CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2370
Heard at Montreal, Thursday, 13 May 1993
concerning
VIA RAIL CANADA INC.
and
CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS
DISPUTE:
The alleged violation of Articles 4.1, 4.2(a) and 4.13 of Collective Agreement No. 2. [VIA-781-92]
JOINT STATEMENT OF ISSUE:
On January 19, 1992, the Corporation posted a regional General Bid in VIA Quebec. On that bulletin, jobs 4, 5, 6 and 7 were posted showing 161.68 hours average in a basic four-week period. The Brotherhood contends that employees may not be worked in excess of 160 hours in a four-week period or 320 hours in an eight-week period.
The Brotherhood believes that Articles 4.1 and 4.2(a) refer to a basic four-week period and that 160 hours is the maximum number of hours allowable for any Operation of Run Statement.
The Corporation denies any violation of Collective Agreement No. 2.
The Corporation believes that the Agreement refers to an "average" of 160 hours not a maximum of 160 hours in a four-week period. The Corporation believes this matter is res judicata due to the writ of evocation issued by the Honourable Mr. Justice J. Fraser Martin to CROA 1334, dated October 2, 1985.

FOR THE BROTHERHOOD:	FOR THE CORPORATION:
(SGD.) T. N. STOL	(SGD.) C. C. MUGGERIDGE
NATIONAL VICE-PRESIDENT	DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. Rouleau	- Senior Officer, Labour Relations, Montreal
C. Pollock	- Senior Officer, Labour Relations, Montreal
D. S. Fisher	- Senior Negotiator & Advisor, Labour Relations, Montreal
J. R. Kish	- Senior Advisor, Labour Relations, Montreal

And on behalf of the Brotherhood:

T. N. Stol	- National Vice-President, Ottawa

AWARD OF THE ARBITRATOR

Upon a review of the material filed, the Arbitrator is satisfied that the substance of the grievance in the instant case is identical to that considered by this Office in CROA 1334. At issue in that case was whether the Corporation could schedule any employee to work in excess of 160 hours in a given four week period. In the case at hand the same issue arises, as reflected in the second paragraph of the Joint Statement of Issue. The fact that the Brotherhood further disputes the right of the Corporation to schedule employees in excess of 320 hours in an eight week period is not, in my view, materially different. The decision of this Office in CROA 1334 was overturned on judicial review by the Quebec Superior Court. In the Court's decision, dated October 2, 1985 Martin J. considered the language of article 4.1 which reads as follows:

4.1 The principle of the 40-hour week is recognized and an average of 160 hours in assigned service shall constitute a basic four-week period.

The learned judge determined that the word "average" appearing in the above language means an average and not a maximum. While in the instant case the Brotherhood further pleads article 4.2, which provides for averaging in accordance with a formula which guarantees 320 hours over an 8-week period. In the Arbitrator's view there is no difference in substance between the provisions of article 4.2 and those of article 4.1, insofar as they both speak in terms of an average number of hours for the purposes of constituting a basic salary for the time periods involved. I must, therefore, find that the Brotherhood's contention with respect to article 4.2 of the collective agreement is fully answered by the decision of the Quebec Superior Court, and that the issue is res judicata.

Even if the Arbitrator were satisfied that the decision of the Court was not determinative, the outcome would be the same. In my view the language of articles 4.1 and 4.2 of the collective agreement would not allow the interpretation advanced by the Brotherhood. It would, as the Corporation's representative suggests, be mathematically impossible to achieve an "average" of 160 hours unless, on occasion, employees were required to work in excess of that number, to compensate for those occasions where they are called upon to work less than 160 hours. With respect, I cannot accept the submission of the Brotherhood that the collective agreement reflects an understanding that employees can only be called upon to work in excess of 160 hours in circumstances which are unforeseen or beyond the Corporation's control.

The position of the Brotherhood is tantamount to an assertion that the Corporation has surrendered its right to schedule overtime. The right to occasionally schedule overtime is a normal incident of management's prerogatives in any industrial setting. While it can, of course, be constrained or limited by the language of a collective agreement, it generally requires clear and unequivocal language in the text of an agreement for a board of arbitration to conclude that the parties have so intended. (See Sealy (Western) Ltd. (1985), 20 LAC (3d) 45 (Wakeling); Bridge & Tank Co. of Canada Ltd. (Hamilton Bridge Division) (1976), 11 LAC (2d) 301 (O'Shea); Stauffer Chemical Co. of Canada Ltd. (1960), 20 LAC 413 (Weatherill).)

As part of its submission the Brotherhood suggests that where the Corporation schedules an operation of runs statement which exceeds 320 hours in an 8-week period it could run afoul of article 4.13 of the collective agreement, which provides that employees are to be allowed a minimum of eight calendar days layover at their home terminal for each designated 4-week period. In the Arbitrator's view, the answer to that concern is that the collective agreement guarantees that protection to employees. The scheduling of work must be done in such a fashion as to respect the obligations of the Corporation and the rights of the employees under article 4.13 of the agreement. In the result, that article may well operate as a constraint on the discretion of the Corporation in scheduling the working hours and days of employees.

For all of the foregoing reasons the grievance must be dismissed.

May 14, 1993 _____

MICHEL G. PICHER
ARBITRATOR