CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION

CASE NO. 3739

Heard in Montreal, Tuesday, 14 April 2009

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Claim on behalf the Members of the Calgary Section and Mobile Crews.

JOINT STATEMENT OF ISSUE:

By way of notice dated February 23, 2005, the Company posted a notice of shift change for the members of the Calgary Section and Mobile Crews. The notice provided that "your hours of work have been changed from. 07:30 to 15:30 to 21:00 to 05:00 beginning Feb 25, 2005." A grievance was filed.

The Union contends that: **(1)** The Company failed to give a 72 hour notice of change as required by section 2.3 of the collective agreement (current section 8.6). **(2)** Section 3.2 (8.6) provides that the Union "shall be advised" of changes in start times. The use of the word "shall" makes clear that the provision is mandatory and not directory,

The Union requests that: The employees of the Calgary Section and Mobile Crews be compensated at the overtime rate for all hours worked outside the original 07:30 -15:30 schedule.

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

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) WM. BREHL	**(SGD.) K. HEIN**
PRESIDENT	**FOR: ASSISTANT VICE-PRESIDENT**

There appeared on behalf of the Company:

B. Lockerby	– Labour Relations Officer, Calgary
M. Thompson	– Labour Relations Officer, Calgary
J. Dorais	– Labour Relations Officer, Calgary
R. Wilson	– Assistant Vice-President, Industrial Relations, Calgary

And on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. W. Brown	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

The case turns on the interpretation of clause 8.6 which reads in part as follows:

> Notwithstanding the provisions of Clause 8.5 (which provides that regular day shifts shall start at or between 6:00 a.m. to 8:00 a.m.), starting times may be established or changed to meet the requirements of the service. Where practicable, the notice of establishment or change will be posted promptly in a place accessible to affected employees. The appropriate Local Representative and the appropriate TCRC MWED Director **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 …
>
> (emphasis added)

The issue of whether the word "shall" as used in a collective agreement is to be interpreted as mandatory or directory has been the subject of arbitrable debate for some time, particularly in reference to time limits. As noted in the Brown and Beatty text, whether the word "shall" is mandatory or directory will turn on the construction of the collective agreement. The authors also note that in the absence of a penalty for non-compliance, the provision will less likely be interpreted as mandatory.

This office has dealt with the mandatory/directory debate in the context of start times for a number of years beginning with **CROA 163** where Arbitrator Weatherill first interpreted a predecessor provision which at the time called for 36 hours notice to the local chairman regarding changes in start times. Even in the absence of a penalty provision within the language of the provision, it was determined that the provision was mandatory as noted below:

> While there is no "penalty" set out for violation of Article 4.7 the natural consequence of non-compliance with its provisions must be that the purported changes are ineffective. That is, until the written notification provided for in the collective agreement was given, Mr. Luciani's regular relief schedule remained the same.

This same line of reasoning was followed in **CROA 462** where the Arbitrator Weatherill states:

> I am in agreement with the Union's contention that the giving of such notice is a condition of the implementation of such change, and it follows as the appropriate redress for this violation, that hours worked outside of the original scheduled hours would be overtime until the requirements of the collective agreement were met.

The Company submits that the use of the notice provision to the local representative was simply a matter of courtesy. The use of the word "following", a change from the previous language found in the earlier collective agreements referenced in **CROA 163** and **CROA 462**, in the Company's view supports this assertion. The Company maintains that the language has been changed to provide notification to the Union Director, but only after the change of shift.

With respect, the Arbitrator cannot agree. To begin with, the language set out above does not differ markedly from the shift notice language considered in previous collective agreements and which was interpreted to be mandatory despite the absence of a penalty clause. The word "following" does not in my view alter the spirit or intent of the provision that notice must be provided to the Local Chairman or General Chairman once the decision has been made to change the start times. More precise language would be required to support the Company's position that the parties meant the notice to be a simple after-the-fact advisory of the change. This Arbitrator further notes that the parties have agreed that the notice must be provided "…within 72 hours from the time the change in starting time became effective". This is a further

indication that the parties have addressed their minds to the time frame in which the notice is to be delivered and reinforces the importance of the Company furnishing the Union officers with proper notice of the shift change. In addition, the fact that parties have agreed the notice is to be delivered by mail is an insufficient basis to draw the inference that the notice is simply advisory, as the Company submits. It is certainly open to the parties to choose any means of communication that they deem to be appropriate to the circumstances.

The grievance is upheld for all the above reasons. The Company shall compensate the Calgary Section and Mobile Crews at the overtime rate for all hours worked outside their original 07:30 to 15:30 schedule. The Arbitrator shall retain jurisdiction should any issue arise with respect to the implementation of this award.

May 4, 2009

(signed) JOHN M. MOREAU QC
ARBITRATOR