

**CANADIAN RAILWAY OFFICE OF ARBITRATION**  
**& DISPUTE RESOLUTION**  
**CASE NO. 4644**

Heard in Edmonton, June 14, 2018

Concerning

**CANADIAN PACIFIC RAILWAY**

And

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

**DISPUTE:**

Denial of expenses pursuant to section 12.9(b).

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

On September 17, 2013 a grievance was filed on behalf of the employees working on the Prairie Region Districts 1 & 2 Crews who were receiving the per diem allowance pursuant to section 12.9(b) but were being denied 50% of the per diem (\$51.50) for rest days prior to the commencement of their work cycles.

The Union contends that: 1) when employees require hotel accommodations the day before the start of their work cycles, they are entitled to receive half of the diem amount provided for in section 12.9(b) of the collective agreement (the \$51.50); and 2) by refusing to pay the half per diem, the Company violated both section 12.9(b) of the collective agreement and, in particular, Item 6 of the Letter of Understanding concerning the Administrative Application of Article 12.9(b) as it pertains to Direct Billed Accommodation and Single Room Occupancy. Item 6 provides that *Employees that elect the per diem allowance will not be permitted to stay in Company provided accommodation during their scheduled days off. They will be provided a per diem of 50% of the per diem amount provided for in Article 12.9(b).*

The Union requests that the Company be ordered to fully compensate all employees on the Prairie Region Districts 1 & 2 Crews who were wrongfully denied the half per diem (\$51.50) in the circumstances described above.

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

**FOR THE UNION:**  
**(SGD.) G. Doherty**  
**President MWED**

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

There appeared on behalf of the Company:

W. McMillan	– Labour Relations Officer, Calgary
D. Walbaum	– Manager Engineering Works, Winnipeg
R. Hope	– Director Production West, Calgary

C. Clark – Assistant Director, Labour Relations, Calgary  
A. Jansen – Labour Relations Officer, Calgary

There appeared on behalf of the Union:

H. Helfenbein – Director, Pacific Region, Medicine Hat  
D. Brown – Counsel, Ottawa

### **AWARD OF THE ARBITRATOR**

To keep its track in good repair Canadian Pacific employs Maintenance of Way crews that often work in remote locations. These crews work a 7 days on 7 days off schedule, or sometimes 8 days on and 6 days off. This grievance involves such employees in Prairie Region Districts 1 and 2.

There are two basic options for housing crew members; they can seek local accommodation for themselves or they can stay in accommodation (usually hotels, motels or boarding cars) arranged by and directly paid for by the Employer. Before 2012, there was no employee option; the Employer simply posted the arrangement and it applied to the whole crew. The new agreement added the choice and shortly after, the parties negotiated a letter setting out how the options were to be administered.

Some crew members chose to go home (or elsewhere) on their days off; others chose to stay nearby. For those who chose to go home, if that is at some distance, they may face a long journey before they get back to the worksite. Sometimes it is impractical, if they are to go to work refreshed, to do so without checking in to their accommodation on the day before they must report for work.

The post 2013 contractual provisions relevant to this dispute are contained in Article 12.9, Appendix A-18, which is a process letter agreed to in 2013 and now part of the agreement, Appendix D which is a series of questions and answers, and Article 12.9(a) which is the Rest Day Travel Policy. Article 12.9(b), which includes the per diem option, reads:

(b) Direct Billed accommodation or a Per Diem in lieu:

- Applies in all instances where direct billed hotel accommodations are provided in this Section 12 with the exception of Article 12.9 e).

*(Article 12.9(e) has no relevance here)*

- When direct billed accommodation is provided by the Company it shall be single occupancy accommodation. The Company further agrees that every employee may, in lieu of single occupancy accommodation, and at his or her sole discretion, choose to receive the Per Diem amount set out in section 12.9(b) of the Agreement No. 41.

After a note about double occupancy, section 12(d) continues:

- When per diems are provided in lieu of direct billed accommodation and meal allowance, they shall be as follows.
- Per Diem: \$103.00 (Effective January 1, 2015, this amount will be increased to \$106.10)
- Employees on a per diem must secure suitable accommodation to ensure proper rest.
- Employees will be responsible for their own travel to and from their place of accommodation and the designated assembly location.
- Assembly locations will be established by mutual agreement between the appropriate Representative of the Union and the Company.

- Time will be paid for travel to and from the worksite and the designated assembly location, if applicable, regardless of where employees elect to take lodging.
- When direct billed accommodation is supplied, the meal allowance shall be \$41.60 (Effective January 1, 2015, this amount will be increased to \$43.00)

Appendix A-18, which forms a part of the agreement, reads in significant part:

Re: Letter of Understanding concerning the Administrative Application of Article 12.9(b) as it pertains to Direct Billed Accommodation and Single Room Occupancy

...

In the application of Article 12.9b), the parties agree that the following guidelines shall govern:

1. When the Company elects to provide direct billed accommodation, employees will have the choice to elect a single occupancy room, or per diem. Employees will be provided a declaration form on the first day of the work cycle at each new work location. This declaration form will include the location and duration of the Crew for the next work schedule. Employees must declare their choice of the following for the next work location:

- a) Direct billed single occupancy room for the entire period of time the crew is at that work location (see item 3 below); or
- b) The per diem allowance for the entire period of time the crew is at that work location (see item 6 below)

Employees must complete their declaration form and submit it to their supervisor by the end of the first work cycle at each new work location.

2. This declaration process will be repeated at the start of each new work location. Should an employee not declare their choice for the next work location during the first cycle at each new work location, then a direct billed room will be secured and the per diem choice will not be available.

...

4. An employee's choice shall remain in effect for either;
  - a) The duration of time that the employee is at the new work location; or *(the balance of the section is not relevant to this issue)*
- ...
6. Employees that elect the per diem allowance will not be permitted to stay in Company provided accommodation during their scheduled days off. They will be provided a per diem of 50% of the per diem amount provided for in Article 12.9b.
7. Employees that elect direct billed single room occupancy will also be entitled to single room occupancy during their scheduled days off should they meet the requirements as set out ...
10. An employee that has elected a per diem allowance is expected to secure suitable accommodation to enable restorative rest.

Appendix D, also part of the collective agreement, is headed "Expense Claims - Q & A's".

C) Scheduled days off Allowance:

Q1. Who is entitled to this allowance?

A1. Any employee that is entitled to travel home on their scheduled days off but elect to remain on boarding cars or Company provided direct billed accommodation.

The point of difference concerns the situation of an employee who has elected the per diem option and who has left the area during their scheduled days off, but has returned and taken accommodation the day before starting the next work cycle. This, sometimes at least, is necessary to "enable restorative rest", and for a fresh start to the work day. The Union argues that, for that day, the employee is entitled to "a per diem of

50% of the per diem amount provided for in Article 12.9(b)” based on point 6 in Appendix A-18 set out above.

The Employer argues that the 50% per diem is only for employees who have elected the per diem and have chosen not to travel back home. It says the Q & A quoted above says exactly that. Those who do travel are entitled to a different benefit under the Article 12.9(a) Rest Day Travel Policy. To pay both, it argues, would be an unjustified pyramiding of benefits. The employees that are the subject of this grievance qualify for this 12(a) benefit which provides, in part:

- Applies to production gang employees who are provided with boarding car or direct billed accommodation. Also applies when a per diem is provided in lieu of boarding cars or direct billed accommodation.  
...
- This allowance will cover all expenses incurred while traveling on scheduled days off.

The Union seeks this 50% per diem when an employee:

1. Has selected the per diem allowance;
2. Has driven a significant distance to get to the job site, and;
3. Is consequently required to seek out (and implicitly pay for) accommodation for the night prior to the beginning of their shift.

In the Employer’s view, employees have the following options when working in remote locations, on their days off rest:

- i) The employee stays near the work site in company paid accommodations.
- ii) The employee stays near the work site and takes a 50% per diem instead of Company provided accommodation however, the employee is responsible for finding his or her own accommodations.

iii) The employee travels home during their days off and receives “rest day travel assistance” as per the System Rest Day Travel Policy of Article 12.9(a) of the Collective Agreement.

The Employer’s reply to the grievance expanded on this approach, saying:

Item 6 in the Letter of Understanding concerning the Administrative Application of Article 12.9(b) as it pertains to Direct Billed Accommodation and Single Room Occupancy states that “an employee is not permitted to stay in Company provided accommodation during their scheduled days off”. It is the Company’s position that this item addresses the employee’s rights when they elect not to travel on their scheduled rest days ... Employees who elect not to travel on their scheduled rest days will be entitled to 50% of the per diem.

Employees who elect per diem in lieu of direct billed accommodations receive this per diem for each working day during their work cycle. This is provided in order to secure suitable accommodation and enable restorative rest. There are no provisions in the Collective Agreement that require the Company to provide further expenses to an employee who has elected per diem in order to secure accommodations prior to the commencement of their work cycle.

The Union’s principle argument is that the “per diem” option is “in lieu of”, in other words a direct substitute for, the direct billed option. They argue from this that whenever an employee who chooses the direct billed option is entitled to company direct paid accommodation, the employee who has chosen the per diem option must logically and in fairness be entitled to a per diem for that same day. If employees who elect the direct billed option are entitled to the per diem provided that they stay nearby, so the per diem employee ought to be entitled to the same benefit when they return and need accommodation near the worksite the day before work.

The Union argues, based on **CROA 2801**, that, had the Company wished these provisions to have a more restrictive application, it was incumbent on the Company to insist upon clarifying language. Absent such language, the parties are presumed to have intended what they said, viewing the language in its normal and ordinary sense and adopting a purposive approach. See Brown and Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> edition, at 4:2100-4:2120.

The Employer's interpretation, the Union argues, leads to an absurdity:

... employees who travel home on their rest days sometimes have to travel hundreds of kilometres in order to do so. Despite this, the Company would have you believe that such employees are not entitled to any kind of expense allowance while employees who may not have travelled at all are provided with direct billed accommodation and meal allowances. It is submitted that this is deeply illogical and leads to the kind of absurdity and inconsistency that both commonsense and Brown and Beatty suggest must be avoided.

There may be some lack of parallelism between the two interpretations advanced, but I cannot find an absurdity results from the Company's position.

The Union argues that, under the Company's interpretation, the employee who elects the per diem option is barred from receiving the 50% per diem benefit for any of his scheduled days off if the employee travels at any time during his days off. That is correct, but the converse is equally true. Under the Union's counterargument, the employee could get the advantage for paid mileage and other expenses for a return home, even if they only left the worksite for 1 or 2 days. They would still be able to return and collect the per diem for all the remaining scheduled days off. I find this



supports the view that the employee must elect to take one of the two “package deals”. The Union’s argument for a day to day equivalency is most sympathetic on the final day after a long drive, but it logically applies to any day where the employee who has travelled but subsequently returns, even days before the start of their shift cycle.

The newly obtained choice for employees, introduced in 2013, required them to elect one of two systems; either the direct billed accommodation system or the per diem system. Once the selection is made it cannot be changed. It is one or the other, not a “mix and match” arrangement.

I find it appropriate to read Article 12.9 sequentially, and the travel policy comes first. It says expressly “these arrangements must also contain suitable restrictions on trips and must not place an unreasonable economic burden on the Company.” A-18 says this (12(a)) allowance will cover all expenses incurred while travelling on scheduled days off. This gives support to the Company’s argument that to require the payment of the 12.9(a) and 12.9(b) benefit would result in pyramiding as explained in Mitchnick and Etherington’s text at 23.7 – The Rule Against Pyramiding.

I find that the Question and Answer under heading C clearly supports the Employer’s approach, that is, the per diem is only for those who choose not to travel.

Each side argues that the other could have sought clarification earlier, including in bargaining in 2017. Each asserts the other had the onus to do so. In my view, if

there is an onus, as this is a substantial financial benefit, the onus of showing clear language falls to the Union under the principles outlined in cases like *Wire Rope Industries* [1982] 4 L.A.C. (3d) 323 at paras. 20-23 (Chertkow).

Having considered these arguments, I find the Employer's interpretation is the more probable and, as a result, I must dismiss the grievance. This makes it unnecessary for me to deal with the further arguments based on laches or delay.

August 9, 2018



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ANDREW C. L. SIMS, Q.C.  
ARBITRATOR