CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2136

Heard at Montreal, Wednesday, 10 April 1991

Concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

The refusal by the Company to give CanPar employee D. Boyce, Oshawa, Ontario, the negotiated rate increase as per Collective Agreement signed the 30th day of May, 1989.

UNION'S STATEMENT OF ISSUE:

Employee D. Boyce was on Workers' Compensation and returned to work August 10, 1990.

May 1, 1990, an increase in the rates "as per Agreement" was due to all union employees.

Upon his return, he was advised by the Company he would not receive the increase due to his being on light duties.

The Union grieved the 45 cents an hour, plus interest, that he should be receiving since his return to work August 10, 1990.

The Company denied the Union's request.

FOR THE UNION:

(SGD.) J. J. BOYCE
SYSTEM GENERAL CHAIRMAN

There appeared on behalf of the Company:

M. Failes	– Counsel, Toronto
P. D. MacLeod	– Director, Linehaul & Safety, Toronto
A. Chaison	– Manager, Safety Supervisor, Toronto
K. Killingbeck	– Supervisor, Toronto

And on behalf of the Union:

M. A. Church	– Counsel, Toronto
J. Crabb	– General Secretary/Treasurer, Toronto
M. Gauthier	– Vice-General Chairman, Montreal

AWARD OF THE ARBITRATOR

The foundation of the Union's case in the instant grievance is that Mr. Boyce was classified by the Company as a Driver Representative and was denied the rate of pay payable to employees in that classification as of May 1, 1990. Rather, Mr. Boyce has been paid at the lower rate which was effective for that classification at the time he left his employment because of his compensable injury. The Union maintains that the grievor is entitled to be paid at the increased rate for the classification of Driver Representative which was in effect at the time of his return. Additionally, it claims that he is entitled to the payment of a shift premium for a period of time between October 17, 1990 and November 30, 1990, when his hours of work were from 2:00 p.m. to 10:30 p.m.

In the Arbitrator's view the first part of this grievance cannot succeed. It is, in my view, incorrect to assert that Mr. Boyce returned to work in the classification of a driver representative. It is common ground that he returned to work under the mandatory provisions of the **Workers' Compensation Act** of Ontario, and was assigned to a mix of light duties which do not belong to any particular classification, although the bulk of them would appear to fall within the warehouseman's classification. The amount paid to the grievor was above the wage rate for warehousemen.

The rates of pay provided in Article 17 of the Collective Agreement are clearly intended to apply to employees assigned to perform work within the classifications appearing in that article, at the rates which correspond to their respective position on the salary grid. As a matter of law Mr. Boyce does not fall within any of those classifications, but, rather, was at work in furtherance of a light duty assignment pursuant to the Company's obligation to re-employ him as provided in Section 54b(5) of the **Workers' Compensation Act** of Ontario. By the operation of that statute, and in particular the terms of Article 40(2)(a) of the Act, it is contemplated that he is to be put into "some suitable employment" with provision to ensure the recovery of a portion of the difference between his net average weekly earnings before the injury and the net average amount that he is able to earn in the light duty position given to him.

Article 40(2)(a) of the Act is as follows:

> (2) Where temporary partial disability results from the injury, the compensation payable shall be,
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> > (a) where the worker returns to employment, a weekly payment of 90% of the difference between the net average weekly earnings of the worker before the injury and a net average amount that the worker is able to earn in some suitable employment or business after the injury; ...

In the instant case it would appear that the Company has provided to Mr. Boyce his full wage and benefit entitlement under the **Workers' Compensation Act**. Any claim that he has not been so protected is a matter within the exclusive jurisdiction of the **Workers' Compensation Board**, and cannot be determined by a board of arbitration. Most importantly, the provision of the **Workers' Compensation Act** must be found to take precedence over the Collective Agreement in so far as the re-employment to light duties and the resulting classification of the grievor is concerned. To put it differently, in so far as possible, the Act and the Collective Agreement should be interpreted and applied as being complimentary and not contradictory.

In the result, I must conclude that the regular wages of Mr. Boyce in respect of his light duty position are not governed by any provision of the Collective Agreement, and no violation of its terms has been disclosed. He was not employed or classified as a driver representative for the purposes of his light duty assignment and cannot claim the wages of that classification as of right. The first part of the Union's claim must therefore be denied.

The Arbitrator is not persuaded that the same result obtains, however, in respect of the grievor's claim for shift differential. Article 17.4 of the Collective Agreement provides as follows:

> **17.4 SHIFT DIFFERENTIAL**
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> Effective July, 1985, employees accumulating seniority under the terms of this Agreement, whose regularly assigned shifts commence between 1400 and 0559 hours shall receive a shift differential of 30 cents per hour. Overtime shall not be calculated on the shift differential nor shall the shift differential be paid for absence from duty such as vacation, general holidays, etc.

In the Arbitrator's view there is no reason to conclude that Mr. Boyce did not fall within the terms of the foregoing provision. At the material time he was an employee accumulating seniority under the terms of the Agreement and was working on regularly assigned shifts which commenced between 1400 and 0559 hours. While, for the reasons related, the issue of his classification and base wages may have been governed by the Workers' Compensation Act, other parts of the Collective Agreement were not displaced by the Act and continued to apply to him. Among these, in the Arbitrator's view, is the provision for shift differential. That is an allowance which the parties have deemed appropriate for payment to an employee who is called upon to work a tour of duty during inconvenient hours. That right is unrelated to the nature of the work being done or the classification in which the employee may find himself or herself. (*See, e.g.,* ***Associated Freezers of Canada Ltd.*** *(1979), 23 L.A.C. (2d) 40 [Burkett];* ***Borden Chemical Co. (Canada) Ltd.*** *(1973) 3 L.A.C. (2d) 383 [Weatherill]*.) The fact that the rate of pay being provided to Mr. Boyce by the Company, without shift differential, met or exceeded what it was required to pay under the terms of the **Workers' Compensation Act** is neither here nor there as regards Mr. Boyce's collective agreement entitlement to shift differential. That right is independent of his rate of pay or classification and operates for his benefit as long as he satisfies the two conditions provided within the terms of Article 17.4. For these reasons the Arbitrator is satisfied that the grievor's claim to the payment of shift differential is well founded.

The grievance is allowed, in part. The Company is directed to pay to Mr. Boyce the amounts claimed in respect of shift differential for the tours of duty worked by him between October 17 and November 30, 1990. I retain jurisdiction should the parties find it necessary to speak to the quantum of compensation.

12 April 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR