CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4164

Heard in Montreal, Wednesday, 12 December 2012

Concerning

BOMBARDIER TRANSPORTATION CANADA INC.

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's failure to comply with the provisions of the *Employment Standards Act, 2000* in relation to hours of work.

JOINT STATEMENT OF ISSUE:

On August 1, 2012, the Union filed a policy grievance in relation to hours of work of employees of the Company. Specifically, the Union alleges that the Company is in violation of the *Employment Standards Act, 2000* by: requiring employees to routinely work in excess of 48 hours in a week; requiring employees to routinely work split shifts resulting in employees having less than 11 consecutive hours free from work; and routinely requiring employees to work more than 5 consecutive hours without a meal period.

The Company maintains that the exemption of *Ontario Regulation 390/05* applies to GO Operations and subsequently to Bombardier as the provider of the crews for this operation. Therefore, the Company maintains it is in compliance with the *Employment Standards Act, 2000* and has denied the Union's grievance.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. MacPHERSON	**(SGD.) A. BROWN**
GENERAL CHAIRMAN	**MANAGER, HUMAN RESOURCES**

There appeared on behalf of the Company:

M. Horvat	– Counsel
A. Brown	– Manager, Human Resources
D. Mitchell	– General Manager GO Operations
J.P. Monter	– Human Resources, BP

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Toronto
G. MacPherson	– General Chairman, Toronto
S. Keene	– Advisor, London

AWARD OF THE ARBITRATOR

The Union maintains that the Company has violated the provisions of the *Employment Standards Act of Ontario*. Section 17 (1) b. of that legislation stipulates that employees are not to work more than forty-eight hours in a work week. Section 18 (1) of the *Employment Standards Act* provides that employees are to have at least eleven consecutive hours free from performing work in each day. Section 20 (1) stipulates that an employee is entitled to at least thirty minutes as an eating period, to be provided at intervals which result in the opportunity to eat being provided within no more than five consecutive hours of work.

With respect to the facts, there is no dispute that the split shift operations of the Company do involve employees sometimes exceeding forty-eight hours of work in a work week, some assignments providing less than eleven consecutive hours off duty and a number of assignments where employees are required to work in excess of five consecutive hours without a scheduled meal break.

The Company submits that it has an exemption from the application of the provisions of the *Employment Standards Act* which are grieved. In that regard it relies on *Ontario Regulation 390/05* which, it maintains, exempts public transit services from the application of the provisions of section 18 of the *Employment Standards Act*. That regulation also makes provision with respect to eating periods. The relevant provisions read, in part, as part, as follows:

Hours free from work:

4. (1) If the employer and employee agree, subsection (2) applies instead of subsection 18 (1) of the Act.

(2) An employer shall give an employee a period of at least eight consecutive hours free from performing work in each day.

Eating periods

5. Section 20 of the Act does not apply to an employee who,

(a) is working a straight shift, and has chosen to work that shift;

(b) is working a split shift for which no meal break that complies with section 20 of the Act is provided, and has chosen to work that shift; or

(c) is working a straight shift, or a split shift for which no meal break that complies with section 20 of the Act is provided, and has chosen to work whatever shift the employer assigns.

The regulation makes exceptions for public transit services. That is reflected in the definition portion of the regulation which reads, in part, as follows:

Terms and Conditions of Employment in Defined Industries----Public Transit Services

Definition

1. In this Regulation,

"defined industry" means the industry of providing public transit services;

"public transit service" means any service for which a fare is charged for transporting the public by vehicles operated by or on behalf of a municipality or a local board, or under an agreement with a municipality or a local board;

"vehicle" includes transportation facilities for the physically disabled, but does not include,

(a) vehicles and marine vessels used for sightseeing tours,

(b) buses used to transport pupils, including buses owned and operated by, or operated under a contract with, a school board, private school or charitable organization,

(c) buses owned and operated by a corporation or organization solely for its own purposes without compensation for transportation,

(d) taxicabs,

(e) railway systems of railway companies incorporated under federal or provincial statutes,

(f) ferries,

(g) aviation systems, or

(h) ambulances.

The position of the employer is that the Company is in fact a public transit service, and is therefore exempted from the provisions of sections 18 and 20 of the Act. Its counsel stresses that the employer is not a railway system or a railway company within the meaning of sub-paragraph (e) of section (1) of the *Regulation*. In his submission, the very purpose of the regulation is to allow for the irregular scheduling and meal requirements that arise in the split shift operations of a public transit service. In the submission of the employer, therefore, the Union cannot assert the application of sections 18 and 20 of the *Employment Standards Act of Ontario* for the benefit of bargaining unit employees. Counsel refers the Arbitrator to the statutory underpinning of the system, including the *Metrolinx Act, 2006,* which currently governs the operations of GO, including the GO transit system which is identified as a “regional transit system” within the Act. Counsel stresses that the instant employer cannot be defined as a railway under the *Canada Transportation Act* as it does not fall within the federal jurisdiction and does not hold a valid certificate of fitness, conditions which are part of the definition of a railway within the *Canada Transportation Act*. Counsel further notes that the Company’s operations are exempted from the *Ontario Short Line Railways Act, 1995*, as that legislation expressly excludes “urban rail transit systems” from its application.

I find the position of the Company more compelling than that of the Union. It is clear from the language of *Regulation 390/05* that the Ontario Legislature did intend to exempt public transit services from the application of section 18 of the *Employment Standards Act*. It expressly permits parties to agree to a system of split shifts. That has clearly been achieved in the instant case, as the possibility of split shifts is expressly agreed to within the terms of the parties' collective agreement.

I agree that the very purpose of *Regulation 390/05* is to permit employers in the public transit service industry to have the benefit of some flexibility in hours of work and meal allowances so as to provide service to the public on commuter routes which are largely staffed on the basis of rush hour schedules. I also agree with the position of the employer that under federal legislation neither GO nor Bombardier qualify as railway companies as defined under the *Canada Transportation Act*. Nor does either of them qualify as a short line railway within provisional jurisdiction under the provision of the *Short Line Railways Act, 1995* of Ontario. That legislation expressly excludes "urban rail transit systems", which I am satisfied is the status of the Company's operation.

For all of the foregoing reasons, I am compelled to conclude that, by reason of the express provisions of *Regulation 390/05*, the employer is exempted from the operation of the hours of service provisions of section 18 of the *Employment Standards Act* as well as section 20 of the act relating to eating periods.

For all the foregoing reasons the grievance must be dismissed.

December 17, 2012

(signed) MICHEL G. PICHER

ARBITRATOR