CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3524

Heard in Calgary, Wednesday, 9 November 2005

concerning

CANADIAN PACIFIC RAILWAY

and

TEAMSTERS CANADA RAIL CONFERENCE

MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Scheduling of shifts and rest days on Bulletin CA-11 (Lake Louise Mobile Crew) (file #10-537).

JOINT STATEMENT OF ISSUE:

Bulletin CA-11 advertised jobs as night shifts from 20:00 – 04:00 with Thursday and Friday as rest days. A grievance was filed.

The Union contends that: **1.)** The Company did not provide for Saturday/Sunday or Sunday/Monday as rest days as set out in article 5.1 of agreement no. 41; **2.)** The Company did not provide for "two consecutive rest days in each seven" as required by article 4.1 of agreement no. 41; **3.)** The Company violated articles 2.7, 4.1, 5.1, 5.4, 5.5, 5.7, 6.3, 8.1, 8.6 and 9.1 of agreement no. 41.

The Union requests that: **1.)** It be declared that the Company violated the collective agreement by unilaterally imposing the working hours and rest days set out in Bulletin CA-11; **2.)** The Company be ordered to reissue the bulletin in conformity with the collective agreement; and **3.)** It be ordered that all affected employees be compensated at the overtime rate for all hours worked on what should have been their regular rest days and for all hours worked on Thursdays.

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

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) WM. BREHL	**(SGD.)**
PRESIDENT	

There appeared on behalf of the Company:

M. Moran	– Labour Relations Officer, Calgary
T. Price	– Supervisor, Maintenance of Way Work Methods
S. Seeney	– Manager, Labour Relations, Calgary

And on behalf of the Union:

Wm. Brehl	– President, Ottawa
R. Tirell	– Vice-President
H. L. Helfenbein	– Director, Pacific Region,
L. G. Wilson	– Secretary/Treasurer,

AWARD OF THE ARBITRATOR

The Union grieves the bulletin issued on November 6, 1997 establishing the Lake Louise Mobile Crew. The regularly scheduled hours of the crew were established on a five-and-two schedule, working from 20:00 until 04:00 with Thursday and Friday as rest days. The Union asserts that the scheduled so established violates the provisions of article 5.1 of the collective agreement which read as follows:

> **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.

The Union claims that the circumstances disclosed do not justify a departure from the normal standard of Saturday and Sunday or Sunday and Monday as days off. Additionally, it claims that the schedule of days off violates article 4.1 of the collective agreement in that they do not encompass two full calendar days. That article reads, in part, as follows:

> **4.1** The work week for all employees covered by this agreement, unless otherwise excepted herein, shall be forty hours consisting of five days of eight hours each, with two consecutive rest days in each seven, …

This Office has had considerable opportunity to consider the provisions of article 5.1 of the collective agreement (**CROA 700, 951, 1061, 1958** and **2464**). In CROA 2464 the Arbitrator reviewed the prior jurisprudence 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.

In that case the grievance was allowed, with the Arbitrator reasoning, in part, as follows:

> 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. When the "ten and four" schedule was first agreed to in 1986 the comparable frequency of train traffic as between Saturdays and Sundays was essentially the same as it is today, and as it was at the time the Company implemented the change in scheduling on May 9, 1993. 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.

In the case at hand the Company submits that severe winter conditions in the mountain locations of the Laggan Subdivision justified establishing the schedule which is the subject of this grievance. Its representatives relate that the Company had just come off the very difficult experience of the prior winter of 1996-97, where extremely cold temperatures and abnormally heavy snows seriously interfered with operations in the mountains. Its representatives submit that because of the amount of work employees were compelled to perform, as well as the fact that many crew members left the work area to return to their homes on weekends, there was substantial difficulty encountered in covering off snow emergencies on Saturdays and Sundays by resort to overtime. As it was put by Supervisor, Maintenance of Way Work Methods, Mr. Tom Price, the initiative adopted in respect of establishing the additional Lake Louise Mobile

Crew was a form of insurance against being caught short in the event of adverse winter conditions and difficulty in scheduling employees on overtime.

The hardships of winter were previously addressed in the context of this same collective agreement provision in **CROA 2995**. In that case the Company sought to alter work schedules for employees in the Lakehead Region for the 1996-97 winter season. The award recognized that the Company's action "… was taken in anticipation of the forthcoming winter, as a means of ensuring coverage to meet winter emergencies …".

The Arbitrator allowed the grievance, striking down the Company's attempt to schedule employees with days off other than Saturday and Sunday or Sunday and Monday. The award reasoned, in part, as follows, after reviewing the jurisprudence examined in **CROA 2464**:

> How do the foregoing principles 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.
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> 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**.
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> 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.

As is evident from the jurisprudence, the onus in a case of this kind rests on the Company. It must demonstrate circumstances which substantially interfere with the Company's inability to meet operational requirements.

In the case at hand the Arbitrator can appreciate the motives which underlie the Company's submission. As explained by Mr. Price, the experience of the prior winter gave the Company some concern. According to his account, there were times when it was difficult to have regular employees at the location agree to work overtime on

Saturdays and Sundays, or in off hours, by reason of a number of factors, including their own exhaustion in light of overtime previously worked and their departure homeward from the location on weekends. In the Arbitrator's view the concerns which the Company raised are, in principle, elements which could form the basis of demonstrating an unusual circumstance which might require recourse to an alternative form of scheduling days off. In fact, however, the hard evidence before the Arbitrator in the case at hand falls short of the standard necessary.

With the greatest respect to the Company, the anecdotal recollections of a supervisor, from a time some eight to nine years removed, falls substantially short of the kind of data that would justify the Company's position. If, on the other hand, the Company could table in evidence specific figures with respect to the inability to find employees able and willing to cover the work in question on an overtime basis, presumably by reference to payroll and calling records, the necessary condition of an irregular circumstance might well be made out, so as to justify the establishing of a permanent crew with a different work schedule. However, the evidence adduced by the Company is not sufficient to establish, on the balance of probabilities, that it truly faced an inability to operate by reason of a lack of manpower by resort to overtime, so as to justify that establishing the irregular schedule was necessary to meet operational requirements, within the meaning of article 5.1 of the collective agreement. In the result the evidence before the Arbitrator does not compellingly demonstrate that the Company was unable to meet its requirements by resorting to overtime to deal with snow falls and other winter conditions. In the absence of such evidence there is little, if anything, to

distinguish the case at hand from the case considered in **CROA 2995**. For the reasons expressed in that award, and in light of the absence of specific supportive data to confirm the necessity for establishing the new schedule, the instant grievance must be allowed.

While the Arbitrator is satisfied that the grievance is to be allowed on the basis of the Company's failure to establish a work schedule for the Lake Louise Mobile Crew which included either Saturday and Sunday or Sunday and Monday as days off, I am not satisfied that the grievance would succeed on the alternative basis that the Company's schedule failed to provide the employees with two consecutive rest days. The Union has addressed the Arbitrator to no compelling authority to suggest that in an industry which operates seven days a week, twenty-four hours a day with the start times of shifts at virtually all hours, there must be adherence to the full calendar day for the purposes of defining "two consecutive rest days". In any event, in light of my conclusions with respect to the first argument of the Union grounded in article 5.1 of the collective agreement, it is unnecessary to deal with this alternative aspect.

For all of the foregoing reasons the grievance is allowed. The Arbitrator declares that the Company did violated article 5.1 of the collective agreement in establishing the schedule of the Lake Louise Mobile Crew prior to the 1997-98 work season and directs that any new bulletin conform with the interpretation of article 5.1 found in this award. The Arbitrator also directs that the Company provide compensation to those employees who were compelled to work on Saturday and Sunday or Sunday and Monday, or

alternatively on their scheduled rest days of Thursday and Friday, if overtime rates were not so paid. Should the parties be unable to agree on the quantum of compensation to any employee the matter may be spoken to.

November 14, 2005

(signed) MICHEL G. PICHER
ARBITRATOR