CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2268

Heard at Montreal, Wednesday, 15 July 1992

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Interpretation and application of paragraph 6.1(2), including the Note thereto, of Clause 6 of the Memorandum of Agreement, dated July 12, 1991, more commonly referred to as the Conductor-Only Agreement.

COMPANY'S STATEMENT OF ISSUE:

On July 12, 1991, the Canadian National Railway Company and the United Transportation Union signed a Memorandum of Agreement in respect of the operation of certain trains with a crew consist of a conductor only. The provisions of the Memorandum of Agreement revised certain provisions of the collective agreement and now forms part of the collective agreement.

Clause 6 of the Memorandum of Agreement governs certain conditions applicable to employees while at the away from home terminal. Paragraph 6.1(1) of Clause 6 reads:

> Employees in freight service who are held at other than their home terminal longer than 10 hours without being called for duty will be paid 1/8th of the daily rate per hour (at the rate applicable to the service last performed) for all time held in excess of 10 hours except as provided by paragraph (3).

Paragraph 6.1(2) of Clause 6 is the provision in dispute and reads:

> Except as provided by paragraph (3), employees in freight service will not be held at other than their home terminal longer than 12 hours except that:
>
> (a) for an employee who books in excess of 3 hours rest pursuant to Clause 11.6(1)(b) hereof, the 12 hour period shall commence at the expiration of such rest;
>
> (b) for an employee who is subject to mandatory rest pursuant to federal regulation, he or she will not be held at other than the home terminal longer than 6 hours after such mandatory rest has expired.
>
> NOTE: The provisions of this paragraph (2) will be altered to the extent necessary by means of agreement between the Local Chairperson and the proper officer of the Company where local operational peculiarities such as at Buffalo, N.Y. or at Armstrong, Ontario make it impracticable to comply with the maximum hours set out in this paragraph or where necessary to accommodate certain operational requirements as might be occasioned by major track maintenance programs requiring lengthy work blocks.

Following implementation of the terms and conditions of the Memorandum of Agreement, the Company invoked the provisions of the NOTE in an attempt to alter the provisions of paragraph 6.1(2) in respect of certain locations including **(1)** Buffalo, N.Y.; **(2)** Toronto, Ontario in respect of Niagara Falls and London based crews; **(3)** Montreal, Quebec in respect of Ottawa based crews; and **(4)** Brent, Ontario.

The respective Local Chairpersons of the Union refused to agree to any alteration to the provisions of paragraph 6.1(2) unless the amount of compensation as set out in paragraph 6.1(1) was increased to the equivalent of 1/4 of the daily rate for each hour after 12. As a consequence, no local agreement is in effect at the locations listed above. The Company is, at present, complying with the 12 hour limitation as set out in paragraph 6.1(2) and bearing the burden of substantially increased deadheading costs that would otherwise not be required.

The General Chairperson of the Union supports the position being taken by the Local Chairpersons and has refused to deal with any request for a local agreement unless the increased compensation cited above is included in the terms of any such local agreement.

The Company submits that: **(1)** Local agreements made pursuant to the Note to paragraph 6.1(2) can only alter the provisions of paragraph 6.1(2); such local agreements cannot alter any other provisions of the collective agreement including those provisions dealing with the amount of compensation to be paid for time held at the away from home terminal. **(2)** Pursuant to the Note to paragraph 6.1(2), it is the Union's duty to deal with legitimate requests for a local arrangement, in the manner set out in the Memorandum of Agreement, in respect of those locations where it can be demonstrated that local operational peculiarities make it impracticable to comply with the limitations set out in paragraph 6.1(2). **(3)** The Union's refusal to deal with such requests unless certain other provisions of the collective agreement are altered constitutes a violation of the collective agreement.

The Company is seeking the Arbitrator's ruling on each of the matters listed above and, in the event that its position is sustained, requests that the make whole principle be applied in respect of the additional deadheading costs incurred as a result of the Union's violation of the collective agreement.

FOR THE COMPANY:

(SGD.) J. B. BART
FOR: ASSISTANT VICE-PRESIDENT, LABOR RELATIONS

There appeared on behalf of the Company:

J. B. Bart	– Manager, Labour Relations, Montreal
R. Lecavalier	– Attorney, Law Department
M. E. Healey	– Director, Labour Relations, Montreal
A. E. Heft	– Manager, Labour Relations, Toronto
M. S. Fisher	– Coordinator, Labour Relations, Montreal
D. Brodie	– System Labour Relations Officer, Montreal
N. Dionne	– System Labour Relations Officer, Montreal
M. Delgreco	– Witness

And on behalf of the Union:

M. Church	– Counsel, Toronto
M. P. Gregotski	– General Chairman, Fort Erie
R. Beatty	– Vice-General Chairman, Hornepayne
G. E. Bird	– Vice-General Chairperson, Montreal
G. Binsfeld	– Secretary/Treasurer, G.C.A., Fort Erie
W. G. Scarrow	– General Chairman, Sarnia
D. Gallagher	– Vice-General Chairman, Fort Erie
J. Coffey	– Local Chairman, Hamilton
C. Hamilton	– General Chairman, BofLE, Kingston

PRELIMINARY AWARD OF THE ARBITRATOR

The Union objects to the arbitrability of this grievance. Additionally, it submits that it should not, in any event, be heard at this time, as the Union is itself in the process of advancing a grievance under the terms of clause 18 of the Memorandum of Agreement concerning the conductor only crew consist (hereinafter the Conductor Only Agreement).

The objection of the Union is made in two parts. Firstly, it asserts that the Company has put forward no information with respect to "local operational peculiarities" at the locations described in its ex parte statement. The Union maintains that there are no local peculiarities of the kind contemplated in the NOTE to clause 6 of the Conductor Only Agreement, and that on that basis the Company cannot succeed in obtaining the arbitration of a declaration or direction to the Union requiring it to negotiate an agreement by way of exception to clause 6. It further submits that, in any event, given the importance of the issue, which involves the first interpretation of the Conductor Only Agreement in respect of an issue of substantial importance to both parties, the Company's grievance, if it should be arbitrable, should be heard at the same time as the grievance now being advanced by the Union.

The Arbitrator finds that the Company's grievance is arbitrable. I am satisfied that the facts of this case fall within the general principles enunciated by this Office in **CROA 663**.

The issue of greater substance, I think, is the procedure to be followed with respect to the hearing of the grievance. I am satisfied that the balance of convenience dictates that it is more appropriate that it be heard in September 1992, concurrently with the grievance of the Union with respect to the Niagara–MacMillan Yard dispute. While the Arbitrator appreciates that this dispute involves a matter of some cost to the Company, a determination of the narrow question of whether the Union is entitled to demand financial concessions in exchange for an agreement under the NOTE to clause 6 of the Conductor Only Agreement would not provide a final resolution to the differences between the parties. The Union still maintains that, even if it cannot make economic demands, the Company cannot establish that there are local peculiarities at the locations for which it seeks exceptions, and that on that basis it is under no obligation to make an agreement. I am satisfied that it would be inappropriate to hear the merits of that issue in the present hearing, as no particulars have been provided to the Union by the Company with respect to how the locations would qualify as having local operational peculiarities which would trigger the application of clause 6. As that issue must be dealt with at a later hearing, in any event, it is more appropriate in my view to hear both the issue of local peculiarities and the issue of the right of the Union to make economic demands in exchange for a local agreement as part of a single hearing dealing more broadly with the application of the relevant provisions of the Conductor Only Agreement.

The procedural decision is facilitated, in part, by the undertaking given by Counsel for the Union to progress its grievance in respect of the Niagara–MacMillan Yard dispute for hearing in September, on the basis of an ex parte statement of issue. In the circumstances it is appropriate, I think, to have a full airing of all of the issues, allowing the fullest opportunity for the exchange of particulars between the parties prior to that hearing, and the continuation of this hearing, to be heard concurrently at the sittings of this Office in September, 1992.

The memorandum which establishes the Canadian Railway Office of Arbitration vests in the Arbitrator authority to make such directions as are necessary for the fair and expeditious hearing of disputes of this kind. It appears to the Arbitrator appropriate that the grievance of the Company be given the broadest scope for hearing, without undue restriction as to the provision under which it is brought. In that way, the merits of the Company's position can be heard fully, in the context of a hearing which is concurrent with the grievance which is being progressed by the Union. In the result, at a single hearing, the Union's dispute with respect to Niagara–MacMillan Yard as well as the Company's concerns with respect to the four locations named in the Company's statement of issue can be fully heard and disposed of.

To facilitate the process, however, the Arbitrator deems it appropriate to make directions to both parties with respect to the prehearing disclosure of particulars. The Company is directed to provide to the Union the particulars of its claim as to each of the five locations concerned with respect to the "local operational peculiarities" which would bring the circumstances of each case within the purview of the NOTE to clause 6 of the Conductor Only Agreement. The Union is directed to provide to the Company particulars with respect to the nature of all of its demands, whether monetary or otherwise, which it makes with respect to the conditions for its agreement in each of the five locations. The exchange of particulars by the parties is to be completed within a period of reasonable notice prior to the continuation of hearing. The matter is referred to the General Secretary to be scheduled for continuation

of hearing in September 1992, concurrently with the grievance of the Union with respect to Niagara–MacMillan Yard.

July 17, 1992 **(Sgd.) MICHEL G. PICHER**
ARBITRATOR

On Thursday, 10 September 1992:

There appeared on behalf of the Company:

J. B. Bart	– Manager, Labour Relations, Montreal
R. Lecavalier	– Attorney, Law Department
A. E. Heft	– Manager, Labour Relations, Toronto
M. S. Fisher	– Coordinator, Labour Relations, Montreal
D. Brodie	– System Labour Relations Officer, Montreal
M. Delgreco	– Witness

And on behalf of the Union:

H. Caley	– Counsel, Toronto
M. P. Gregotsk	– General Chairman, Fort Erie
R. Beatty	– Vice-General Chairman, Hornepayne
G. E. Bird	– Vice-General Chairperson, Montreal
G. J. Binsfeld	– Secretary/Treasurer, G.C.A., Fort Erie
W. G. Scarrow	– General Chairman, Sarnia
P. Gallagher	– Vice-General Chairman, Fort Erie
C. Hamilton	– General Chairman, BofLE, Kingston

AWARD OF THE ARBITRATOR

This is the first occasion upon which this Office has been called upon to resolve a dispute relating to the Conductor Only Agreement. That agreement is of great importance to both parties, representing as it does substantial changes in the assignment, payment and administration of crew consists in certain classes of trains under their collective agreement. As the agreement first became effective in September of 1991, experience under it is relatively limited. As the parties will undoubtedly develop mutual accommodations and understandings as its application evolves, it is incumbent on this Office to exercise care in the resolution of disputes in the early stages. In the Arbitrator's view awards should avoid unnecessary generality or conclusions beyond what is necessary for the purposes of the dispute presented.

At the time of the hearing the Company's claim was confined to its desire to alter the provisions of paragraph 6.1(2) of the Conductor Only Agreement (COA) in respect of Buffalo, Toronto–Niagara Falls and Brent, Ontario. The Company's grievance was heard concurrently with the grievance of the Union in CROA 2283, for reasons expressed in the preliminary award herein dated July 17, 1992.

The first issue raised is whether in the negotiation of a local agreement within the contemplation of the NOTE to article 6.1(2) allows the Union to make proposals or demands which would involve the payment of compensation, or any other term which would, in the Company's view, involve a departure from the general terms of the collective agreement.

The agreements negotiated between the parties, including collective agreement 4.16 and the COA, which is incorporated within it, fall under the Canada Labour Code. Under the Code the parties are masters of their own agreement. Subject to the requirement that the terms of their collective agreement be consistent with laws of general application, they are at liberty to make such changes, exceptions or amendments to their agreement as they see fit. They may, if they choose, waive the application of parts of the agreement generally or in specific circumstances, should they so agree. The freedom of contract which they enjoy is an important part of the collective bargaining process contemplated under the Code for the enhancement of collective bargaining and the promotion of industrial relations stability. As a matter of general principle, therefore, a board of arbitration should, absent clear and unequivocal language to the contrary, exercise great caution in assessing a claim that the parties have entered into an agreement which effectively limits their flexibility to amend or make exceptions to their collective agreement in specific cases.

The Union does not seek the payment of direct compensation in respect of the Company's request for relief from the 12 hour layover rule at either Buffalo or at Brent. It is only in relation to the Toronto-Niagara Falls layovers that the Union seeks compensation for crew members held beyond 12 hours. The narrow issue raised by the ex parte statement filed by the Company is whether the mere tabling of that demand constitutes a violation of the collective agreement. For the purposes of appreciating the issue, it should be noted that the bargaining stance of the Union is, effectively, that it will not sign a local agreement in respect of the Toronto-Niagara Falls crews which would relieve the Company from the 12 hour rule unless there is some compensation agreed to as part of the package. It takes that position based on its view that the Niagara Falls case does not involve "local peculiarities", and does not fall within the contemplation of the NOTE.

The Company points to the language of the NOTE to support its view that a demand of that kind is outside the purview of clause 6 of the COA. Its representative stresses that the first sentence of the NOTE speaks only in terms of: "the provisions of this paragraph (2) will be altered to the extent necessary by means of agreement ... where local operational peculiarities ... make it impracticable to comply with the maximum hours set out in this paragraph ...". In his submission the negotiations, therefore, can only bear on the alteration of the provisions of paragraph 2 of clause 6.1 of the COA. He does not assert, however, that such negotiations can only involve the increasing of hours provided for under that paragraph. The Company accepts, for example, that an agreed guarantee of deadheading by taxi at the Company's expense after the expiry of an increased number of hours would fall within the purview of an alteration of the terms of the paragraph. In this regard its representative stresses that there is no provision within the collective agreement as to the method of deadheading, and that such an arrangement would not be in violation of any particular term. When asked whether the payment of a waiting bonus, which presumably would also fall outside the collective agreement, would be beyond the scope of alteration contemplated, the Company's representative states that it would. He argues that it would constitute a payment of a form of wages or benefits, terms which are already covered by the agreement.

The Arbitrator must confess to some difficulty with the position so characterized. The Company's position is based, in part, on the language of clause 18 of the COA, which relates to the resolution of disputes. In my view, it is important to distinguish between the provisions of clause 6, which provides for the negotiation, on a local basis, of agreements to allow the Company relief from the 12 hour rule, on the one hand and clause 18 of the COA, which is a procedural provision allowing for the resolution of disputes by arbitration. It provides, in part, as follows:

> **18.1** A new article is incorporated into Agreement 4.16 to read:
>
> > **(1)** Any dispute or disagreement concerning the establishment and regulation of assignments, pools and sets of runs, spare boards, furlough boards and the administration of such local arrangements as set out herein shall be processed in the manner set out herein.
> >
> > ...
> >
> > **(5)** The decision of the arbitrator shall be limited to a determination as to the practicality of the parties' respective positions on the issue(s) in dispute. The decision of the arbitrator shall, in no way, add to, subtract from, modify, rescind or disregard any provision of this Memorandum of Agreement or Agreement 4.16.

Implicit in the submission of the Company is that if the arbitrator contemplated under clause 18 cannot add to, subtract from, modify, rescind or disregard any provision of the collective agreement, it is therefore not open to the parties to do so in the negotiations of local terms as contemplated under clause 6 of the COA. Setting aside for the moment the Union's position with respect to the application of clause 18, dealt with below, I can see no basis to sustain that interpretation. While it is understandable that the parties might seek to restrain a third party with respect to making determinations to resolve their dispute, the same need not be said where they negotiate to resolve their mutual interests themselves.

The first sentence of the NOTE to paragraph 2 of clause 6.1 of the COA contemplates that the local chairperson and the proper officer of the Company may enter into agreements which alter the provisions of paragraph (2) of that clause. It provides no guidance as to what the contents of those agreements might be, save to indicate that one of the consequences is an alteration of the application of paragraph 2 in a particular circumstance, presumably as regards

relief from the 12 hour rule. The trade offs and accommodations which may be made in achieving that result are not addressed, and in the Arbitrator's view not limited by the language of that provision.

Does this mean that local Union and Company officers are given *carte blanche* to amend substantive provisions of the collective agreement without any accountability to their superiors, or to the administration of the collective agreement as a whole? I think not. It is for the parties themselves to control the mandate which they choose to give to a local representative, be it a local chairperson of the Union or a local officer of the Company, for the purposes of negotiating agreements of the type contemplated in the NOTE to clause 6.1(2) of the COA. Given the sophistication of the parties and their general ability to oversee their respective administrators, there is little reason to believe that the "hypothetical horribles" of inconsistent local practices suggested by the Company's argument will be realized. In this regard it is significant that paragraph (3) of clause 6.1 specifically addressed the compensation to be paid for employees in unforeseen and emergency circumstances, such as wrecks, snow blockades or washouts. By contrast, as appears from the text of sub-paragraph (2) and the language of the NOTE, the negotiations which are there contemplated take place in a context which allows deliberation and reflection, with ample scope for supervision and review by such higher authorities as the parties may themselves deem appropriate.

In the result, the Arbitrator cannot sustain the position of the Company that the Union has violated either clause 6 of the COA, or any provision of the collective agreement by seeking to secure an agreement of the parties with respect to the payment of compensation for employees who would be affected by the Company's request for relief from the 12 hour rule in the Toronto-Niagara Falls runs. As noted above, that does not mean that the Company is obliged to agree with the Union's demand for compensation, or with the payment of compensation in any amount, whether direct or indirect. Significantly, however, the Arbitrator can find nothing in the language of clause 6, or in any other part of the COA which would fetter the freedom of contract of the parties in that regard. In my view, if they are free to make such arrangements, they must each be free to make corresponding proposals.

In the Arbitrator's view the foregoing observations dispose of the first and third submissions contained in the ex parte statement of the Company. Local agreements can, if the parties should so agree, alter, disregard, waive or otherwise amend provisions of their collective agreement, as they see fit. Consequently, the position advanced by the Union to the effect that it would not enter into a local agreements in respect of the Niagara Falls runs without the negotiation of some monetary compensation is not, of itself, a violation of any provision of the collective agreement or of the COA.

To some extent the above conclusions also dispose of the second submission of the Company. As a matter of general principle, the Arbitrator can see no violence to the collective agreement or to the COA if the Union should take the position that it will not agree to waiving the 12 hour rule absent some form of compensation. It is not disputed by the Union that it is under an obligation to meet with the Company and discuss its request in a rational, good faith manner. Should it refuse to meet with a local Company officer to hear his or her submissions as to why compensation is inappropriate, or why an alternative arrangement is preferable, it would in all likelihood violate the process contemplated under the NOTE to clause 6.1(2). That kind of intransigence, however, is not demonstrated in the material before the Arbitrator with respect to Buffalo, Toronto-Niagara Falls or Brent. All three locations involved extensive discussion and correspondence between the parties, and the Arbitrator cannot find that the Union has in some manner violated its duty to deal with or consider the requests of the Company.

Do these findings mean that the Company is without protection when there are legitimate reasons to seek relief from the 12 hour rule? The answer to that question depends, in part, upon the interpretation of clause 18 of the COA. It is necessary to deal with that issue, as it was intrinsic to the position of the Union in the argument of the case, and it arises directly in **CROA 2283**, argued concurrently.

The Union maintains, as a preliminary matter, that where the negotiations under the NOTE to clause 6.1(2) lead to impasse there is no further avenue of discussion or redress and the Company is obliged to respect the 12 hour rule, regardless of the cost which that might involve. Its Counsel submits that the 12 hour rule was a cornerstone aspect of the COA, gained by making substantial concession to the Company in respect of the abolishment of positions and future savings in the use of crews on a conductor only basis. He refers the Arbitrator to the minutes of the negotiation of the COA which reflect the expressed concern of Union representatives with respect to the protection of the 12 hour rule and what the Union characterizes as assurances given by Company representatives in that regard. On the basis of those representations the Union argues that the Company is estopped from asserting the position which it takes in these proceedings. Its Counsel stresses that the Company knew and accepted the cost of deadheading which would be unavoidable under the new COA. It submits that its representations included indications that it would alter

train schedules and make such other administrative changes as would be necessary to protect the 12 hour rule, and that in the context of those representations its present position, which the Union characterizes as an attempt to undermine the general integrity the 12 hour rule, must be estopped.

With respect to the application of clause 18 of the COA, Counsel for the Union relies upon the strict interpretation of the language of sub-paragraph 18.1(1). He submits that the language of that provision contemplates the referral to the dispute resolution mechanism, including arbitration under sub-paragraph (5) disputes as to the merits of establishing only assignments, pools, sets of runs, spareboards and furlough boards. The Union states that those heads of dispute are the only ones which can go to interest arbitration. Its Counsel submits that the reference to "local arrangements" appearing in sub-paragraph (1) of clause 18.1 limits that part of the disputes procedure to disagreements with respect to their administration. In other words, in the submission of Counsel for the Union, the parties have provided a limited form of interest arbitration as relates to impasses reached in respect of establishing assignments, pools, sets of runs, spareboards and furlough boards. Should the parties be unable to agree on those issues they may be referred to arbitration under sub-paragraph (5). However, he submits that local arrangements concerning the Company's request for relief from the 12 hour rule must be negotiated between the parties, and it is only after an arrangement is negotiated and a dispute arises as to the administration of that arrangement that recourse may be had to the disputes procedure in clause 18.

I turn to consider the merits of that submission. Before examining the provisions of the COA, however, it is instructive to briefly review certain of the evidence concerning the negotiation of the COA, particularly as relates to the 12 hour rule and the cost that it might require the employer to incur. The principal evidence in this regard relates to a meeting between officers of the Union and the Company held at Oakville, Ontario on June 26, 1991. The importance of the 12 hour rule to the membership is clearly reflected in the minutes of that meeting.

It is evident that the Company, which was eager to obtain the Union's agreement to the COA, was made aware that the 12 hour rule was of paramount concern to the rank and file, and was a critical factor in the possibility of the negotiations succeeding. By the same token, the Union officers were aware of the potential cost that the 12 hour rule would involve to the Company, particularly as regards deadheading. These realities are reflected in the following portion of the minutes:

> D. Glass (344) questioned CN officers regarding the abuse of the 12-hour held away clause at away-from-home terminals. This might involve crews being placed on duty before trains are ready and the Company absorbing the additional cost, resulting in crews taking rest on the road.
>
> B. Hogan committed that the 12-hour time frame would be honoured with crews deadheaded before laying over at away-from-home terminals longer than 12 hours.
>
> R. Beatty (1508) outlined problems the crews are encountering with layover times at Armstrong and Brent.
>
> W. Metcalfe assured the Committees that the commitment to have employees deadheaded from away-from-home terminals prior to the expiration of 12 hours is solid. B. Hogan indicated to the Committees that a survey on Armstrong layovers indicates that the problem was not as serious as originally thought. The survey indicated that 14 to 31 percent of crews were laying at Armstrong over the 12 hour time frame. There was, however, no survey done on Brent and problems there were not addressed. W. Metcalfe asked that this type of situation not be judged on past performance, that the commitment would be honoured to send crews out of away-from-home terminals before they had laid over 12 hours. The Company recognizes that there will be deadheading of crews and it is willing to enter into clear, concise language to address this issue. The Company outlined that local agreement and flexibility is a very important part of this whole subject.

There can be little doubt, as the above passage indicates, that both parties were well aware of the potential cost to be incurred in relation to deadheading if the 12 hour rule was to be respected, and that respect for the 12 hour rule a point of critical concern for the Union officers and their members. The Arbitrator deems it important to bear that reality in mind when construing the language of clause 18 of the COA. I am satisfied that there are ambiguities in the language of clause 18.1(1) which justify recourse to extrinsic evidence of that kind.

For the purposes of clarity I deem it appropriate to repeat the text of clause 18.1(1) of the COA:

18.1 A new article is in incorporated into Agreement 4.16 to read:

> **(1)** Any dispute or disagreement concerning the establishment and regulation of assignments, pools and sets of runs, spare boards, furlough boards and the administration of such local arrangements as set out herein shall be processed in the manner set out herein.

A review of the COA discloses that the parties did make specific provision for the local negotiation of a number of things. The involvement of local union officers in the establishment of assignments, pools and sets of runs is reflected in the language of clause 7.1(1) of the COA, which is as follows:

> **7.1** In respect of through freight service and SPRINT train operation only, the provisions of Article 27 (Crew Runs) of Agreement 4.16 are superseded by the following:
>
> **(1)** In through freight service, assignments, pools or sets of runs will be established and regulated as locally arranged between the Local Chairperson of the Union and the proper officer of the Company. Such local arrangements will be consistent with the provisions of this Clause 7.

The same is found in respect of the establishment of spareboards and furlough boards. Clause 14.2(1)(b) deals with the regulation of spareboards in the following terms:

> **14.2** Paragraph 56.7 of Article 56 of Agreement 4.16 is superseded by the following:
>
> **(1)** Subject to operational requirements and except as provided by paragraph 56.5 of Article 56 of Agreement 4.16, the Company will regulate the number of employees on the road, yard or joint spare boards and, when spare boards are regulated, the Local Chairperson or delegate will be notified of the particulars at the time of regulation, except:
>
> ...
>
> **(b)** The earnings specified for the regulation of spare boards will not be construed as the maximum earnings which employees will be permitted to make. It is acknowledged that spare boards are, generally, regulated, in consultation with the Local Chairperson, in a manner that tends to allow for earnings closer to the maximum permissible rather than the minimum permissible and that, where practicable, this manner of regulation shall be maintained. However, it is recognized by all concerned that, in certain situations, earnings cannot practicable be maintained above the guarantee level; such cases should be limited to situations where the operation or the terms of the collective agreement make it impracticable to avoid.

Similarly, the operation of furlough boards, established in clause 15.1(6) also contemplates the negotiation of local terms with the local chairperson of the Union. Sub-paragraph 6(a) requires the bulletining of furlough board positions to protected freight employees at the change of time table, while sub-paragraph (b) provides for the election to be made by those employees. sub-paragraph (c) of clause 15.1(6) then goes on to provide as follows:

> **15.1 (6) (c)** Positions on the furlough board advertised and bid for in accordance with paragraphs (a) and (b) will be filled as locally arranged between the proper officer of the Company and the Local Chairperson. When bid for, such positions will be assigned on the basis of brakemen's seniority provided such employees are not required elsewhere at the terminal. If there are insufficient applications, the junior protected freight employee will be assigned.

Additionally, sub-paragraph (9) of the same provision reads as follows:

> **15.1 (9)** Local arrangements will be established between the Local Chairperson and the proper officer of the Company to allow for the use of employees on the furlough board on a tour of duty basis in the event the spare board is exhausted. Such arrangements will include a mechanism to reduce the furlough board guarantee by 1/20th [i.e., the amount set out in

> sub-paragraph (2)(b) of this Clause 15] for employees who are not available in accordance with such local arrangements.

It is against the background of the foregoing provisions that the language of clause 18.1(1) must be understood. The parties, who are sophisticated in the ways of collective bargaining and the complexity of special agreements, have plainly established three categories of dispute to be dealt with under that provision: the establishment of assignments, pools and sets of runs, spareboards and furlough boards constitutes the first kind of dispute identified for possible referral to the disputes procedure. The second is the regulation of those activities. The third and final type of dispute which may be referred to the disputes procedure is "... the administration of such local arrangements as set out herein ...".

It is significant, in the Arbitrator's view, that the clause makes no reference to disputes relating to the establishment of all local arrangements contemplated within the COA. On the contrary, the issue of establishment is expressly restricted to the enumerated heads of assignments, pools and sets of runs, spare boards and furlough boards. As noted above, these all involve the negotiation of terms with a local chairperson. The relief against the 12 hour rule also involves negotiation with the local chairperson, in certain limited circumstances described in clause 6. There is, however, no express provision to be found within clause 18.1(1) with respect to the resolution of an impasse regarding the establishment of such an exception.

At first blush this might appear to be a mere oversight. Upon careful examination of the record, as well as the provisions of the COA, however, the Arbitrator cannot come to that conclusion. The words of clause 18 appear to be carefully chosen. It is well accepted in collective bargaining that, absent clear language to the contrary, the "administration" of an agreement, including a local arrangement, means the application or interpretation of an already established agreement or arrangement. As the words within clause 18.1(1) plainly reflect, there is a significant difference between the establishment of an agreement or arrangement and its administration, once established.

The evidence respecting the negotiation of the COA referred to above substantially supports the submission advanced by the Union that the choice of words reflected in clause 18.1(1) is not an oversight, and that the agreement expressly excludes the resolution of disputes with respect to the establishment of exceptions to the 12 hour rule from the terms of clause 18.1(1) of the COA. That provision is clear in enumerating the heads of dispute which can be referred to arbitration for the purposes of establishment, that is to say resolution as to the content of the agreement by the determination of an arbitrator under sub-paragraph (5) of clause 18.1. Just as there is a difference in respect of a dispute regarding the establishment of furlough boards and, once established, their administration, there is a clear difference in respect of the establishment of an agreement relieving from the obligations of the 12 hour rule, and the administration of such an agreement, once made. On the basis of the language of clause 18.1(1), therefore, the Arbitrator must conclude that the Union is correct in its position that a failure to reach agreement in that regard cannot, absent the specific agreement of the parties, be brought forward for arbitral determination under the terms of clause 18.1(5) of the COA.

For the foregoing reasons the Arbitrator is satisfied that the position of the Union with respect to the non-application of clause 18.1(1) to unresolved disputes with respect to requests for local relief from the 12 hour rule is correct. Given the very precise wording of that provision, if the parties had intended to include the establishment of local exceptions to the 12 hour rule in respect of employees held away from their home terminal within the category of matters referable to arbitration, such as assignments, spareboards and furlough boards, they would have done so expressly. The absence of any such language leads compellingly to the conclusion that it is only disputes respecting the administration of such arrangements, once they are voluntarily made, which can be resolved through the application of clause 18.1(5) of the agreement. In the Arbitrator's view, however, the result herein does not mean that the Company will unreasonably be held to ransom in exceptional cases where local peculiarities indicate the need for relief from the 12 hour rule. Firstly, the record indicates that there have been instances where local arrangements have been reached which are mutually acceptable. In the presentation of the instant case, the Union indicated its willingness to accept a 14 hour layover time at Buffalo, without compensation, subject only to the condition that deadheading be by taxi. Additionally, there may be circumstances in which the Company will have flexibility within its own decisions respecting the scheduling of trains so as to reduce the frequency of deadheading. The Conductor Only Agreement represents substantial productivity gains for the Company, as well as certain hard won protections for the Union and its members. It is far from clear at this early stage that it cannot be viably administered in the best interests of both parties over the long term.

The only remaining issue to be dealt with is the submission of the Union that the Company has failed to establish, in any of the three cases, that there are local peculiarities which justify invoking the provision for local negotiation. While the dispositions of the issues dealt with above may arguably render that issue somewhat academic, a brief comment is warranted. In the Arbitrator's view there is no basis upon which to conclude that the circumstances disclosed at Buffalo and at Brent do not constitute local peculiarities of the kind contemplated in the NOTE to clause 6.1(2) of the COA. The peculiarities existing at Buffalo, New York are themselves referred to within the body of the NOTE, and it is difficult to understand how any other conclusion can be arrived at with respect to that location. It is common ground that train movements in and out of Buffalo are beyond the Company's control, as its trains are handled by Conrail and subject to U.S. laws and regulations which limit its flexibility. As regards Brent, it is an isolated location, inaccessible by road for a substantial portion of the year. In the Arbitrator's view it is difficult to distinguish the circumstances at that location from those that obtain at Armstrong. The reference to Armstrong in the language of the NOTE with clause 6 must be taken as an indication of the parties' agreement that geographic isolation is the kind of local peculiarity that triggers the right to negotiate relief from the 12 hour rule contemplated under that provision.

I have greater difficulty, however, with the position of the Company with respect to its assertion that the Niagara Falls-Toronto runs are constrained by local peculiarities. Its position in that regard seems to be based on the indirect impact of the circumstances at Buffalo, to the extent that the layover of Niagara Falls crews at MacMillan Yard may be influenced by the arrival of trains from Buffalo, which in turn depend on local peculiarities at that location. In the Arbitrator's view that kind of relationship is too remote, and is beyond the contemplation of the direct impact of local peculiarities contemplated within the body of the NOTE. Clearly in the linear and integrated operation of a railway events at one location may have ripple effects upon another. That, however, does not, absent clear language to the contrary, bring the circumstance within the contemplation of the very specific and narrow "local operational peculiarities" contemplated within the language of the NOTE to clause 6.1(2) of the COA.

For all of the foregoing the grievance must be dismissed.

September 11, 1992

(Sgd.) MICHEL G. PICHER
ARBITRATOR