CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2931

Heard in Montreal, Wednesday, 11 February 1998

concerning

Canadian Pacific Railway Company

and

Transportation Communications Union

EX PARTE

DISPUTE - COMPANY:

Claim for 8 hours' overtime on behalf of Obico Terminal employee T. O'Rourke for time worked by a junior employee on March 26, 1997.

DISPUTE - UNION:

The assignment of overtime on March 26, 1997, at the Obico Terminal.

COMPANY STATEMENT OF ISSUE:

On Wednesday, March 26, 1997, the Company had an overtime opportunity for a Toplift Operator at the Obico Intermodal Terminal. The overtime opportunity was offered to and accepted by an employee junior to Mr. O'Rourke. Had Mr. O'Rourke been offered the overtime opportunity, he would have had less than 8 hours' rest prior to the commencement of his regular assigned shift.

The Union progressed a grievance claiming that Mr. O'Rourke should have been called for the overtime in question and claimed payment of 8 hours' at the overtime rate of pay.

The Company denied the grievance stating that the overtime was properly assigned to an employee junior to Mr. O'Rourke in compliance with a local agreement providing that an individual would not be offered overtime in circumstances where s/he would have less than 8 hours' rest prior to the commencement of his/her regular assigned shift. The Union has denied the existence of such a local agreement.

UNION STATEMENT OF ISSUE:

Machine Operator Thomas O'Rourke was the senior available toplift operator for an overtime assignment for the hours of 16:00-24:00 on March 26, 1997. Mr. O'Rourke's regular assigned hours on that date were 06:00-14:00 with Saturday and Sunday off. Had he been offered the overtime, Mr. O'Rourke would have had only six hours' rest prior to the commencement of his next regular shift.

The Company assigned the overtime to a junior person, asserting a local agreement that a person would not be offered overtime in circumstances where he/she would have less that 8 hours' rest prior to the commencement of his/her regular shift.

The Union progressed a grievance, claiming eight hours' pay at overtime rates, and denying the existence of the local agreement asserted by the Company. The Company, claiming that the agreement existed, declined the grievance.

FOR THE UNION: FOR THE COMPANY:

(SGD.) P. J. CONLON **(SGD.) C. M. GRAHAM**

ASSISTANT DIVISIONAL VICE-PRESIDENT for:
GENERAL MANAGER, FACILITIES & ASSET MANAGEMENT

There appeared on behalf of the Company:

C. M. Graham – Labour Relations Officer, Calgary

M. Bartkowiak – Office Supervisor, Obico Intermodal Terminal, Toronto

And on behalf of the Union:

P. J. Conlon – Assistant Division Vice-President, Toronto

N. Lapointe – Assistant Division Vice-President, Montreal

AWARD OF THE ARBITRATOR

The Company alleges that a local agreement was made whereby an employee could not be assigned overtime if the assignment meant that he or she would not have a full eight hours' rest prior to the commencement of their regular shift. The Union denies that any such agreement was ever made, either locally or otherwise.

At issue is the interpretation and application of article 9.7(b)(2) and 9.7(b)(4) of the collective agreement which read as follows:

> **9.7 (b)** Work in a particular office, shed or work location which is not identifiable as belong to a specific position due to there being two or more positions in the same job classification and performing the same work:

...

(2) work which is required to be performed at overtime rates and which is brought about by an employee being absent and the Company requiring a replacement, shall first be assigned to the senior qualified employee in that job classification in such office, shed or work location, where such overtime is required who has signified a desire to work overtime pursuant to paragraph (3) of this clause (b); however, if overtime work remains to be assigned, the junior available qualified employee in that job classification in such office, shed or work location will be required to work the overtime.

...

(4) Arrangements may be made to assign overtime work on a different basis by local agreement.

The Company relies on the minutes to a meeting of the Safety & Health Committee, dated March 25, 1994. One of the entries for that meeting reads as follows:

> 94-01-01 With reference to employees working 16 hours straight.
>
> RESOLVED It was agreed that employee do not work more than 16 hours consecutively. All supervisors are to ensure this is being adhered to.

The evidence of Mr. M. Bartkowiak, the Company's supervisor at the Obico Terminal, is that since 1994 his office has interpreted the arrangement with the Union, reflected in the minutes of the Safety & Health Committee meeting, to mean that an employee is not to be assigned overtime if to do so would leave him or her short of a full eight hours' rest prior to the commencement of their regular shift. He indicates that a number of overtime assignments were made in a manner consistent with that understanding over the years, without any grievance or objection.

On behalf of the Union, Mr. Herb Devlin, Co-Chair of the Safety & Health Committee, testified that he has no recollection to the effect that the agreement of the parties was to protect a minimum eight hour period prior to the commencement of an employee's next regular shift. He agrees that there was an understanding that an employee should not be scheduled to work more than sixteen consecutive hours. This, he relates, arose out of two incidents in which employees were apparently assigned to work for uninterrupted periods of twenty hours and twenty-four hours respectively. This caused the Union concerns, which resulted in the resolution of the Safety & Health Committee. Further, the representative of the Union questions whether the collective agreement could have been modified, as the Company suggests, by agreement at the level of a Safety & Health Committee, even allowing for the

contemplation of local agreements as reflected in article 9.7(b)(4) of the collective agreement.

Upon a review of the material the Arbitrator is satisfied that both parties are in good faith with respect to their belief and understanding as to the existence and meaning of the local agreement. I am forced to the conclusion, however, that such agreement as did exist, emanating from the deliberations of the Safety & Health Committee, is not an agreement in the terms interpreted by the Company. There is no written evidence whatsoever that the parties agreed that overtime could not be assigned in circumstances where an employee might have less than a full eight hours' rest prior to the commencement of his or her next tour of duty. The resolution reflected in the minutes of the Committee deals solely with the number of consecutive hours which an employee might work, without any reference to the commencement of their next regular tour of duty. The agreement reflected in those minutes would, it appears to the Arbitrator, be honoured where, for example, an employee worked no more than sixteen hours straight, and then returned to work at his or her regular tour of duty some six or seven hours thereafter. Without commenting on the advisability of such an outcome, the Arbitrator is without any evidentiary basis, other than that the agreement of the parties as reflected in the minutes of the Safety & Health Committee, to establish that an agreement was made limiting access to overtime on the basis of an employee's time off prior to the commencement of his or her regular shift. Consequently, the grievance must be sustained, to the extent that there was no local agreement, at the time in question, supporting the Company's interpretation.

With respect to remedy, the Arbitrator is of the view that, if possible, the grievor should be provided a remedy in the form of an additional overtime opportunity in the future, the effect of which would be to make him whole. Should the scheduling of overtime for a period of months not allow for the grievor to be awarded such overtime, consistent with the **Canada Labour Code**, he should then be compensated outright by the payment of eight hours at overtime rates.

For the foregoing reasons the grievance is allowed. The Arbitrator declares that the Company violated the collective agreement in failing to assign overtime to employee O'Rourke on March 26, 1997. The Arbitrator directs that a further opportunity of eight hours' overtime be offered to the grievor, in addition to any overtime which would normally be made available to him. Should no such opportunity be possible within a period of twelve months from the date of this award, Mr. O'Rourke shall thereafter be compensated in an amount equivalent to eight hours' pay at overtime rates.

February 16, 1998 **(signed) MICHEL G. PICHER**

ARBITRATOR