his or her regular job. In that circumstance, from the standpoint of the individual there would be little or no overtime premium for the loss of a day's rest.

The alternative theory, underlying the position of the Company, is that employees are paid at the rate which attaches to the work which they perform. If, as in this case, a Foreman Mechanic is assigned the work of a Mechanic "A", it is the rate of that lower classification which is payable, at least as far as overtime work is concerned. It is common ground that that would not happen, however, when a higher rated employee is assigned to the work of a lower rated classification during regular, non-overtime hours. In that situation Article 21.1 of the Collective Agreement specifically provides that "an employee temporarily assigned to a lower-rated position shall not have his rate reduced.".

The Collective Agreement contemplates the negotiation of local overtime provisions. It appears, however, that in a number of locations, including Brampton where this grievance originates, no specific agreement has been articulated. In other locations arrangements sometimes provide for overtime to be worked at one and a half times the employee's regular rate of pay, even if the work is in a lower rated classification. In other locations, arrangements consistent with the position of the Company in this case, where overtime rates are paid on the basis of the job performed, have been agreed to. While the Company suggests that a practice of applying the latter interpretation has operated in Brampton for some ten years, the consistency of the practice is questioned by the Union. Absent clear evidence as to the nature and frequency of the occasions when higher rated employees have been paid overtime rates within a

lower classification, it is difficult for the Arbitrator to attach significant weight to the argument based on past practice.

The grievance must be resolved on the language and purpose of Article 5.8. There can be little doubt that underlying the provision is an acceptance of the notion that an employee who is forced to sacrifice a rest day should be compensated at premium rates. That purpose would obviously be defeated if the employee were obligated to work on what otherwise would be a day off, for an overtime rate in a lower classification which was in fact equal to or inferior to his or her regular straight time rate. I find it difficult to conclude that the parties would have contemplated such a result. Different considerations arise, however, if an employee accepts a call for overtime on a purely voluntary basis, and is not obligated to work overtime. In that circumstance the employee is given the alternative of taking the day off as scheduled, or earning some extra money for working within the lower rated classification on the overtime day. In that there is nothing offensive to the principle that an employee should receive premium pay when he or she is forced to work overtime.

It is, in the Arbitrator's view, significant that Article 5.8 speaks in terms of employees "required to work on their assigned rest days". It is common ground that in the instant case Foreman Mechanic Delong was not required to work overtime as a Mechanic "A", but voluntarily accepted when requested to do so. He was, in other words, free to take his day off. In these circumstances, noting that it was not suggested by the Company that the grievor could or would have been disciplined for declining the call, I must find the interpretation advanced by the Company to be more compelling. When overtime is voluntary, it is payable at the rate of the classification of the work performed. When it is required, in the sense that is is mandatory, and enforceable through discipline, "their hourly rate" refers to the rate of the employee's regular classification. I note that the facts in this case are clearly distinguishable from those in CROA 641, involving a separate Collective Agreement under which an employee was disciplined for refusing to perform emergency repairs on a remote transmitter on an overtime basis.

For these reasons, the Arbitrator must conclude that the interpretation advanced by the Company is correct, given the facts of the instant case. For the reasons expressed above, however, I am not persuaded that Article 5.8 can be interpreted to force an employee to work overtime involuntarily for rates below those payable for his or her regular classification. It also should perhaps be noted that it was not suggested by the Company that Article 5.8 does not require the payment of overtime at the rates of an employee's regular classification when he or she voluntarily accepts overtime work within that classification. The Agreement plainly contemplates that that would be so, and that is well reflected in the practice of the parties.

For the reasons related, the grievance must be dismissed.

MICHEL G. PICHER,
ARBITRATOR.