CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2571
Heard in Montreal, Wednesday, 11 January 1995
concerning
Canadian Pacific Limited
and
Brotherhood of Maintenance of Way Employees
DISPUTE:
Claim for overtime payment.
JOINT STATEMENT OF ISSUE:

From March 15, 1993 to March 18, 1993 Mr. L. Mitchell, Welder Foreman, worked at Brampton welding track. Mr. Mitchell's designated headquarters was Hamilton, approximately 40 miles,, or 65 kms, from his job site. While working at Brampton, Mr. Mitchell was required by the Company to stay at a motel and was, therefore, not able to start and end his regular tour of duty at his designated headquarters.

The Union contends that the Company has violated article 2.11 and 11 of Wage Agreement # 41and 42.

The Union requests that the grievor be compensated, at overtime rates, for all hours he was detained at the Company's convenience. These hours are from 1530 hours to 0700 hours on each of the three days the grievor was required to stay at the motel.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD: FOR THE COMPANY:
(SGD.) D. MCKracken (SGD.) M. G. Mudie
System Federation General Chairman General Manager, IFS
There appeared on behalf of the Company:
R. J. Martel– Labour Relations Officer, Toronto
A. G. Mielke– Supervisor, Engineering Maintenace, Toronto Division
D. Botting – Roadmaster, Toronto Division
R. M. Andrews – Labour Relations Officer, Vancouver

And on behalf of the Brotherhood:
D. Brown – Senior Counsel, Ottawa
J. J. Kruk – System Federation General Chairman, Ottawa
D. McCracken– Federation General Chairman, Ottawa
P. Davidson – Counsel, Ottawa
AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that on Friday, March 12, 1993 Roadmaster Doug Botting advised Welder Foreman L. Mitchell and Welder J. Davies that they would be required to work on the diamond at Mile 7.8 of the Owen Sound Subdivision for a period of several days commencing March 15, 1993. He told them that they would be staying in hotel accommodation in Brampton, which is located some forty miles from their home location at Hamilton. The unchallenged evidence of Mr. Botting is that the grievor made no protest about the assignment, and did not request the opportunity to commute from his home to the work location near Brampton. It appears that the work assignment was completed on March 18, 1993 without further incident.

On March 30, 1993 the grievor submitted an expense claim for

meals. Later, on April 3, 1993 he filed a grievance claiming overtime payment for all hours between 1530 hours and 0700 hours on each of the days in question for which he was "... detained for the Company's convenience."

The Brotherhood's claim is based on the alleged violation of article 2.11 of the collective agreement which provides as follows:

2.11 Employees' time will start an end at designated tool houses, outfit cars or shops. Where local conditions necessitate it temporarily, other designated assembly points may be established by mutual agreement between local committees and the appropriate representatives of the Railway.

The Company asserts that article 2.11 has no application in the circumstances of the case at hand. First incorporated into the collective agreement in 1929, the article has never been grieved in the manner which is asserted in the instant case. The Company submits that persons occupying welder positions, such as Mr. Mitchell, have for many years been assigned away from their home headquarters, as a necessary incident of their normal duties, and that such assignments have never been grieved. In the Company's submission that is because the parties did not contemplate the application of article 2.11 to such circumstances.

The Brotherhood asserts a strict application of the language of article 2.11, maintaining that the grievor was effectively ordered to a different "assembly point" without mutual agreement.

In the Arbitrator's view the case put forward by the Brotherhood is not compelling. Firstly, the purpose of article 2.11 appears, on its face, to relate to giving clear definition to the start and end of employees' working days, for the purposes of timekeeping. It does not speak directly to the circumstance of employees who, like Mr. Mitchell, are regularly assigned to work away from their headquarters, and have for many years, without objection by the Brotherhood, been compensated in the way Mr. Mitchell was. It would appear well accepted, as evidenced by the long standing practice of the parties, that article 2.11 does not contemplate the circumstances in which the grievor was assigned. For that reason it cannot be invoked to sustain Mr. Mitchell's claim.

The Arbitrator finds it unnecessary, however, to rest the award solely on that basis. Even if it were accepted, for the purposes of argument, that the Company needed to obtain the agreement of the Brotherhood to establish Brampton, or any other location, as a temporary designated assembly point for Mr. Mitchell, the case advanced by the Brotherhood would still fail. It is common ground that Mr. Mitchell was himself the Brotherhood's local chairman at the time of the events giving rise to the grievance. Any agreement for the purposes of article 2.11 would have been negotiated with him. As the evidence discloses, however, he made no objection to the assignment given, and gave no indication to the Company that he was proceeding to Brampton under protest and would be claiming upwards of forty hours in overtime. As noted above, there was no indication of any such claim on his part until well after the completion of the assignment.

If, in his capacity as local chairman, Mr. Mitchell objected to the work assignment and the related direction that he stay in

hotel accommodation in Brampton, it was incumbent upon him to bring that point of view to the attention of the Company. In a collective bargaining relationship both employer and union bear some onus of candour, and cannot "lie in the bushes" to enhance a claim or position disclosed later to the prejudice of the other party. (cf, CROA 1241, 1575 and 1833) At a minimum, in the case at hand, the Company was entitled to take Mr. Mitchell's apparent acceptance of the assignment, without protest, as reflecting his agreement with the assignment, and the substitution of a designated assembly point in Brampton, even if the Brotherhood's view with respect to the application of article 2.11 were to obtain.

Finally, the suggestion of Counsel for the Brotherhood that Mr. Mitchell had, in any event, no choice in the matter, as he was instructed to proceed to Brampton by Mr. Botting, is not persuasive. It may be that he would, ultimately, have been required to proceed to Brampton. However, by putting the Company on notice that, as local chairman, he did not agree with the assignment, and considered it to be a violation of article 2.11 of the collective agreement, he would have given the employer a fair opportunity to contemplate its options and, assuming that the grievor's position had merit, minimize its liability. However, in the circumstances, by accepting to take the assignment without any indication of protest, Mr. Mitchell must be taken to have effectively agreed to it, both as an employee and in his capacity as local chairman. In the circumstances, he could not merely remain silent and log substantial volumes of compensable overtime unbeknownst to the employer.

For all of the foregoing reasons no violation of articles 2.11 or 11 as disclosed and the grievance must be dismissed.

13 January 1995 _____

MICHEL G. PICHER
ARBITRATOR