CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2995

Heard in Calgary, Tuesday, 10 November 1998

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of employees on the Lakehead Division Seniority Territory.

EX PARTE STATEMENT OF ISSUE:

By way of letter dated November 18, 1996, the Company unilaterally changed the grievors' work hours and days of service. The Brotherhood disagreed with the terms of the November 18th letter and requested that it be rescinded. This was denied.

The Union contends that the changes implemented as a result of the initiative outlined in the Company's letter of November 18, 1996 are in violation of sections 2.2, 4.1, 5.1, 5.3-5.9, 6.1-6.3, 8.6, 8.7, 9.1, 13.13(a), 14.1, 14.2, 15.1 and 26.17 of agreement no. 41.

The Union requests that: **1.)** The letter of November 18, 1996 be rescinded; **2.)** All regularly assigned permanent employees affected by the change be returned to their respective bulletined positions immediately; **3.)** All affected employees be compensated for all regular and overtime hours lost as a result of this matter; **4.)** All affected employees be compensated at the overtime rate for all Saturdays and Sundays worked; and **5.)** all affected employees be compensated at the overtime rate for work done on Saturdays and Sundays by junior employees.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

E. J. MacIsaac	– Labour Relations Officer, Calgary
R. M. Andrews	– Manager, Labour Relations, Calgary
J. Dragani	– Labour Relations Officer, Calgary
D. E. Freeborn	– Labour Relations Officer, Calgary

And on behalf of the Brotherhood:

D. W. Brown	– Sr. Counsel, Ottawa
P. Davidson	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
Wm. Brehl	– General Chairman, Revelstoke
H. Heinrichs	– General Chairman,
H. J. Thiessen	– System Federation General Chairman (ret'd), witness

AWARD OF THE ARBITRATOR

The facts in relation to this dispute are not contested. By notice dated November 18, 1996 the Company implemented changes to work schedules affecting a number of employees in the Lakehead Region. It is common ground that the Company's action was taken in anticipation of the forthcoming winter, as a means of ensuring coverage to meet winter emergencies on the Keewatin, Kaministiquia and Ignace Subdivisions by the use of employees on regular tours of duty, as opposed to overtime. To meet its needs the Company's notice changed the work days and hours of service for eight leading track maintainers and track maintainers. Two employees from crews stationed at Dryden, Ontario were rescheduled to work from 07:30 to 15:30 on Saturday, Sunday, Monday, Tuesday and Wednesday. Three employees from Kenora crews were rescheduled to work the same schedule and three employees from Ignace were rescheduled to work 22:00 to 06:00 Tuesday, Wednesday, Thursday as well as 08:00 to 16:00 Saturday and Sunday.

While the Brotherhood's contention raises a number of articles of the collective agreement, the thrust of its submission to the Arbitrator is that the changes implemented by the Company for the winter season commencing Friday, November 22, 1996 are in violation of section 5.1 of the collective agreement, which deals with the scheduling of rest days, providing for preference to be given to Saturday and Sunday or Sunday and Monday. It further alleges a violation of section 2.2 of the collective agreement which governs the starting time of regular day shifts. The Brotherhood also challenges the Company's decision as being in violation of the bulletining provisions of section 8.6 of the collective agreement, as well as the overtime pay provisions for work on assigned rest days, contained in section 9.1

The Company denies any violation of the substantive provisions of the collective agreement, and submits that the action which it took in respect of changing the starting times of certain of the employees affected is contemplated by the provisions of section 2.2 of the collective agreement, as well as appendix B-2.

The relevant provisions of the collective agreement read as follows:

> **2.2** Regular day shifts shall start at or between 6:00 a.m. and 8:00 a.m.
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> **2.3** Notwithstanding the provisions of Clause 2.2, the starting time for employees not living in boarding cars or other mobile units may be established or changed to meet the requirements of the service. When the starting time is to be changed, forty-eight hours' advance notice will be given to the employees affected and, where practicable, the notice will be posted promptly in a place accessible to such employees. The appropriate Local Chairman and the General Chairman shall be advised by mail as soon as practicable following any change in starting times and in any event, within 72 hours of the time the change in starting time became effective.
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> **2.4** Notwithstanding the provisions of Clause 2.2, the starting time for employees living in boarding cars or other mobile units, or for employees who would ordinarily be accommodated in boarding cars or other mobile units, may be established or changed to meet the requirements of the service. When the starting time is to be changed, as much advance notice as possible, but not later than at the completion of the previous tour of duty, shall be given the employees affected and, where practicable, the notice will be posted promptly in a place accessible to such employees. The appropriate Local Chairman and the General Chairman shall be advised by mail as soon as practicable following any change in starting times and in any event, within 72 hours of the time the change in starting time became effective.
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> (See letter dated March 13, 1970, Appendix B-2)
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> **5.1** The rest days shall be consecutive as far as is possible consistent with the establishment of regular relief assignments and the avoidance of working an employee on an assigned rest day. Preference shall be given to Saturday and Sunday and then to Sunday and Monday. In any dispute as to the necessity of departing from the pattern of two consecutive rest days or for granting rest days other than Saturday and Sunday or Sunday and Monday, it shall be incumbent on the Railway to show that such departure is necessary to meet operational requirements and that otherwise additional relief service or working an employee on an assigned rest day would be involved.

8.6 The term "work week" for regularly assigned employees shall mean a week beginning on the first day on which the assignment is bulletined to work, and for laid off or unassigned employees shall mean a period of seven consecutive days starting with Monday.

9.1 Employees required to work on regularly assigned rest days, except when these are being accumulated under Clause 5.2, shall be paid at the rate of time and one-half. For overtime work, the senior employee regularly performing the work will be called. In cases of urgency (train delay) requiring BTMF forces, a qualified employee, who can respond to the service requirement at least ten (10) minutes sooner than the senior employee, will be called.

APPENDIX B-2
THE RAILWAY ASSOCIATION OF CANADA

Montreal, Que.
March 13, 1970

Mr. C. Smith
Vice-President
Brotherhood of Maintenance of Way Employees
115 Donald Street
Winnipeg, Manitoba

Dear Mr. Smith:

Referring to your discussion today with Mr. J.C. Anderson, Vice-President, Industrial Relations, CP Rail, in which you expressed the concern on the part of some members of your General Committee as to the manner in which the Railways intend to apply the new starting time rules agreed to in the Memorandum of Settlement signed on February 18, 1970.

We are prepared to advise the line officers that the purpose of the flexibility in starting times is to permit them to establish or adjust starting times which will enable a particular work force to function in the manner that will achieve higher productivity. It was realized by all concerned at the negotiations that maintenance and construction work on the Railways' facilities must, to the extent possible, be performed at times when conditions permit the undertaking to be progressed in the most efficient and productive manner and the purpose of the rule is to meet these conditions. There is no intention whatever that starting times be changed as you put it to suit the personal desire or convenience of any Company officer. Starting times will not be changed except where it is necessary to do so to obtain proper productivity and efficiency in the work force.

The foregoing is consistent with the application of starting time flexibility in the other collective agreements in the railway industry.

Yours truly,

(signed) D.M. Dunlop
Chairman, Operating Committee

(signed) K. L. Crump
Executive Secretary

There is little doubt as to what the Company intended to do by the notice giving rise to this grievance. By its own account, the intention was to avoid the working of overtime in the eventuality of emergencies arising by reason of winter conditions. Such factors as snowfall and abnormally low temperatures common to the geographic area concerned have traditionally required the Company to assign employees on an overtime basis to deal with various kinds of maintenance and repair problems including snow removal, the cleaning out of snow and ice from switches and the detection and replacement of broken rails at times when employees would not otherwise be regularly scheduled. By the Company's own account, not challenged by the Brotherhood, during the winter of 1995/96, the year preceding the rescheduling which is the subject of this grievance, there were some fifteen overtime call outs on either Saturday or Sunday on the Ignace Subdivision, over the fifteen week period between November 19, 1995 and February 24, 1996. By the Company's estimate there were only three weekends in which no overtime call outs were necessary. It submits that experience proves that work of an emergency nature, including the replacing of broken rails and joint bars, or cleaning switches, is predictable and inevitable during the winter months on the territory. On

that basis it submits that it is appropriate for the Company to reschedule the rest days of some eight employees on the three subdivisions over the winter period to deal with conditions which could be reasonably anticipated.

The Brotherhood takes issue with the interpretation which the Company brings to the language of Appendix B-2. It appears that during the open period of the 1995 round of negotiations for the renewal of the collective agreement the Company issued two letters to the Brotherhood asserting its position on its right to change hours of service. In a letter to the System Federation General Chairman, Mr. J.J. Kruk, the Company's Director, Labour Relations, D. Cooke, wrote on March 20, 1995 that the Company would be applying the principles of the second paragraph of the letter of March 13, 1970. The Brotherhood's System Federation General Chairman responded on May 1, 1995, stressing that the purpose of Appendix B-2 was to provide flexibility in the production gangs or extra gangs normally employed during the summer season, and was not intended to apply to the scheduling of section forces. In his letter of response dated May 17, 1995 Mr. Cooke comments, in part, as follows:

> You are correct that the application of this letter, over the past 25 years, has been limited within the context of Section forces. It was for that reason that the Company first sought to openly address this work rule with the Union during negotiations. When it became apparent, however, that such an understanding would not be possible, the Company elected, during the open period of the collective agreement, to serve notice on the BMWE that in the future, it would be applying its right, as per the strict wording of Appendix B-2, to "enable a particular work force to function in the manner that will achieve higher productivity."

At the hearing the Brotherhood called as its witness Mr. H.J. Thiessen, who gave evidence with respect to the origins of appendix B-2. Mr. Thiessen, who was previously involved as the Brotherhood's representative in relations with the Company, relates that he was party to the discussions and negotiations which lead to the issuing of appendix B-2. According to his evidence, which is unchallenged before the Arbitrator, the issue which gave rise to the appendix was the use of outside contractors to perform work on Saturdays and Sundays which otherwise would have been performed by construction and maintenance gangs during the summer season. He stresses that the parties clearly understood that the letter was intended to apply to maintenance gangs only, and was not to have any application in respect of track forces.

As is apparent from the letter of Mr. Cooke, reproduced in part above, and the submissions of the Company's representatives at the arbitration hearing, the Company does not substantially deny that for many years appendix B-2 has been applied to construction and maintenance gangs, and not to track forces. The position put forward during the course of the open period is tantamount to asserting a reversion to the strict language of the appendix, as well as of the provisions of the collective agreement, ostensibly to put the Brotherhood on notice that the Company's practice in relation to the scheduling of track forces would in the future be subject to change, presumably to avoid an assertion of estoppel by the Brotherhood.

I turn to consider the merits of this dispute. This Office has had occasion in the past to consider similar conflicts, and to interpret clause 5.1 of the collective agreement which is at the heart of the Brotherhood's grievance. The prior awards of this Office were reviewed in **CROA 2464**, a case involving the same parties as the instant grievance. In that case the Company sought to justify the rescheduling of days off to days other than Saturday and Sunday or Sunday and Monday by reason of a general increase in the flow of traffic. This Office allowed the grievance, finding that the circumstances disclosed did not satisfy the onus upon the railway to show the necessity of the change for the purposes of operational requirements as contemplated within clause 5.1. In that award the Arbitrator reviewed prior cases **CROA 700, 951, 1008, 1061** and 1958 and commented as follows:

> In the Arbitrator's view there is a common theme running through all of the prior decisions relating to the interpretation and application of the language of article 5.1. Arbitrators in this Office have found that the onus which the Company bears to justify a departure from the scheduling of rest days on either Saturday and Sunday or Sunday and Monday is discharged where a temporary and/or urgent circumstance necessitates such a departure, and where the Company would otherwise be compelled to incur the additional cost of relief or overtime assignments.

The Arbitrator further commented upon the nature of the burden established under clause 5.1, and rejected the proposition that the factors of productivity and profitability, standing alone, necessarily satisfy the onus contemplated. In that case, which dealt with the scheduling of maintenance gangs, the Arbitrator commented as follows:

> The logic of the Company's position is, of course, understandable. It does not appear disputed that it is to the employer's advantage to have the road maintenance gangs working on days when traffic is lighter, and to minimize the disruption of traffic on days of heavier train frequency by scheduling their time off on those days.
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> On a close review of the data, however, and of the history of the application of article 5.1, the position of the Company appears less compelling. Firstly, the differences in traffic flows as between Saturdays and Sundays are not, in all cases, dramatic. **…**
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> A second, and in the Arbitrator' view still more significant, factor militates against the position advanced by the Company. As noted above, it is common ground that the "ten and four" schedule has been in place, by mutual agreement, since 1986. It is agreed that from 1986 to the present the comparative traffic flows, on a day to day basis over the week, have remained consistent. In other words, the difference in traffic on any given subdivision as between Saturday and Sunday, or as among any other days of the week, has been consistent year after year. **…**
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> It may be true that the Company's convenience and productivity would be better served by never scheduling days off for work gangs on Sundays and that efficiencies would be maximized by always scheduling the days off of the work gangs on Fridays and Saturdays. As is evident from the text of article 5.1, however, the Company's natural desire for efficiency and productivity is not the sole consideration governing the scheduling of days off. Significantly, the language of the provision makes it clear that the parties agree that Sundays off are a matter of primary importance, and that any departure from a schedule which involves Sunday as a day off must be shown, by clear and cogent evidence, to flow from a necessity to meet operational requirements. In the Arbitrator's view the exceptional provision for the necessity to meet operational requirements involves the kind of irregular circumstances noted in the prior decisions of the Office, reviewed above. Schedules designed solely to permit better, more efficient or more profitable ways of operating are a legitimate employer concern, but they do not, by that reason alone, satisfy the conditions of article 5.1 of the collective agreement.
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> In the Arbitrator's view the material presented does not satisfy the onus upon the Company of establishing that the departure from the scheduling of days off on either Saturday and Sunday or Sunday and Monday is "necessary to meet operational requirements" as that phrase is understood and has been interpreted by this Office within the context of article 5.1 of the collective agreement. **…** In the circumstances the Arbitrator has some difficulty in understanding how there has been any substantial change which would, in any meaningful way, justify a departure to meet operational requirements. In my view, absent clear and unequivocal language in the text of article 5.1 of the collective agreement, the mere increase in the flow of traffic, spread evenly over all days, is not the kind of change which would justify a departure necessary to meet operational requirements within the meaning of the article.
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> … For the foregoing reasons the Arbitrator is satisfied that the Company has not discharged the onus of justifying the departure from either Saturday and Sunday or Sunday and Monday as scheduled days off within the contemplation of article 5.1 of the collective agreement, and on that issue the grievance must succeed.

How do the foregoing principle apply to the case at hand? Firstly, it is not disputed that the winter which was contemplated in November of 1996 could be expected to be no better and no worse than all winters in recent memory in the same geographic area. If ice storms, snowfalls and extremely cold conditions had been normal in years prior, they could be expected to recur in the 1996-97 winter.

The evidence also discloses that for many years the Company has coped with winter conditions without changing the regular days off of section forces at Dryden, Kenora and Ignace. It has, in the face of winter conditions, resorted to calling out employees on an overtime basis to deal with such exigencies as might arise. To be sure, it might have saved itself overtime costs had it been able to change the regular hours of part of its section forces to be on duty during weekends. That it did not do so consistently over a period of many years speaks, I think, to the mutual expectation and understanding of the parties to the effect that the advent of winter conditions was not considered to be a condition sufficient to invoke a departure from the preferential scheduling of days off to Saturday and Sunday or Sunday and Monday, to meet operational requirements. To be sure, as reflected in **CROA 1061**,

when the Company is actually struck by a particularly heavy burden of snow removal, extended over several weeks, the temporary rescheduling of days off to meet that urgency could properly justify a change in schedule. There is, however, a substantial difference between an after the fact adjustment, as disclosed in that case, and the speculative reorganization of days off in anticipation of a change of season, in a manner unprecedented over decades of practice. Reduced to its basic elements, the decision of the Company in the instant case is distinguishable from that discussed in **CROA 1061**. It is, in essence, a realisation that it is less costly for the Company to schedule a certain number of employees to work their regular hours on Saturday, Sunday and evenings during the winter months, regardless of what conditions may actually prevail as the winter unfolds. While the Arbitrator can understand the cost efficiency which motivates the Company's actions, it is nevertheless difficult to reconcile what it has done with the language of clause 5.1, and the interpretation which this Office has given to its provisions through a number of awards, culminating in **CROA 2464**.

To use the words of the foregoing award, can it be said that the normal advent of winter is a "temporary and/or urgent circumstance [which] necessitates such a departure" as to deprive certain employees of the preference of consecutive days off on Saturday and Sunday or Sunday and Monday? When that question is addressed the practice of many decades, whereby the Company has not rescheduled the regular days off of employees by reason only of the approach of winter, becomes a significant piece of evidence. It would appear that the expectation of the parties has been that, consistent with **CROA 1061**, the Company can indeed reschedule regular days off in the event of a winter crisis, where, for example, a backlog of snow clearance might justify such an adjustment over a period of a few weeks. However, it is an entirely different matter, which departs from the concept of an urgent circumstance, to simply reschedule employees to regular hours or days of duty on Saturday and Sunday as a form of insurance against overtime in the event of winter inclemencies which may or may not occur.

Nor does the Arbitrator see in the language and history of appendix B-2 justification for the Company's approach, notwithstanding its purported notice to the Brotherhood during the open period. The Company's own admission tends to confirm the evidence of Mr. Thiessen that in its inception the letter of March 13, 1970 was intended to address the circumstances of construction and maintenance gangs, and not to deal with the scheduling of days off for section forces. While it is arguable that the strict wording of the letter could be bent to the Company's interpretation, the Arbitrator would be inclined to conclude that there is a latent ambiguity in the language of the letter as regards the meaning of "maintenance and construction work", in respect of which extrinsic evidence, such as the testimony of Mr. Thiessen, is admissible for the purposes of clarification. I am satisfied, on the basis of his evidence, that the mutual intention of the parties has always been to apply appendix B-2 to maintenance and construction gangs, and not to section forces. In that circumstance the unilateral declarations of the Company to the contrary in the open period of 1995 are of no significance. Further, the parenthetical reference to appendix B-2 which appears at the conclusion of clause 2.4, which plainly deals with work gangs, confirms the evidence of Mr. Thiessen to the effect that appendix B-2 was intended to apply to those employees.

In **CROA 2464** it was made clear that it is incumbent upon the Company to show actual "irregular circumstances" of the kind noted in the prior awards. The "temporary and/or urgent circumstance" contemplated in the interpretation of this Office plainly involved an actual circumstance, and not a speculative or undefined happening which might or might not be realized. Following the issuing of **CROA 2464** the parties renewed the language of clause 5.1 without any amendment. In that circumstance they must, I think, be taken to have adopted the interpretation of this Office with respect to the limitations upon the Company's discretion under the provisions of that clause. They must be taken to have accepted the following comment from that award:

> Schedules designed solely to permit better, more efficient or more profitable ways of operating are a legitimate employer concern, but they do not, by that reason alone, satisfy the conditions of article 5.1 of the collective agreement.

On the foregoing basis the Arbitrator is satisfied that the grievance, insofar as it relates to the rescheduling of the days off of the eight employees to work Saturday and Sunday as part of their regular schedule is in violation of the collective agreement.

I turn next to consider the Brotherhood's allegation that the scheduling of three employees of the Ignace crews to work 22:00 to 06:00 Tuesday, Wednesday and Thursday is in violation of the collective agreement. I have more difficulty with this aspect of the Brotherhood's submission.

It is of course true that clause 2.2 establishes the normal regular day shift as starting between 06:00 and 08:00 hours. It is equally clear, however, that clause 2.3 makes provision for different starting times, subject only to the

Company providing of the proper notice as contemplated therein. By the Brotherhood's own submission, at paragraph 40 of its brief to the Arbitrator, clause 2.3 deals with section forces. I cannot, therefore, escape the conclusion that the parties intended the Company to have the discretion to change the starting time of the regular shift of section forces, as expressly contemplated within clause 2.3. The only qualification is that such changes are "… to meet the requirements of the service." In the Arbitrator's view this is not a right which is given the same level of protection as preferential access to consecutive days off on Saturday and Sunday, or alternatively Sunday and Monday, as articulated within clause 5.1 of the collective agreement. Nor, in my view, can the Brotherhood successfully plead the bulletining provisions of the collective agreement, to the extent that the matter of hours of service is directly addressed within section 2 of the collective agreement, which, by the plain terms of clause 2.3, gives to the Company the discretion in respect of section forces to change the start times of regular shifts to meet the requirements of the service. I am satisfied that in the instant case meeting the requirements of the service is what prompted the Company's decision to change the start times of two employees from the Ignace BTMF crews to 22:00 to 06:00 on Tuesday, Wednesday and Thursday. The exercise of the Company's discretion was, in that circumstance, within its prerogatives preserved under section 2.3 of the collective agreement.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator finds and declares that the Company violated clause 5.1 of the collective agreement by its letter of November 18, 1996, to the extent that it purported to assign Saturday and Sunday as regular work days for the employees on whose behalf this grievance is filed. As it is not disputed that the employees in question have in fact been returned to their normal bulletined and regularly assigned positions, no further direction is necessary in that regard. The Arbitrator does, however, direct that the Company compensate the affected employees for any wages and benefits lost by reason of the loss of overtime work which would otherwise have been scheduled to their benefit, and which may have been performed by junior employees on Saturdays and Sundays. Employees compelled to work on days which would otherwise have been their scheduled days off shall be compensated for such time at overtime rates. Should the parties be unable to agree on the issue of compensation, or any other aspect of the interpretation or implementation of this award, the matter may be spoken to.

November 24, 1998

(signed) MICHEL G. PICHER
ARBITRATOR