CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4316

Heard in Edmonton June 10, 2014

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

**TEAMSTERS CANADIAN RAIL CONFERENCE –
MAINTENANCE OF WAY EMPLOYEES DIVISION**

DISPUTE:

Company's decision to implement a Policy of mandatory overtime.

UNION'S EXPARTE STATEMENT OF ISSUE:

On February 24, 2014, the Union received a letter from Mr. Myron Becker, AVP Labour Relations, which set out the Company's belief that it can unilaterally impose mandatory overtime. Mr. Becker's letter stated (1) that the Company "is well within its right to mandate employees to work overtime up to the 48 hour maximum hours as provided for in the Canada Labour Code" and (2) that the Company has the right "to require employees to work overtime". On March 6, 2014, the Union learned that at least two supervisors, Mr. Paul Purser in BC and Mr. Kevin Boak in Alberta, had informed their employees that they were required to work overtime. The Union grieved.

The Union contends that the working of overtime by CP Maintenance of Way workers, in the performance of their regular duties, has never been mandatory in the history of the railway, a fact most recently confirmed by Mr. Rick Wilson, then AVP of Industrial Relations. In other words, the working of regular overtime has always been recognized as voluntary pursuant to the collective agreement,a number of provisions in the collective agreement, including but not limited to Sections 3.1, 3.6 and 3.12, all plainly reflect the long standing past practice between the parties that the working of overtime is voluntary. The imposition of mandatory overtime will in effect render such provisions null and void, without meaning, and have the effect of putting all Maintenance of Way employees involuntarily and permanently on call, all of which would be unprecedented in the industry, on the bases of both the wording of the collective agreement and the long past practice between the parties, the Company is estopped from unilaterally implementing mandatory overtime and from unilaterally altering the terms and conditions of employment of TCRCMWED members. The Company's position violates section 169(1), and all associated provisions, of the Canada Labour Code.

The Union requests the Arbitrator to declare that the Company's imposition of mandatory overtime constitutes a violation of the collective agreement, the past practice between the parties and applicable law; (2) order the Company to cease and desist such unilateral action; (3)

order the Company to meet with the Union to determine compensation for employees who have suffered loss as a result of the Company's violation; and (4) order the Company to pay any such compensation.The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) W. Brehl **(SGD.)**
President

There appeared on behalf of the Company:

N. Hasham	– Counsel, Labour Relations, Toronto
D. Guerin	– Director, Labour Relations, Calgary
W. Kuczek	– Supervisor Machine Operations, Winnipeg
R. Hope	– Director Track Renewal, Calgary
A. Damji	– Manager Workforce Planning, Calgary
B. Larocque	– Deputy Regional Chief Engineering, Calgary

There appeared on behalf of the Union:

W. Brehl	– President, Ottawa
D. Brown	– Counsel, Ottawa
G. Doherty	– Director Prairie Region, Brandon
H. Helfenbein	– Director Pacific Region, Medicine Hat

AWARD OF THE ARBITRATOR

The issue in thispolicy grievance is whether the Company can mandate bargaining unit employees to work overtime between 40 and 48 hours in a week.The Company says it can. The Union disagrees.

The Union states that in the history of the railway, overtime has never been mandatory for the Maintenance of Way (or engineering)employees, except in emergencies.

The engineering employees, as I understand it, can be subdivided into at least two major groupings including those employees who work on capital projects/construction crews and those who work on maintenance crews. Crews working

on capital projects often work in remote locations, often long hours, and their work is usually planned in advance. Maintenance crews work in smaller groups generally, and are responsible for day-to-day work arising in the operation of the railway.

The parties agree that operational exigencies may require the performance of overtime in the field. There is also planned overtime, which comes up when there is a specific job or jobs that may require it. According to the Company, it is in these circumstances thatthe collective agreement call out procedures established in section 3.1 of the collective agreement,are followed.

At the hearing, considering the Union's assertion that overtime has never been mandatory, I asked those Company representatives in attendance to explain how overtime in the field is assigned.The Company's representatives provided a few examples. In one, the crew may be asked of its preference for overtime. If the majority are willing to work overtime, then it is assigned to the crew. One Company representative articulated that those employees who were uninterested in performing overtime work in the field, would be bussed home with others being brought in to perform it. Of significance is that the Company essentially confirmed that the practice has been that overtime work has been voluntary.

The Company asserts that it is within its rights to mandate employees to work overtime up to the 48-hour maximum hours as provided for in the ***Canada Labour Code***(*"Code*)*"*and that the parties' current practice, the case law and arbitral jurisprudence support its position.

I turn first to a consideration of the *Code.*

The *Code*

The relevant sections are reproduced below:

> Hours of work are defined in section 169;
> 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 or and 40 hours in a week; and
>
> (b) no employer shall cause or permit an employee to work longer hours than eight hours in a day or 40 hours in any week.

The standard hours of week are modified by the following exceptions: averaging of hours as per section 169(2); or modified work schedule as set out in section 170.

Section 170 of the *Code r*eads:

> 170. (1) An employer may, in respect of employees subject to a collective agreement, establish, modify or cancel a work schedule under which the hours exceed the standard of work set out in paragraph 169 (1)(a) if
>
> (a) the average hours of work for a period of two or more weeks does not exceed 40 hours a week; and
>
> (b) the schedule, or its modification or cancellation, is agreed to in writing by the employer and the trade union.

Section 172 of the *Code* stipulates the following:

> 172. (1) An employer may, in respect of employees subject to a collective agreement, establish, modify or cancel a work schedule under which the hours exceed the maximum set out in 171 or in regulations made under section 175 if
>
> (a) the average hours of work for a period of two or more weeks does not exceed 48 hours in a week; and
>
> (b) this schedule, or its modification or cancellation, is agreed to in writing by the employer and trade union.

Section 171 of the *Code* specifically provides for hours of work to be worked beyond the standard hours:

> An employee may be employed in excess of the standard hours of work but, subject to sections 172, 176 and 177, and to any regulations made pursuant to section 175, the total hours that may be worked by any employee in a week shall not exceed 48 hours in a week or such fewer total number of hours as may be prescribed by the regulations as the maximum working hours in the industrial establishment in or in connection with the operation of which the employee is employed.

Having regard to the sections of the *Code* set out above, the hours of work can exceed 40 hours in a week but shall not exceed 48 hours, subject to sections 172, 176 and 177 as well as regulations made under section 175 of the *Code*. Section 176 has no application in this case, nor do regulations made under section 175. Section 177 deals with emergency work, as defined in that section.

The *Code* also stipulates in section 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 [which are not applicable here] be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.

In my view, the application of section 174 means that it is not a violation of the *Code*for an employer to require an employee to work overtime as is necessary, keeping in mind that the employer must maintain standard hours that do not exceed 40 hours in a work week in accordance with section 169(1).

The Canadian Pacific Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 101 (Antoski Grievance) case, cited by the Union, does not advance the Union's position as set out in its brief. This case does not stand for the proposition that an employer can never insist that an employee work in excess of 8 hours in a day. It stands for the proposition that the standard hours provisions of the *Code* contemplate eight hours on and sixteen hours off in a twenty-four hours period. The grievor's swing shift schedule had him working, on two occasions during the week, with only eight hours off between shifts. It was the standard work day implemented by the Company – with only eight hours between shifts- that Arbitrator Picher found to have offended against section 169 (1) the *Code.*

The Collective Agreement

The Union reiterates that in its history, the Maintenance of Way workforce has never, except in emergencies, been forced or mandated to work overtime. According to the Union, required overtime workhas always been voluntary. The Company disagrees, but concedes that in making the determination before me, the conduct of the parties is an important consideration.

The parties directed me to sections 3.1, 3.6 and 3.12 of the collective agreement relating toovertime for my consideration.

SECTION 3

OVERTIME, CALLS AND WORK ON REST DAYS

3.1 Except as otherwise provided, when employees are required to work in excess of eight (8) hours per day or on regularly assigned rest days, unless when these are being accumulated under Article 8.18, employees shall be paid for overtime on an actual minute basis at the rate of time and one half.

For overtime work, the senior employee regularly performing the work will be called. Employees shall be paid overtime based on their regular rate of pay, or the rate of pay for the position they actually work, whichever is higher.

(a) For overtime work on any particular track section the following order of call will be utilized:

First Employee – TMF on that section, if unavailable the ATMC, if unavailable the LTM, etc…

Second Employee – TM/TD on the track section affected.

Additional employees – will be called, based on Track Maintainer seniority from the track section affected. If further employees are required they shall be called in the same order as above from the following:

. mobile gangs on the assigned territory, if any
. employees from the closest adjoining section on that seniority territory
. other track employees from the seniority territory

Note: In cases of urgency (train delay) requiring track section forces, a qualified employee, who can respond to the service requirement at least ten (10) minutes sooner than the senior employee, will be called.

(b) For overtime work and call out procedures for Structures employees, the following order of call will be utilized:

First Employee

(i) If a callout problem is not known the senior Structures Forman working as such at the headquarter location on the territory where the problem occurs. If unavailable the next senior qualified employee from the structures foreman's list on the territory where the problem occurs. If unavailable then proceed to additional employees call it procedures listed below.

(ii) If the callout problem is known, the senior qualified employee regularly performing the work will be called.

Additional Employees - will be called from the Bridgman seniority list at the location if qualified in seniority order. If no qualified employees are available at the location, additional qualified employees will be called from the seniority territory as per appendix D of the wage agreement 41 where applicable.

….

3.6 An employee who is called by the company for overtime work pre-arranged or otherwise and accepts a call, will be paid one (1) hour at punitive rates if such a call is cancelled prior to their leaving home.
…..

After Hours and Weekend Response

3.12 Opportunity will be provided for two (2) or possibly three (3) qualified employees from designated mainline subdivisions to be placed on call on the following basis:

- positions will be awarded on a senior may basis
- employees on call are only to be called if the company is unable to secure adequate qualified staff after exhausting the caller procedures, currently specified within the collective agreement.
- On call employees cover entire subdivision or terminal.

…

In addition to the collective agreement, I have before me a form called "overtime call availability list" - a weekly list which is circulated to bargaining unit employees whereby they indicate which of the four categories they wish to be considered for the purposes of overtime: employees who wish to be on call as per section 3.12 to the collective agreement, those who wish to be on call if needed, those who are or will be on vacation and therefore unavailable, and finally those who decline to work overtime and do not want to be called after hours. According to the Union, this form was circulated to the bargaining unit employees in Manitoba after the Company asserted its entitlement to mandate employees to work overtime up to the 48 hours maximum provided by the *Code.*

Finally, I have before me a letter from Mr. Rick Wilson, a former assistant Vice-President of Labour Relations, to William Brehl, President, TCRC-MWED, which correspondence is marked with a heading "Without Prejudice" dated August 18, 2006 ("Wilson letter"), covering two issues, namely the job biding process for disabled employees and overtime issues. The Company issued the letter after a meeting with the Union. It reads in part:

> **Re: Disabled Employees and Job Bids;**
> **Overtime Issues**
>
> ---
>
> Further to our meeting of August 10, 2006, in Calgary, and our discussion about the ability of disabled employees to bid on jobs, this letter represents Canadian Pacific Railway's ("CPR") position on the issue. In addition, we also speak to the issue of forcing overtime, which was discussed at the meeting.
>
> **Disabled Employees and Job Bids**
>
> ……
>
> **Overtime Issues**
>
> With respect to the issue of overtime, CPR maintains the position that overtime is voluntary and thus it cannot force its workers to work overtime. The exception to this position is in the case of emergent situations. Here, CPR believes that it should be able to force employees to work overtime. Clear and effective processes will, however, be required to ensure that all parties have an understanding of when overtime will be required. We suggest that this matter warrants further discussion between CPR and TCRC at the bargaining table.

At the hearing, the Company pointed out that the letter suggested that there would be a need for further discussions at the bargaining table to clearly determine when overtime would be required. Two rounds of bargaining have since taken place. The issue was not raised in either round.

The Positions of the Parties

The Union's position is straightforward: it says that when employees are required to work overtime then section 3.1 is the process for its distribution. The Union says that if overtime can be forced on an employee, there would be no need for the callout order. According to the Union, the first person called would have to work and that would be the end of that. The Union says that section 3.6 reinforces its position, as it explicitly speaks to the employee's choice of accepting a call. In the Union's view section 3.12 provides for the establishment of voluntary "on call" for overtime work. Such employees, the clause stipulates, can only be called once the Company has exhausted the callout procedures referenced in section 3.1. Since it would be literally impossible to exhaust the callout procedures if overtime was mandatory, it must be voluntary.

As for the "Overtime Call Availability List," referenced above, which the Union says was circulated a month after the Company took the position that it could mandate overtime, the Union asserts that it is evidence that front-line supervisors were continuing to operate, as they always had, on the basis that overtime was voluntary.

Finally the August 18, 2006 letter, in the Union's view, clearly establishes the parties' understanding of the collective agreement as it pertains to the voluntary nature of overtime under this collective agreement.

The Company relies on the arbitral jurisprudence, cited in its brief to support its position:

> where there is no overriding legislative provision governing overtime work or where such legislation is not applicable to the particular assignment in issue, and where the collective agreement does not specifically address the question, the

> employer has the right to schedule overtime assignments as required, and that such assignments are to be regarded as compulsory." (*Brown and Beatty* 7:3634) (See also *Fundy Gypsum Co.* (2003), 117 L.A.C. (4th) 58 (MacDonald) at paragraphs 17 and 29).

Moreover, "…arbitrators have assumed that unless the agreement provides otherwise, the scheduling of overtime work falls within the exclusive management prerogative." (*Brown and Beatty* 5:3200).

The Company asserts that the provisions of the collective agreement reproduced above do not support the Union's position that overtime is strictly voluntary.

In the Company's view, article 3.1 provides a process by which calls for overtime purposes are handled. The call for required overtime is in seniority order. The right to overtime work, however,is provided first to the employee who normally works the position before resorting to the order of call.

In the Company's view, it is only when it is necessary to call employees for overtime purposes that the Company abides by the call provisions. The Company retains the ability to force the junior employee should the senior one decline. Article 3.6 does not derogate from that right. Article 3.12, relating to after-hours and weekend responses, simply provides the Company with the assurance that an employee will be available to work when called after the calling procedures are exhausted.

As for the letter reproduced above, the Company suggests that the "without prejudice" Wilson letterhas been at best misunderstood, and at worst selectively

interpreted. The Company states that while at the time the Company may have taken the position that overtime was voluntary there was a disagreement between the parties on what constituted on an “emergent situation”suggesting that there would be a need for further discussions at the bargaining table to clearly determine when overtime would be required. (But as I have noted, that has not happened). The Company also points out that even if it were to accept the Wilson letter as accurate, is not part of the collective agreement.

By letter dated February 24, 2014 the Company has asserted its rights to impose mandatory overtime when required. In its view, the Wilson letter is at odds with the reality in the field where overtime is required and overtime is worked whenever necessary. The Company says that if the Wilson letter ever had any practical application, it no longer applies.In support of its position, the Company points out that ithas successfully applied for over 300 Ministerial Permits issued pursuant to section 176 (2) of the *Code*since 2006 – whereby the Companyhas been authorized to “require” employees to work in excess of 48 hours per week, without Union objection.

Decision

In**CROA 1930***,* Arbitrator Picher reiterated that the parties through past practice might 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 in that case was whether a laid off welder foreman was entitled to weekly benefits provided 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)

Having regard to the relevant provisions of the collective agreement and to the past practice between the parties, I am persuaded that by their conduct and by their words, the parties have made clear their intent that overtime is voluntary.

The nature of the work performed by the bargaining unit employees has not recently changed. Overtime work in the field has gone on for yearsand I readily accept the Company's contention that its nature is such that it must be performed. Nevertheless, Company representatives, when asked directly, essentially agreed that when overtime "in the field" was required, it has not been compelled. As for the Company's contention that pursuant to articles 3.1 3.6 and 3.12 it reserves the right to require junior employees to work overtime in reverse order of seniority, the Company has never done so, nor does the collective agreement express such a right. According

to those present at the hearing, when the call-procedures for required overtime have exhausted, which virtually never happens, no bargaining unit employee has been compelled to work.

The practice of the parties in this case is evidence of their intent as it relates to respect to the nature of required overtime in the collective agreement before me.

The Wilson letter confirms the Company's understanding of the collective agreement as it relates to forcing overtime.That clear understanding, reflected in the Company's application of the overtime provisions as voluntary, has withstood two rounds of bargaining. The Company could have been no clearer when it wrote: "CPR maintains the position that overtime is voluntary and thus it cannot force its workers to work overtime." The words "Without Prejudice" at the top of Mr. Wilson's letter do not confer some sort of privilege on the communication. The letter was not written, from what I can see, in anticipation of litigation, for example. The words "without prejudice" do not permit the Company to assert one interpretation of the collective agreement and then a completely opposite interpretation when the Company finds it convenient to do so.

The Wilson letter refers to overtime in emergent situations, Mr. Wilson states that the Company **should** be able to mandate employees to work overtime (my emphasis). It is not an assertion that, under the terms of the collective agreement, the Company is entitled to impose overtime on a mandatory basis. Mr. Wilson quite rightly, goes on to

suggest that the “clear and effective processes” required to ensure when overtime will be required are properly discussions to be held at the bargaining table.

The collective bargaining implication flowing from the past practice of voluntary overtime pursuant to section 3, confirmed in writing most recently in 2006 by the Company, is that the Company must be taken to accept the interpretation that the Company cannot impose compulsory overtime on employees in the bargaining unit. Whether 300 Ministerial Permits have been issued since 2006 under section 176 of the *Code* is irrelevant to the issue of whether the Company can impose mandatory overtime on an employee.

For these reasons, the grievance is allowed. I declare that the imposition of mandatory overtime is a violation of the collective agreement. Since there is an absence of evidence indicating that the Company’s position on this issue has translated to a concerted practice of imposing mandatory overtime, I do not consider it necessary to issue a cease and desist order as requested by the Union. The Company can be expected to act in good faith and comply with this award.

June 27, 2014

CHRISTINE SCHMIDT
ARBITRATOR