CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2906

Heard in Calgary, Wednesday, 12 November 1997

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

DISPUTE:

Violation of article 26(c) of the current collective agreement.

JOINT STATEMENT OF ISSUE:

On February 12, 1997, Locomotive Engineer Florence was called in TCS, Lethbridge to Alyth. Locomotive Engineer Florence was then cancelled due to the fact that there were only eight hours, twenty-one minutes remaining on his government regulated 18-hour clock.

The Union contends Locomotive Engineer Florence was within the time guidelines set out by Canadian Pacific Railway's policy of February 18, 1994.

The Company's position is that Locomotive Engineer Florence required twelve hours on his 18-hour clock in order to take a call.

The Brotherhood requests that Locomotive Engineer Florence's claim for a 50 mile run-around under article 16(c) be placed in line for payment.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) D. C. CURTIS	(SGD.) K. E. WEBB
GENERAL CHAIRMAN	FOR: GENERAL MANAGER, PRAIRIE DISTRICT

There appeared on behalf of the Company:

K. E. Webb	– Manager, Labour Relations, Calgary
G. S. Seeney	– Manager, Labour Relations, Calgary
R. M. Smith	– Labour Relations Officer, Calgary
R. V. Hampel	– Labour Relations Officer, Calgary
J. H. McFarlane	– Manager, Yard Operations, Calgary

And on behalf of the Council:

J. Flegel	– Senior Vice Chairman, Saskatoon
D. C. Curtis	– General Chairman, Calgary
R. Lewis	– Local Chairman, Revelstoke
R. Cameron	– General Secretary/Treasurer, Revelstoke
B. Knowles	– Local Chairman, Lethbridge

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that by a federal order dated August 26, 1993, made pursuant to paragraph 31(9)(b) of **Railway Safety Act**, the Canadian National Railway Company and VIA Rail Canada Inc. were directed as follows:

> I hereby order that the total on duty time for all operating employees, whether or not in covered service, shall not exceed eighteen hours in any twenty-four hour period and that the on duty time in any single tour of duty shall not exceed twelve hours.

It is not disputed that, by voluntary compliance, the Company has also undertaken to honour the Federal directive, it being evident that the failure to do so would result in a similar order in respect of its own operations. As a consequence, the Company promulgated general operating instructions consistent with the regulatory requirements of the **Railway Safety Act** referred to above. Further, shortly after what is referred to as the "max hours" policy came into effect, in 1994, the Company established estimated times for average tours of duty on a number of subdivisions, for the purposes of general guidance in the calling of employees to duty. A bulletin issued to all employees on February 18, 1994 included the following statement:

> Employees who have less time remaining than the time listed in the table, will not be called.

In addition to the estimated running times, the Company is compelled to calculate deadheading time in the calculation of an employee's maximum hours, where deadheading precedes active on duty time.

By the Company's estimate the assignment which was not given to Locomotive Engineer Florence would, in normal circumstances, have required 8 hours and 30 minutes to complete. As the grievor then had 8 hours and 21 minutes remaining on his 18-hour clock, the decision was made to assign the trip to Locomotive Engineer Maniquet, who had 10 hours remaining on his 18-hour clock.

The Council submits that the Company could not depart from the first-in first-out principle contained within the collective agreement for the purposes of calling the grievor, as provided in article 26(a) and article 5(b)(7) of the collective agreement, in the circumstances disclosed. The Arbitrator cannot agree. It is well established that the parties to a collective agreement cannot negotiate terms in their collective agreement, or apply and administer such terms, in a manner that is inconsistent with public law, be it statute or regulations. In the case at hand it is obvious that the first-in first-out calling provisions of the collective agreement must be rationalized and applied in a manner that is consistent with the federal regulations in respect of mandatory limits on duty, which the Company has undertaken to apply. It is, moreover, significant that the Council, which obviously has an equal interest in seeing reasonable rest provisions enforced for the protection of its members, apparently took no exception to the Company's bulletin of February 18, 1994 which indicated that employees are not to be called should they have insufficient time remaining on their on duty clocks to be able to handle the assignment in question.

Article 26(c) of the collective agreement, which is the basis of this claim, provides as follows:

> **ARTICLE 26 - HANDLING MEN**
>
> **(c)** If run around avoidably engineer will be entitled to 50 miles at minimum passenger rate.

Even on the language of this provision the Arbitrator could not sustain the grievance. Clearly the Company, which must maintain its operations so as to respect the law and regulations which govern railroading, could not, in practical terms, avoid running around Locomotive Engineer Florence in the circumstances disclosed. Nor, in the Arbitrator's view, was it compelled to call him merely because there was some chance that he might, by gratuitous circumstance, be able to accomplish the assignment within the time remaining on his clock. A miscalculation in that regard would obviously have put the Company to considerable dislocation and expense, a risk which in my view goes beyond the standard of avoidability contemplated within article 26.

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

November 25, 1997

(signed) MICHEL G. PICHER
ARBITRATOR