**CANADIAN RAILWAY OFFICE OF ARBITRATION**
**CASE NO. 3292**

**Heard in Montreal, Thursday, 10 October 2002**

**concerning**

**CANPAR**

**and**

**UNITED STEELWORKERS OF AMERICA (LOCAL 1976)**

**DISPUTE:**
The Union, on behalf of Mr. Scott Fortune, grieves 3.5 hours overtime that supervisor James Weicht worked on October 15, 2001. The Company denied this grievance.

**JOINT STATEMENT OF ISSUE:**
On October 15, 2001, Mr. Fortune approached his supervisor and asked if there was any extra work he could do, as he was available to work overtime. He was told there was nothing. He later found out that his supervisor did unionized work that day for 3.5 hours.

On October 24, 2001, a grievance was filed claiming 3.5 hours pay on behalf of Mr. Fortune. The Company denied the grievance.

The Union argues that Mr. Fortune was available to work overtime that day. The Union further argues that not only was Mr. Fortune available but he also informed his supervisor he was available for overtime work.

For the above reason, the Union requests that Mr. Fortune be paid 3.5 hours at the applicable overtime rate. The Company denied our request.

FOR THE UNION: FOR THE COMPANY:
(SGD.) D. BYFIELD (SGD.) P. D. MACLEOD
CHIEF STEWARD VICE-PRESIDENT, OPERATIONS
There appeared on behalf of the Company:
P. D. MacLeod – Vice-President, Operations, Mississauga
J. Coleman – Regional Manager, South Western Ontario
And on behalf of the Union:
D. Dunster – Staff Representative, Ottawa
R. Quevillon – President, USWA Unit 2344

## AWARD OF THE ARBITRATOR

A preliminary issue arises with respect to the application of article 9.4 of the collective agreement. The Union maintains that the Company failed to respond to the grievance in a timely fashion at both step 1 and step 2, and that it is therefore compelled to pay the claim made on behalf of Mr. S. Fortune. Article 9.4 provides as follows:

**9.4** When a grievance based on a claim for unpaid wages is not progressed by the Union within the prescribed time limits, it shall be considered as dropped. When the appropriate officer of the Company fails to render a decision with respect to such a claim for unpaid wages within the prescribed time limits, the claim will be paid. The application of this rule shall not constitute an interpretation of the collective agreement.

The Company objects to the pleading of article 9.4 at the arbitration stage by the Union, stressing that it was never before raised between the parties. The Union's representative counters that the correspondence in the file does indicate that the Union's local representative stated to the Company, in writing, that the Company had failed to respond in a timely manner.

In the circumstances the Arbitrator is compelled to support the position of the Company. It appears clear to me that a claim under article 9.4 is qualitatively different from the original grievance, which concerns an alleged violation of article 8.6 of the collective agreement. Quite apart from whether the case at hand concerns "a claim for unpaid wages", a proposition which the Company denies, it is clear that at no time prior to the arbitration hearing was the Company placed on notice that the Union would assert the application of article 9.4 of the collective agreement to claim payment on what is essentially a procedural, rather than a substantive, basis under a separate provision of the collective agreement.

As is well known to the parties, the jurisdiction of the Arbitrator in the CROA is limited to those issues raised in the Joint Statement of Issue, as reflected in the language of paragraph 12 of the memorandum of agreement establishing the Office. In the case at hand the statement of issue is devoid not only of any reference to article 9.4 of the collective agreement, but to any mention of the fact that the Company did not respond in a timely fashion at either step 1 or step 2 of the grievance procedure. In these circumstances I am satisfied

that the claim under article 9.4 cannot now be advanced. It would be clearly prejudicial to the Company to allow the Union to argue a provision of the collective agreement for which it did not have the opportunity to prepare its case. The Company's objection with respect to the arbitrability of the article 9.4 issue is therefore sustained.

I turn to consider the merits of this dispute. It is common ground that there was work performed by Supervisor James Weicht of the Courtney Park Terminal, where Mr. Fortune was employed as a dockperson, on October 15, 2001. It appears that Mr. Weicht attended at the Toronto airport, as required by new airport rules, to tend the vehicle of another driver who was making deliveries at that location. Following that duty Mr. Weicht proceeded, in the second vehicle which he was operating, to make some twenty-three pickups over a period of some three and one-half hours. The claim on behalf of Mr. Fortune is made under the terms of article 8.6 of the collective agreement which reads, in part, as follows:

**8.6** Overtime shall be allocated on the basis of seniority wherever possible, in a voluntary manner, within the work classification and shifts, provided the employee is capable of performing the duties; however, upon reaching the bottom of the seniority list in that classification and shift, the junior employee(s) will be required, in reverse order, to work the overtime.

The Arbitrator has some difficulty with the submission of the Union, having regard to the facts of this particular case. As is evident from the foregoing it is a condition of the overtime provision of article 8.6 that the employee claiming overtime "... is capable of performing the duties ...". The undisputed evidence before the Arbitrator is that the grievor had previously been a P&D driver operating out of the Courtney Park Terminal in Mississauga. In October of 2000, because of issues of personal stress, Mr. Fortune removed himself from his regular driving duties and accepted modified work in the warehouse. Shortly thereafter, in January of 2001, the grievor decided to bid on a full time warehouseman's position. He was successful in that bid and held that position on the date of the events giving rise to this grievance, October 15, 2001.

It is significant, in the Arbitrator's view, that prior to bidding onto the permanent dockperson's position the grievor was, on the basis of medical information provided to the Company, being accommodated because of his own inability to

handle the stress of the P&D driver's position. The stress of dealing with traffic, paper work, customers and the other exigencies of that work had effectively led him to a medical leave of absence. There was no subsequent indication to the Company that his condition was such as to permit him to handle pick-up and delivery work. Indeed, although it occurred after October 15, 2001, a meeting between Regional Manager John Coleman and the grievor, in the company of his Union representative Dave Neale, which apparently involved some discussion of this grievance, included an agreement between the parties to the conversation, in the words of a letter written by Mr. Coleman dated March 12, 2002, that "... Mr. Fortune was off the road because of his inability to deal with everyday issues and if Mr. Fortune wished to change his status he was to provide medical documentation and a letter advising the company accordingly." There is no documentation in the file recording any dispute by the Union with respect to the content of the agreement so described.

What, then, do these circumstances signify? In my view the evidence does confirm, as asserted by the Company, that at the time in question Mr. Fortune did not bring himself within the language of article 8.6 with respect to the performance of overtime which would involve driving a Company truck for the purposes of performing pick ups and deliveries. He was not, in other words, capable of performing the duties within the meaning of article 8.6 at the time Supervisor Weicht performed the work which is the subject of this dispute. While it does not appear disputed that Mr. Fortune does perform a mail delivery function in the early hours of the morning between the Company's Mississauga terminal and its Mississauga headquarters, there is no evidence before the Arbitrator to confirm that Mr. Fortune has obtained medical clearance to return to P&D driving work. There is, in these circumstances, no violation of the collective agreement disclosed in the evidence.

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

**October 11, 2002**

MICHEL G. PICHER
ARBITRATOR