CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3784

Heard in Edmonton, Thursday, 11 June 2009

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Claim on behalf of Mr. Mark Wardle.

JOINT STATEMENT OF ISSUE:

The Company issued Special Bulletin #107/99 dated January 6, 2000 advertising positions to provide flagging protection for Ledcor Contracting. The bulletin included under General Conditions, Clause 5.2.3 "When the scheduled rest days of the contractor will be different than the flagman the flagman must report to work to the nearest toolhouse to his flagging assignment or to the headquarter of his permanent position." Mr. Wardle was awarded and occupied one of the bulletined positions. On February 3, 2000 Mr. Wardle completed a Flagging 15/6 work cycle and informed Supervisor Pierre Haince that he would be returning to his permanent position in accordance with the bulletin provision. He was informed that he could not return to that position and would have to take the 6 days off without pay in violation of the bulletin provision, past and current practice. A grievance was filed.

The Union contends that: **1)** The Company is in violation of Articles 44, 14,5 and 15.2(a) of Wage Agreement 41 in not allowing Mr. Wardle to work his permanent position. **2)** The Company has violated Clause 5.2.3 of Special Bulletin 107/99. **3)** The Company has violated past and current practice in this regard.

The Union requests that: Mr. Wardle and any other affected employees be compensated for any losses suffered as a result of these violations

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

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) WM. BREHL	**(SGD.) D. FREEBORN**
NATIONAL PRESIDENT	**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

K. Hein	– Labour Relations Officer, Calgary
D. Corrigan	– Labour Relations Officer, Calgary
D. Freeborn	– Manager, Labour Relations, Calgary

And on behalf of the Union:
Wm. Brehl – President, Ottawa
D. W. Brown – Counsel, Ottawa

AWARD OF THE ARBITRATOR

It is worth noting at the outset that employees who were awarded flagging positions under Bulletin #107/99, worked fifteen straight days but were paid on the basis of a 5/2 schedule (five days at straight time followed by two days at overtime rates). The flagmen were not paid during the contractor's six days of rest. The Union alleges that the Company contravened the bulletin of January 6, 2000 by requiring the grievor to take six days off without pay instead of allowing him to return to his permanent position. The grievor had been awarded a B&B Foreman's position to work on the Ledcor Fibre Optic Project on the London Division senior territory on January 25, 2000.

The Union points to the requirement set out in section 5 of that bulletin:

5.2 Hours of work

5.2.1 The regular working hours of these positions will be from 07:00 hrs. to 15:00 hrs, Monday to Friday inclusive.

5.2.2 The applicants will be required to work similar hours as the contractor and may be required to work up to seven days per week.

5.2.3 When the scheduled rest days of the contractor will be different than the flagman, the flagman must report to work at the nearest toolhouse to his flagging assignment or to the headquarter of his permanent position; this must be arranged and coordinated between the flagman and the designated Railway representative.

The Union submits that when the scheduled days of rest of the contractor were different from the flagman, the flagman was required to report to work at the nearest toolhouse or to report to his permanent position. Accordingly, the Union maintains that the Company acted improperly by refusing to permit the grievor to return to his permanent position during his rest days from the Ledcor project. The Union rejects the Company's position that the grievor needed sufficient rest for safety reasons and that the average hours of work would have exceeded those permitted under the **Canada Labour Code** if the grievor had been allowed to return to his permanent position. The Union submits, in that regard, that the language of the bulletin was drafted by the Company and it cannot now refuse to enforce its clear terms regarding the grievor returning to his permanent carpenter position in London during his six days off. The Union further notes that the Company could have obtained a Ministerial Permit to permit employees to work in excess of 48 hours per week, once it determined for purposes of the bulletin that employees would be required to work in excess of seven days per week.

The evidence before the Arbitrator is that the Company and the Union exchanged correspondence after discussing the flagging crews on January 27 and 28, 2000. The Company proposed on February 3, 2000 that, in keeping with a five day on – two day off work schedule, that employees work for ten straight days "… based on hours associated with 5 on and 2 off. Hours in excess of 8 hrs. a day and 40 hrs. a week being paid at the time and one-half as per Wage Agreement 41 & 42." The proposal also included the following at paragraph 5:

> **5.** We strongly recommend that employees take 4 days off at the conclusion of the 10 days worked. We need to ensure that a quality of life is maintained for your members, and our employees, given the amount of days and long hours anticipated to be worked. We must also be aware of the fatigue factor and not unduly risk our employees' well being.

The Union replied to the Company proposal on February 10, 2000. The reply letter deals in a single paragraph with many of the points in the Company correspondence including the following in reference to the four days off:

> I am supporting the idea that the employees should be taking their days off and should not be allowed to displace into their bulletined positions due to the fact that this will only cause a displacement reaction.

In my view, the above correspondence captures the parties' intentions concerning the application of the bulletin. The Union's submission that paragraph 5 of the Company's letter should not be read as a commitment to the four days off on the part of the Company (in keeping with the five days on two days off), because the Company only "recommended" in their correspondence that employees take four days off after ten straight days of work, is not a fair representation of the Company's intent as set out in paragraph 5 above. The fact that the Company goes on to speak to the need to maintain a quality of life for the membership reinforces the Company's position that employees should not be working on their days off. The Union reply of February 10th in turn favourably accepts the Company proposal and adds that allowing employees to work on their days off would cause an unwanted displacement reaction. Given the clear understanding between the parties, there was no need to issue an amended bulletin as the Union suggests in this case. In this instance, the grievor, having worked fifteen

continuous days in keeping with the Ledcor cycle, was required to take a total of six days off.

The evidence does not support the Union's allegation, as set out in the Joint Statement of Issue, of a violation of the 40 hour work week provision set out in Article 4.1. The Union did not pursue in their submissions any further allegations concerning the breach of article 14.5 (dealing with temporary vacancies) or article 15. 2 (dealing with staff reductions and displacements). I agree with the Company that there is no evidence before me to support a breach of these latter provisions.

A procedural issue arose during the hearing when the Company, for the first time, raised an argument of *laches*, or as Arbitrator Weatherill succinctly described it in his supplementary award to **CROA 901**, "unreasonable delay". The Union objected to the introduction of this submission and their objection was upheld by the Arbitrator. There was no indication in the Joint Statement of Issue, submitted on May 8, 2009 that the Company would be raising this issue at arbitration. The Memorandum of Agreement governing this office stipulates that the arbitrator shall only deal with those disputes contained in the joint statement:

> 14. **The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties** or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions. The Arbitrator's decision shall be rendered in writing, together with written reasons therefore, to the parties concerned within 30 calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, unless the applicable

> collective agreement specifically provides for a different period, in which case such different period shall prevail.
>
> (emphasis added)

I note the comments of Arbitrator Picher in **CROA 2891**:

> The Arbitrator cannot accede to that submission, on a number of grounds. Clauses 8 and 12 [now clauses 10 and 14] of the memorandum of agreement obviously reflect the agreement of the parties that the procedures of the Office should ensure that there be specificity, well in advance of the hearing, with respect to the identification of contractual or **legal issues to be pleaded and resolved.** To that end, clause 5 requires that a joint statement, or an *ex parte* statement, be filed not later than the eighth day of the month preceding the month in which the hearing of the grievance is to take place, with a copy to be provided to the opposite party.
>
> (emphasis added)

See also **CROA 1755S, 2234, 2528, 2533,** and **2739**.

I similarly found in the instant case that the Company should have put the Union on notice and raised the substantive legal argument of *laches* as part of their proposed joint statement of issue. To have allowed the Company to proceed with this submission without prior notice to the Union would, in my view, not have been in keeping with the rules of this office regarding the jurisdiction of the Arbitrator.

For all the above reasons, the grievance is dismissed.

July 2, 2009 **(signed) JOHN M. MOREAU, Q.C.**
ARBITRATOR