CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2395
Heard at Montreal, Thursday, 16 September 1993
concerning
CP EXPRESS & TRANSPORT
and
TRANSPORTATION & COMMUNICATIONS UNION
EX PARTE
DISPUTE:
The hourly rate to be used when employee P. Nichols of Moncton, New Brunswick is on overtime.

UNION'S STATEMENT OF ISSUE:
Employee P. Nichols, who had been working a highway run, had an Article V notice served on him and he was required to return to the Moncton Terminal to hold his work. A mutually agreed on hourly rate of $18.149 was established for Mr. Nichols for his base rate. This was his "MBR". The regular published rate for a Warehouseman-Vehicleman T.T. in the Atlantic Canada Agreement is $11.006. When this employee works overtime he is paid at the rate of $16.510 for his overtime hours.

The Union contends that work in excess of 8 hours per day shall be considered overtime and be paid for at the rate of time and one-half time. From that, the Union contends that the overtime rate would be based on the regular rate being paid to the employee at the time, which in this case is his established and agreed on rate of $18.149.
The Union further contends that this is the practice that has been used for employees on an MBR.

The Company declined the grievance at Step 1, claiming that the matter was being handled by B. Weinert, Director, Labour Relations.
The Company failed to respond to the grievance at Step 2. The Union wrote a further letter to the Director of Labour Relations, CPET, which also was not answered.

The relief requested is the payment to Mr. Nichols of time and one-half the hourly rate of $18.149 for all overtime hours he works, with a retroactive payment for all the overtime hours he has worked since his new MBR rate was established.

FOR THE UNION:
(SGD.) J. CRABB
EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:
B. F. Weinert - Director, Labour Relations, Toronto

And on behalf of the Brotherhood:
D. Dunster - Executive Vice-President, Toronto
J. J. Boyce - National President, Ottawa
D. J. Bujold - National Secretary-Treasurer, Ottawa
M. Prebinski - Education Director, Ottawa

AWARD OF THE ARBITRATOR

The issue presented in this grievance is straightforward. The Union maintains that Mr. Nichols is entitled to overtime calculated on the full rate of his wages, which includes his Maintenance of Basic Rates. It is common ground that as a result of an operational change implemented effective January 1, 1992 Mr. Nichols moved from linehaul work to city delivery work, with the protection of an "MBR" of $18.149 per hour as his rate of pay. This clearly exceeds the regular rate for a warehouse-vehicleman in the Atlantic Canada agreement.

The grievance arises because during hours of overtime worked by Mr. Nichols he has been paid on the basis of time and one-half calculated on the basic collective agreement rate of $11.006 per hour, for an overtime rate of $16.510 per hour. The Union maintains that he is entitled to be paid time and one-half calculated on his "MBR" rate of $18.149 per hour.

The Union submits that its position is consistent with the application of article 13.1 of the collective agreement which provides as follows:

> 13.1 Except as otherwise provided in this Article, work in excess of 8 hours per day shall be considered overtime and be paid for at the rate of time and one-half, on the actual minute basis.

Its representative submits that the above provision does not reflect an understanding that overtime is to be calculated solely on the basis of rates which appear in the collective agreement. In his submission the appropriate rate for the purposes of calculating overtime must be construed as the rate payable to the employee in question. In support of its position, the Union points to the treatment of two employees who have MBR protection, and who are working in a maintenance facility in the Toronto area. Payroll data for the two individuals concerned reveals that they have been paid overtime based on their personal MBR rate, rather than on the basis of time and one-half calculated on collective agreement rates.

Additionally, the Union has tabled in evidence a letter signed by the Company's Director of Labour Relations on August 9, 1984. That letter expressly acknowledges the claim of three Calgary employees to be paid overtime based on the MBR rates which they then held.

The Company's representative submits that the claim is excessive, and disregards the fundamental purpose of the maintenance of basic rates system, which is to provide a minimum guarantee to an employee. He submits that the interpretation applied by the Company in the case of Mr. Nichols does not violate that principle to the extent that the monies paid to him, whether on a daily or weekly basis, have remained in excess of the average weekly rate which was the basis of this MBR. He submits that the MBR is to be interpreted and applied in a manner consistent with its original purpose, but that it should not extend to impact the application the article 13.1 in respect of overtime payments, as claimed by the Union.

The Arbitrator can understand the points of principle which underlie the Company's argument. By the same token, the Union raises a practicality which appears anomalous, namely that the monies earned by the grievor during overtime hours, on the basis of the Company's interpretation, are less than those which he earns during regular hours of work when he is paid at the rate of his MBR.

In the Arbitrator's view the resolution of the grievance must turn to a great degree on the weight to be given to the extrinsic evidence advanced. I am satisfied that article 13.1 bears a certain ambiguity, to the extent that the basis for the calculation of the "rate of time and one-half time" is not expressed within the language of the provision. Nor is there anything within the general and related provisions of article 13 which casts any light on this issue.

What, then, does the evidence indicate? From the standpoint of the Union, those cases of which it is aware involving an employee who holds an MBR and who works overtime reflect the payment of the employee for overtime in accordance with its interpretation, that is to say on the basis of the employee's MBR rate. That, it submits, is reflected in the documented resolution of the grievances in Calgary in 1984 as well as the current treatment of the two employees in Toronto. On the opposite side of the ledger the Company is unable to point to any meaningful examples of employees who hold MBR protection and who also work overtime. In other words, it can offer no examples to counter those advanced by the Union. In the circumstances, while the matter is not without some uncertainty, I am persuaded that the best evidence, and the most compelling case, is put forward by the Union, and that it has discharged the burden of establishing, on the balance of probabilities, that the

parties
have a long-standing agreement that the overtime rate for employees
who have Maintenance of Basic Rate protection is to be calculated on
the basis of time and one-half their MBR rate.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the claim of Mr. Nichols for all overtime hours worked, including retroactive payment for all overtime hours worked since the establishment of his MBR be paid forthwith and in the future.

September 17, 1993 (sgd.) MICHEL G. PICHER
ARBITRATOR