

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2678

Heard in Montreal, Tuesday, 12 December 1995

concerning

VIA RAIL CANADA INC.

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Interpretation and Application of the basic day provision of the contract dated June 14, 1995, issued by Justice Mackenzie.

EX PARTE STATEMENT OF ISSUE

On September 11, 12 and 13 the Union met with representatives from VIA Rail concerning the interpretation and application of the national contract issued by Justice Mackenzie in accordance with the back to work legislation ordered by the Canadian government.

At this time the Corporation stated to the Union its interpretation of the basic day provision specifically in regards to less than 3 hours off duty time at the away from home terminal. The Corporation stated that if a crew has less than 3 hours' off duty time at the away from home terminal, then the principle established by Justice Mackenzie of "on duty time 4 hours but less than 6 hours, the crew will be credited with 6 hours towards the eight week averaging period", does not apply. The crew would only be credited with actual time on duty for each trip plus the 3 hours or less at the away from home terminal time.

The Union disagrees with the Corporation's interpretation and application. The Union's position is, a crew will be credited in accordance with principle of a basic day established by Justice Mackenzie. A crew on duty between 4-6 hours will be credited with 6 hours and a crew on duty between 6-8 hours will be credited with 8 hours, etc., as stated in the award.

The Corporation disagrees with the Union.

FOR THE UNION:

(SGD.) M. MATHEWSON

FOR: GENERAL CHAIRPERSON

There appeared on behalf of the Corporation:

K. Taylor – Senior Advisor and Negotiator, Labour Relations, Montreal
J. Ouellet – Senior Labour Relations Officer, Montreal

And on behalf of the Union:

H. Caley – Counsel, Toronto
M. P. Gregotski – General Chairman, Fort Erie
G. F. Binsfeld – Secretary/Treasurer, GCA, Fort Erie
R. Skelton – Local Chairperson, Toronto

PRELIMINARY AWARD OF THE ARBITRATOR

The parties are disagreed as to the calculation of the basic day. The basic day is dealt with in the following terms of article C of the collective agreement language handed down by the Mediation-Arbitration Commission chaired by Mr. Justice Mackenzie:

BASIC DAY

Effective with the Fall 1995 change of timetable.

1. A minimum basic day shall be established in accordance with the tour of duty. In the calculation of this principle, the following shall apply:

Time On Duty	Basic Day
(a) 0'00" - 4 hours	4 hours
(b) 4'01" - 6 hours	6 hours
(c) 6'01" - 8 hours	8 hours
(d) over 8 hours	Actual hours

2. At locations where the layover time is three hours or less, employees shall be considered as being on continuous duty in the computation of the 160 hour basic four-week period. Such time will be considered as "Held" time and not used in the calculation of hours for Transport Canada's maximum hours of service on duty.

It appears that the parties are disagreed as to the manner of calculating an employee's basic day where he or she has layover time of three hours or less.

For the reasons related in **CROA 2676**, the Arbitrator is satisfied that this is, *prima facie*, an issue relating to the meaning of the collective agreement, and not a dispute as to the incorporation of the Mackenzie award into the collective agreement.

Subject to the reservation expressed in **CROA 2676**, I therefore find that the grievance is arbitrable. The General Secretary is directed to list this matter for hearing on its merits.

December 15, 1995

(signed) MICHEL G. PICHER
ARBITRATOR

On Tuesday, 10 September 1996, there appeared on behalf of the Corporation:

L. Béchamp – Counsel, Montreal
E. Houlihan – Senior Officer, Labour Contracts, Montreal
F. Hebert – Manager, Control Centre, Montreal

And on behalf of the Union:

H. Caley – Counsel, Toronto
M. P. Gregotski – General Chairman, Fort Erie
R. LeBel – General Chairman, Quebec
G. Bird – Vice-General Chairman, Montreal

AWARD OF THE ARBITRATOR

The dispute concerns the interpretation of article C of the award of Mr. Justice Mackenzie, dated June 14, 1995. The parties are disagreed as to the calculation of employee's basic day, where the employee has less than three hours' off duty time at an away-from-home terminal. The provision in question reads as follows:

BASIC DAY

Effective with the Fall 1995 change of timetable.

1. A minimum basic day shall be established in accordance with the tour of duty. In the calculation of this principle, the following shall apply:

Time On Duty	Basic Day
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(a)	0'00"	- 4 hours	4 hours
(b)	4'01"	- 6 hours	6 hours
(c)	6'01"	- 8 hours	8 hours
(d)	over 8 hours		Actual hours

2. At locations where the layover time is three hours or less, employees shall be considered as being on continuous duty in the computation of the 160 hour basic four-week period. Such time will be considered as "Held" time and not used in the calculation of hours for Transport Canada's maximum hours of service on duty.

The issue is best explained by reference to an example provided by the Union, and not disputed by the Corporation. The example concerns a hypothetical employee assigned to the Toronto-Windsor return run with time out of service at the away-from-home terminal of Windsor for a period of two hours.

On Duty @ 0700 Off Duty @ 1130 Time on Duty = 4'30"

Held at away from home terminal in Windsor for 2 hours

On Duty @ 1330 Off Duty @ 1800 Time on Duty = 4'30"

In this situation, the Corporation says the employee is paid:

$$4\text{-}1/2 + 2 + 4\text{-}1/2 = 11 \text{ hours' pay}$$

The Union says the employee is paid:

$$6 + 2 + 6 = 12 \text{ hours' pay}$$

The Corporation justifies its position by asserting the language of the second paragraph of article C of the Mackenzie award. Its counsel argues that the reference within the language of the second paragraph to employees being "considered as being on continuous duty in the computation of the 160 hour basic four-week period." must be construed as confirming that layover time of three hours or less is to be calculated continuous with on-duty hours for the purposes of establishing a basic day.

The Arbitrator cannot agree. The concept of the 160-hour basic four-week period, fashioned by Mr. Justice Mackenzie, fundamentally reflects the adoption of the 40-hour week into the collective agreement governing the running trades, as more specifically reflected in the language of article D of the collective agreement which governs hours of service and overtime. Because of the irregular nature of the work and hours of work, a 40-hour work week over a basic four-week period must, of necessity, be expressed in terms of an average of 160 hours for the purposes of determining hours to be paid at basic wages and those to be paid at overtime rates, as well as the application of the guarantee.

The basic day, however, is established for different reasons, having regard to the fact that the length of service of an employee on duty may vary drastically from day to day, and that some compensation should be made for the disruption to employees who are compelled to work shortened hours by reason of the nature of the service in which they are involved. In that context the Arbitrator sees nothing instructive with respect to the application of paragraph 2 in the construction of the first paragraph of Mr. Justice Mackenzie's award. In the Arbitrator's view the reference to employees being deemed on continuous duty in short layover situations must be construed for the purpose stated, namely the computation of the 160 hour basic four week period. There is, very simply, no language in the provision to suggest that it was intended to influence the calculation of the basic day, which is dealt with separately, and in very clear terms in the first paragraph of article C.

In the result, the Arbitrator is satisfied that the interpretation advanced by the Union, namely that off duty layovers of three hours or less are not to be calculated as part of an employee's basic day, is correct. In the example cited above, therefore, the employee would be properly paid at the rate of 14 hours' pay for two basic days of 6 hours for time on duty to and from Windsor, as well as the separate payment of two hours for the off duty layover. There is, in my view, nothing in the text of article C of the Mackenzie award which would suggest it was intended that layover time of three hours or less should be computed within the basic day.

The grievance is therefore allowed.

September 14, 1996

(signed) MICHEL G. PICHER
ARBITRATOR