

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION  
CASE NO. 4279**

Heard in Montreal, January 15, 2014

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Grievance advanced by the Union regarding ongoing breaches of the Algoma Central Railway (ACR) and CN Collective Agreements.

**UNION'S EXPARTE STATEMENT OF ISSUE:**

In December 2011, the parties agreed to integrate the ACR and CN Rail Collective Agreements. Discussions in 2012 failed to lead an agreement on outstanding integration issues, including in particular issues regarding the proper application and payment of salaries in accordance with Articles 16, 18, 20 and 25 of the ACR Collective Agreement and *Canada Labour Code*.

The Union contends that the ACR Collective Agreement and *Canada Labour Code* require the Company to establish a procedure for booking of "Comp" time for all hours worked in excess of 40 hours per workweek, and that the Company compensate employees for all time worked in in excess of 40 hours per workweek at overtime rates of pay.

The Union initiated a grievance in 2013 with respect to these continuing issues. The Union seeks: a finding that the Company has violated the above Agreements as well as the *Canada Labour Code*; an order that the Company cease and desist its ongoing breaches, and; a direction that the Company compensate employees for all time worked in in excess of 40 hours per workweek at overtime rates of pay. The Union seeks damages to compensate its members in addition to such further relief the Arbitrator deems necessary in order to ensure future compliance with the Articles in question.

The Company disagrees with the Union's position, and seeks an order that the grievance be dismissed.

**FOR THE UNION:**  
**(SGD.) J. Robbins**  
General Chairman

**FOR THE COMPANY:**  
**(SGD.)**

There appeared on behalf of the Company:

- |             |   |
|-------------|---|
| M. Marshall | – Senior Manager Labour Relations, Toronto              |
| D. Gagne    | – Senior Manager Labour Relations, Montreal             |
| D. Fisher   | – Senior Director Labour Relations & Strategy, Montreal |
| D. Veenis   | – Retired Labour Relations Manager                      |
| G. Hare     | – Superintendent  |
| D. Larouche | – Labour Relations Manager, Montreal                    |
| V. Paquet   | – Labour Relations Manager, Toronto                     |

There appeared on behalf of the Union:

- |             |  |
|-------------|--|
| M. Church   | – Counsel, Caley Wray, Toronto         |
| J. Robbins  | – General Chairman, Sarnia             |
| J. Lennie   | – Vice General Chairman, Port Robinson |
| M. McKay    | – Local Chairman, Sault Ste. Marie     |
| R. Caldwell | – General Chairman, Bancroft           |
| P. Boucher  | – Vice General Chairman, Belleville    |

### **AWARD OF THE ARBITRATOR**

The Union alleges that the Company has violated articles 16, 20 and 25 of the Algoma Central Railway Agreement (“ACR”) and the *Canada Labour Code* (“the Code”).

The Union challenges the Company’s practice of not paying overtime to employees in the Conductor A classification after 40 hours in a week.

Conductors in Classification A are assigned on road assignments that vary between 10 to 12 hours per shift whereas their counterpart Conductors in Classification B work in the yard or home terminal on eight-hour shifts. Conductors in Classification A often work more than 40 hours in a week, work irregular hours, including nights, weekends and holidays and may be absent from their home terminal for a period in

excess of 24 hours. They are paid significantly more than those in Classification B as reflected in their salaries set out in Schedule A of the collective agreement.

Conductors in Classification B accumulate “comp” time (up to a maximum set out in article 25.01) and qualify for overtime pay based on all hours worked in excess of 40 hours in a week. Although conductors in Classification A can also accumulate “comp” time (also up to a maximum) and are paid overtime, the threshold for entitlement for the accumulation of “comp” and for overtime is after 12 hours in a day. Conductors in Classification A do not receive “comp” time or overtime on the basis of working more than 40 hours a week.

The relevant provisions of the collective agreement and the *Code* are referenced below:

**Collective Agreement Provisions : Article 16 – Overtime**

16.01 Overtime assigned by the Employer will be paid in accordance with the *Canada Labour Code* and permits issued under that legislation. Employees will be given the option of taking compensatory time off in lieu of receiving overtime pay in accordance with Article 25.01.

**Article 20 – Monthly/Hourly Salaries**

20.01 Salaries shall be in accordance with Article 25 Schedule “A”

**Article 25 – Job Classifications & Salaries  
(Attached as Schedule “A”)**

**Article 25.01**

All employees covered by this Agreement will be paid a salary in accordance with Article 25.02. Unless otherwise specified in the job description, salary levels assume an average five (5) day, forty hour work week, which shall unless otherwise posted in a bulletin commence on Monday of each week. Employees who work more than

said number of hours in each workweek may, at their discretion, either:

- (a) be provided "Comp" time (time off with pay) the equivalent of the actual hours they worked in excess of such standard hours, or
- (b) be paid overtime at the rate of time and one-half for the equivalent of the actual hours they worked in excess of such standard hours

#### Comp Time – Transportation Employees

Transportation employees will be permitted to accumulate "comp" days up to the total of their normal work cycle. For example: an employee holding a yard assignment will be permitted to accumulate up to five (5) "comp" days. An employee working four (4) train service assignment will be permitted to accumulate up to four (4) "comp" days. The intention is to allow an employee, where circumstances permit, a Leave Absence equal to his normal work assignment.

....

#### 25.06

An hourly rate of pay for yard employees and assignments will be established on the basis of eight-hour shifts and a forty-hour work week. Overtime at time and one half will apply for hours in excess of eight in a work day, except in cases of a bulletined swing assignment working two shifts in a twenty-four hour period, or a spareboard employee reporting for duty at straight time rates under the terms and conditions governing spareboard employees.

The *Code* provisions relevant to this dispute are:

### **PART III STANDARD HOURS, WAGES, VACATIONS AND HOLIDAYS**

#### **Interpretation**

#### **Definitions**

**166.** In this Part,

....

"overtime" means hours of work in excess of standard hours of work;

....

"standard hours of work" means the hours of work established pursuant to section 169 or 170 or in any regulations made pursuant to section 175;

#### **Division I**

## Hours of Work

### Standard hours of work

**169.** (1) Except as otherwise provided by or under this Division

(a) the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; and

(b) no employer shall cause or permit an employee to work longer hours than eight hours in any day or forty hours in any week.

...

### Overtime pay

**174.** When an employee is required or permitted to work in excess of the standard hours of work, the employee shall, subject to any regulations made pursuant to section 175, be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.

The applicable regulation (“the *Regulation*”) reads as follows:

## Railway Running-Trades Employees Hours of Work

### Regulations

#### EXEMPTION

**3.** The following classes of employees, that is to say, yardmasters, assistant yardmasters, locomotive engineers, locomotive firemen (helpers), hostlers, train conductors, train baggagemen, brakemen, yard foremen, yardmen, switch tenders and car retarder operators in those railroads that are within the legislative authority of Parliament are exempted from the application of sections 169 and 171 of the Act.

### The parties’ positions

The Union argues that the collective agreement and the *Code* entitle employees in the Conductor A classification, to either be paid at overtime rates, or bank “comp” time, for all hours worked in excess of 40 hours in a week just as their Conductor B

counterparts are entitled. The Union submits that the collective agreement and the *Code* are clear that this is the case.

The Union relies on article 25.01 of the collective agreement:

Article 25.01 All employees covered by this Agreement will be paid a salary in accordance with Article 25.02. Unless otherwise specified in the job description, salary levels assume an average five (5) day, forty hour work week, which shall unless otherwise posted in a bulletin commence on Monday of each week. Employees who work more than said number of hours in each workweek may, at their discretion, either:

- (a) be provided "Comp" time (time off with pay) the equivalent of the actual hours they worked **in excess of such standard hours, or**
- (b) be paid overtime at the rate of time and one-half for the equivalent of the actual hours they worked **in excess of such standard hours.**

(Emphasis added)

"Standard hours of work" and "overtime" are defined in section 166 of the *Code*. The minimum standard with respect to standard hours of work is set out in section 169 of the *Code*. Section 174 of the *Code*, the provision dealing with overtime, provides that work in excess of the standard hours of work will be paid at time and one-half. Article 16.01 of the collective agreement, which incorporates the *Code* reads: "Overtime assigned by the Employer will be paid in accordance with the *Canada Labour Code* and permits issued under that legislation." No permit has been issued to the Company in this case.

Therefore, according to the Union, employees in the Conductor A classification are entitled to either be paid at overtime rates, or bank "comp" time for all hours worked in excess of 40 hours in a week. The Union submits that article 25.01 of the collective

agreement dictates that all employees are salaried and that the reference “Unless otherwise specified in the job description” in no way detracts the Conductor A classification’s entitlement to overtime pay or “comp” time after 40 hours of work. It says the reference to the assumption of an average five (5) day, forty (40) hour work week is a formula for explaining how salary levels are to be calculated in the normal course.

The Company disagrees. Its position is that the collective agreement does not provide that all hours in excess of 40 hours per week must be compensated at overtime rates for conductors except as specified in article 25.06. It points out that article 16 of the collective agreement does not specify the threshold number of hours to be worked or when overtime applies. Rather, the Company emphasizes that overtime assigned will be in accordance with the *Code*. According to the Company, since the *Railway Running Trades Employees Hours of Work Regulation* (“*Regulation*”) exempts conductors from the application of sections 169 and 171 of the *Code* conductors are not entitled to overtime after 40 hours in a week pursuant to the *Code*.

Turning to the collective agreement, the Company points out that the parties have turned their minds specifically to those employees entitled to the payment of overtime when they work more than 8 hours in a day and forty-hours in a week – that is, the employees in the Conductor B classification. In contrast, the collective agreement is silent with respect to the Conductor A classification.

The Company submits that the reference to salary levels assuming an average forty-hour work week as set out in article 25.01 of the collective agreement, is inapplicable to the Conductor A classification. In support of this, the Company directs me to the second sentence of that article: “Unless otherwise specified in the job description... .” The job description for the Conductor A classification is clear about the nature of work on the road, including the variable nature of the hours (“up to 12 hours in duration where required”). In short, Conductor A classification hours are neither standard nor are they limited to 40 hours per week.

In support of its interpretation of the collective agreement, the Company relies on past practice. Since the Company has had ownership of the ACR (in 2001) those employees in Conductor A classification have worked varying hours and often more than 40 hours in a week. The Company can find no record of their ever having been paid overtime when they work in excess of 40 hours in a week.

At the hearing the Company relied on records from as early as 2005 confirming the practice that those employees in the Conductor A classification have been paid neither “comp” time nor overtime on the basis of having worked in excess of 40 hours. Further, the language of the collective agreement has remained largely unchanged through numerous rounds of negotiations (including negotiations with the Union’s predecessor).



## Decision

Having thoroughly read the relevant provisions of the applicable collective agreement, the *Code* and the *Regulation* that exempts the application of certain sections of the *Code* to conductors and other classes of employees cited therein, I am unable to find the language as clear as the Union would suggest, nor do I find that the *Code* applies to conductors for the purpose of overtime.

Article 16 is the collective agreement provision that incorporates the *Code*. It does not set out the threshold number of hours after which overtime applies. In the *Code*, however, “*overtime*” refers to “hours in excess of standard hours of work”, which means “hours of work established pursuant to section 169...”. Section 169 sets out standard hours of work as eight hours in a day or forty hours in a week. The *Regulation* exempts conductors from the section 169 of the *Code*. The exemption from the hours of work provision is intimately and necessarily linked to the overtime provision which itself references standard hours of work. As such conductors are exempted from overtime pursuant to the *Code*.

I agree with the Company’s interpretation of the collective agreement that the Conductor A classification is not entitled to overtime after 40 hours in a week. Further, the consistent practice of paying only conductors in the Conductor B classification overtime or “comp” time up to a maximum at their discretion after 40 hours in a week, is

instructive in understanding the parties interpretation and application of the collective agreement language.

In **CROA1930**, Arbitrator Picher reiterated that the parties through past practice may fashion what amounts to an interpretation of the collective agreement. The dispute before the Arbitrator in that case is not factually analogous to the circumstances here. At issue was whether a laid off welder foreman was entitled to weekly benefits provided for pursuant to an agreement between the parties. Nonetheless, the case is conceptually analogous and the Arbitrator's rationale (as described in the bolded portion of the below excerpt) in making the determination before him is applicable to the circumstances here and I adopt it:

But for the long-standing past practice of the Company, apparently unobjected to by the Brotherhood over many years, by which it treated seasonal employees other than extra gang labourers as reverting to extra gang labourer status if they do not claim permanent employment at the conclusion of their seasonal employment, thereby bringing them within the exception described in Article 10 of the Job Security Agreement, the Brotherhood's argument might have some appeal. **As is well established in the prior decisions of this Office, when a given interpretation of a collective agreement has been knowingly applied between the parties, without objection or grievance over a substantial number of years, spanning the renegotiation and renewal of the Collective Agreement in unchanged terms, the parties are taken to accept the established interpretation as part of their agreement, and the union which has acquiesced in the interpretation so applied cannot assert some different interpretation by means of a grievance.**

(My emphasis)

As referenced above, employees in Conductor A classification work varying hours, often greater than 40 hours in a week, and they have done so without complaint and without overtime after 40 hours for a substantial number of years. The parties are sophisticated collective bargaining partners. Moreover, overtime pay after 40 hours

worked is not the norm in the railway industry. One would therefore expect in the circumstances of this case to see clear and explicit language in the collective agreement that the Conductor A classification is entitled to overtime after 40 hours worked, which is clearly the case for the Conductor B classification.

It is also important to note that in the 2005 round of negotiations, to facilitate the payment of ACR employees through the Company's bi-weekly payroll system, the parties agreed to convert the monthly salaries into hourly rates for both Conductor A and B classifications. At that time, the parties agreed that conductors in the Conductor A classification would continue to work the same hours, often more than 40 in a week, at straight time. The negotiations in 2005 resulted in the specific language about the yard assignments for the conductors in the Conductor B classification as set out above in article 25.06. This suggests that the parties turned their minds to the conductors in Classification B explicitly specifying overtime for them at that time. In the circumstances, had the parties intended to confer the same benefit upon the Conductor A classification, one would expect to see specific language to that effect.

Significantly, during that same round of bargaining, the parties negotiated language to increase transportation employees' option of banking overtime by accumulating "comp" days from up to three shifts to "comp" time equal to their normal work cycle. That is to say, an employee holding a yard assignment could accumulate up to five (5) comp days or an employee working a four (4) day train service assignment could accumulate up to four (4) such days. The explicit intention of the parties was to

allow for transportation employees a leave of absence equal to their normal work assignment. In the case of employees in Conductor A classification, they do not and never have worked a standard 40-hour work week.

In addition, a review of the bargaining history reveals that at no time since the Company's purchase of the ACR, notably in 2002, 2005 or in 2011, did the Union make a demand or propose that article 16 or 25 should be interpreted to mean that all conductors were entitled to be paid overtime after 40 hours. In fact, in December 2011 (post section 18 application under the *Code* with the Canada Industrial Relations Board ("CIRB")), the parties reached an agreement whereby the terms and conditions of the ACR agreement as it pertains to the issue here remained in effect.

One month after the parties' agreement was approved by the CIRB, in March 2012, the Union sent a letter to the Company indicating its interpretation of article 25.01 of the collective agreement. In the same letter the Union advised the Company of its intent to advance the issue to CROA if the Company did not agree. Fourteen months later, on June 25, 2013, the Union filed the policy grievance now before me. The Union did not table any proposals to change the language of the collective agreement during the most recent round of bargaining. The grievance was denied on October 13, 2013 and the parties concluded a tentative collective agreement on October 31, 2013, with no mention of overtime for Conductors in Classification A. That agreement is currently out for ratification.

The collective bargaining implication flowing from the past practice of paying only conductors in classification B overtime and “comp” pursuant to article 25.01, together with the bargaining history is that the Union must be taken to accept the interpretation that employees in Conductor A classification are not entitled to the overtime to which their counterparts are explicitly entitled. The Union has acquiesced in the interpretation of the collective agreement. Accordingly, that interpretation governs the outcome of this matter.

For all these reasons, the grievance is dismissed.

February 7, 2014



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CHRISTINE SCHMIDT  
ARBITRATOR