

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2155

Heard at Montreal, Tuesday, 11 June 1991

concerning

VIA RAIL CANADA INC.

and

**CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT & GENERAL WORKERS**

DISPUTE:

Policy grievance concerning the calculation of pay for employees with Maintenance of Earnings protection under Article E of the Special Agreement.

JOINT STATEMENT OF ISSUE:

The Brotherhood contends that employees who work regular part-time assignments (less than 40 hours per week), on shifts outside regular hours, which are entitled to shift differentials under Article 32.1 of Collective Agreement No. 1, should be paid the associated shift differential for actual hours worked over and above their Maintenance of Earnings incumbency rate.

The Corporation contends that there has been no violation of Article 32.1, as the shift differentials were included in the calculation of individual maintenance of earnings incumbency rates and that it is obliged to pay employees the greater of their actual earnings or their incumbency rate, which ever is higher.

FOR THE BROTHERHOOD:

(SGD.) T. MCGRATH
NATIONAL VICE-PRESIDENT

FOR THE CORPORATION:

(SGD.) C. C. MUGGERIDGE
DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. Pollock	– Senior Officer, Labour Relations, Montreal
R. Wesley	– Senior Negotiator & Advisor, Labour Relations, Montreal
D. Fisher	– Senior Officer, Labour Relations, Montreal
J. Kish	– Senior Advisor, Labour Relations, Montreal

And on behalf of the Brotherhood:

G. T. Murray	Regional Vice-President, Moncton
A. Cerrilli	– Regional Vice-President, Winnipeg
R. Dennis	– Representative, Moncton
K. Sing	– Representative, Halifax

AWARD OF THE ARBITRATOR

The instant claim is for the payment of shift differential under article 32.1 of the collective agreement. That provision is as follows:

- 32.1** Effective July 1, 1989, employees whose regularly assigned shifts commence between 14:00 and 21:59 hours shall receive a shift differential of 40 cents per hour, and employees whose regularly assigned shifts commence between 22:00 and 05:59 hours shall receive a shift differential of 45 cents per hour. Overtime shall not be calculated on the shift differential nor shall the shift differential be paid for paid absence from duty such as vacations, general holidays, etc.

The dispute relates to the entitlement of employees to shift differential when they work during hours contemplated within article 32.1 of the collective agreement when they are in receipt of maintenance of earnings protection under the terms of the collective agreement, and where their incumbency is calculated on hours of work which do not include any shift differential. The preamble of the Special Agreement of November 19, 1989 which establishes incumbencies for off-train employees contains, in part, the following definition:

The term "rate of position" for off-train employees is defined as follows:

"The rate that the employee regularly receives on the position on which he was last employed, exclusive of incidental overtime. **Included in rate of position would be such items as shift differential** and clock punching payments, etc." (emphasis added)

The Brotherhood's claim does not extend to an employee who, prior to January 15, 1990 regularly worked forty hours a week during hours which attract shift differential within the contemplation of article 32.1. Should such an individual now be working reduced hours which still fall within that time frame, the Brotherhood acknowledges that the calculation of the employee's incumbency already provides for shift differential. The claim is limited to the employee who, prior to January 15, 1990, worked hours outside the work periods contemplated in article 32.1, and whose incumbency rate does not include any amount in respect of shift differential. It submits that an employee who, for example, previously worked a forty hour week in that circumstance, and is now assigned to a reduced work period of twenty hours per week, and whose hours of work fall within the times contemplated in article 32.1, should, in addition to his or her incumbency rate, further be paid the shift differential for all hours actually worked within the periods described in article 32.1.

The Corporation takes a different view. It submits that to the extent that the employee in the example above works only twenty hours, and is paid for a full forty hours based on his or her incumbency, a part of the overage can be deemed to be in respect of shift differential, and that no violation of article 32.1 is therefore disclosed.

The Arbitrator cannot accept that position. Rate protection and incumbencies established under the terms of the Special Agreement, or alternatively, under the terms of the Supplemental Agreement between the parties are conceived for a very specific purpose which is distinct and apart from the purpose of shift differential. Incumbency protection is established as a measure to assure to an employee who has been displaced from his or her regular position into a lower rated position, and/or into a position with fewer available hours of work, suffers no reduction in total wages. The incumbency is, in effect, a guarantee of wages based on the earnings of the employee prior to the reduction in operations which occasioned his or her displacement.

Shift differential, on the other hand, is established in this agreement, as in other collective agreements, for the purpose of compensating employees whose hours of work are scheduled at times that are inconvenient, and which would otherwise be available to employees for their own rest or leisure. Boards of arbitration have long recognized the particular characteristics of shift differential, and have ruled repeatedly that the payment of shift premiums at the same time as the payment of other payments, such as overtime premiums, does not constitute double payment or pyramiding. (See, e.g., *Re Associated Freezers of Canada Ltd. and Teamsters Union, Local 419*, (1979) 23 L.A.C. (2d) 40 (Burkett) and *Re Texaco Canada Ltd. and Oil, Chemical and Atomic Workers, Local 9-599*, (1975) 10 L.A.C. (2d) 221 (Shime).)

What the instant case discloses is that the Corporation has denied the payment of shift differential to employees whose rate protection or incumbency contains no element of shift differential and whose actual hours of work fall within the hours contemplated under article 32.1 of the collective agreement. In the Arbitrator's view the terms of

that article are clear and unequivocal. They contemplate that employees working within those hours are to be compensated for their inconvenience by being paid the premiums provided for work performed during the hours identified within the article. There is no qualification of that right for employees who also have incumbency rate protection. As noted above, in the case of employees whose incumbency rate already includes allowance for shift differential, no claim can be made. Where, however, the incumbency of an employee does not contain any element in respect of shift differential, and his or her hours of work fall within the hours contemplated, there is no basis on which the Arbitrator can conclude that the Corporation can avoid the payment of shift differentials for hours actually worked within the contemplation of article 32.1.

For the foregoing reasons the grievance must be allowed. The Arbitrator finds and declares that the Corporation has violated the provisions of article 32 and directs the Corporation forthwith to pay shift differentials to employees whose incumbencies do not contain any element of shift differential and whose hours of work fall within those contemplated in article 32. As requested by the Brotherhood, I make no order, for the time being, with respect to compensation for the wage claims of employees who have been affected, and retain jurisdiction in the event that parties are not able to reach a settlement on that issue.

June 14, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR