CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4657

Heard in Calgary, November 13, 2018

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED STEELWORKERS – LOCAL 2004

DISPUTE:

The alleged violation of Articles 1.2, 2.4, 4.1, 4.3 (b), 8.1 and 8.9 of the Collective Agreement 10.1 when changing the start time for gangs RW52, 53, and 55 without notice, additionally when working the aforementioned gangs on their respective calendar rest days without Punitive Over Time (POT) remuneration, and finally when working them in excess of eight (8) hours on the last day of the work cycle when no operational necessity was demonstrated.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The Union submitted a grievance contending that the Company had violated Articles 1.2, 2.4, 4.1, 4.3 (b), 8.1 and 8.9 of the Collective Agreement 10.1. The Union's grievance requested that the Grievors be made whole for all lost earnings when working on their assigned calendar rest days. The Union further requested that the Company immediately conforms to Article 4.3 (b) and cease and desist its practice referred to as "chasing blocks" resulting in working our members in excess of eight (8) hours and the last day of work cycles. And finally, the Union requested that the Company immediately conforms to Articles 2.3 and 2.4 and CROA 462 and immediately cease and desist its practice of not providing the Union with a written notice of start time change.

The Union met at joint conferences to discuss this and other Step 3 grievance on April 14 and June 19, 2014.

The Company disagrees with the Union's contentions and to date has not provided with a written reply to the Step 3 grievance.

The Union provided CN with a joint statement of issue requiring their signature on July 4, 2014 which has not been returned to date.

FOR THE UNION:
(SGD.) P. Jacques
Regional Chief Steward

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

F. Daignault – Manager, Labour Relations, Montreal
S. Grou – Senior Manager, Labour Relations, Montreal
N. Nielsen – Chief Engineer, Western Canada, Edmonton

M. Ouellette – Assistant Chief Engineering, Montreal
K. Luke – Manager Track Quality, Winnipeg

And on behalf of the Union:
R. Gatzka – Staff Representative, Vancouver
J. Desjardins – Chief Steward, Wilkie

AWARD OF THE ARBITRATOR

This case concerns the hours/days worked by three production gangs assigned to change rail in Northern British Columbia.

The gangs, on the three occasions at issue, were working on an agreed work cycle arrangement of ten days of work followed by four days of rest in accordance with a Work Cycle Agreement (*Union Tab 4*) between the parties. As set out therein, the respective 10 day cycles began on Tuesdays and were to continue until Thursday (August 20 – August 30, 2013; September 3 – September 12/13, 2013; September 17 – September 26, 2013) when they were to be followed by 4 consecutive days of rest from Friday - Monday.

On each of the Thursdays referred to above, the Company scheduled the gangs to start their last shifts at a time which extended their work day into the Friday rest day which followed. The Company paid the employees involved time and one-half overtime for any hours worked over their eight (8) hour shifts.

The Union filed a grievance alleging that since the shifts so scheduled by the Company extended into the days assigned as rest days, the employees were entitled to time and one-half rates for every hour worked during the scheduled rest day and not just those which exceeded eight hours.

Relevant Terms

The applicable Articles of the Collective Agreement read as follows:

> *1.2 The word "employee" used herein shall be understood to mean employees for whom rates of pay are provided in this Agreement or Supplemental Agreement hereto. The use of the word "days" will mean calendar days unless otherwise indicated herein.*
>
> *2.1 Eight consecutive hours**,** exclusive of meal period (which shall be one hour unless otherwise mutually arranged) shall, except as otherwise provided, constitute a day's work"*
>
> *2.4 Notwithstanding the provisions of Article 2.2, the starting time for employees living in hotel, motel, boarding cars or other mobile units, or for employees who would ordinarily be accommodated in boarding cars or other mobile units, may be established or changed to meet the requirements of the service. When the starting time is to be changed, as much advance notice as possible, but not later than at the completion of the previous tour of duty, shall be given the employees affected and, where practicable, the notice will be posted promptly in a place accessible to such employees. The USW President, Local 2004 or designated representative shall be advised of any change in starting time at the same time such notice is given to employees.*
>
> *Starting times will not be changed except where it is necessary to do so to obtain proper productivity and efficiency in the work force.*
>
> *2.5 Any change in starting time is subject to employees being afforded eight hours' rest between tours of duty.*
>
> *4.1 The work week for all employees covered by this Agreement, unless otherwise excepted herein, shall be forty hours consisting of five days of eight hours each, with two consecutive rest days in each seven, subject to the following modifications: the work weeks may be staggered in accordance with the Company's operational requirements. This Article shall not be construed to create a guarantee*

> *of any number of hours or days of work not provided for elsewhere in this Agreement.*
>
> *4.3(a) Various work cycle arrangements may be established between the proper officer of the Company and the Union. Where such agreement is reached the parties will make a joint application to the Minister of Labour in accordance with the provisions of the Canada Labour Code, if required.*
>
> *5.1 The rest days shall be consecutive as far as is possible consistent with the establishment of regular relief assignments and the avoidance of working an employee on an assigned rest day. Preference shall be given to Saturday and Sunday, and then to Sunday and Monday, and Friday and Saturday. In any dispute as to the necessity of departing from the pattern of two consecutive rest days or for granting rest days other than Saturday and Sunday, or Sunday and Monday, or Friday and Saturday, it shall be incumbent on the Company to show that such departure is necessary to meet operational requirements and that otherwise additional relief service or working an employee on an assigned rest day would be involved.*
>
> *8.9 Employees required to work on regularly assigned rest days shall be paid at the rate of time and one-half.*

In addition, the parties agreed to adjust the work cycle pursuant to a letter agreement (*Union Tab 3*), that states, at Article 4:

> *"Other than the normal 5/2 cycle outlined in Article 4.1, the work cycles agreed upon as per Article 4.3 shall consist of the following:*
>
> *Ten (10) consecutive working ways of either (8) hours each, followed by four (4) consecutive rest days or nine (9) consecutive working days of nine (9) hours each except that the ninth day shall be eight (8) hours, followed by five (5) consecutive rest days or eight (8) consecutive working days of (10) hours each, followed by six (6) consecutive rest days or seven (7) consecutive working days of twelve (12) hours each except that the seventh day shall be eight (8) hours, followed by seven (7) consecutive rest days or four (4) consecutive working days of ten (10) hours each followed by three (3) consecutive rest days.*

Union

The Union does not dispute the Company's right to stagger the work week (Article 4.1) or otherwise change starting times or the work cycle (Article 4.3(a)) to accommodate

operational requirements. This includes the right to adjust scheduled, consecutive days rest (Article 5.1).

Rather, it argues that:

- the parties agreed to a ten (10) day work cycle with a four (4) day rest period;
- The language of Article 1.2 is unique to this Collective Agreement and specifically defines “days” as calendar days;
- The agreement of December 12, 2012 (*Union Tab 3*) also refers to “calendar days”;
- Taking the above, and Articles 2.1, 5.1 and 8.9 into consideration - and even factoring in the Company’s right to change start times to meet operational requirements – the Company cannot change start times so as to compel employees to work on their scheduled calendar day of rest without paying them the required overtime to work on such day of rest as prescribed by Article 8.9.

Company

The Company asserts that a “days” work is defined in Article 2.1 as follows:

> ***“Eight consecutive hours,*** *exclusive of meal period (which shall be one hour unless otherwise mutually arranged)* ***shall, except as otherwise provided, constitute a day’s work”***

It argues that having properly changed the employees’ start time in accordance with Article 2.4, it is not compelled to pay the overtime rate, as suggested by the Union, until after the employees have completed an eight hour shift as per Article 2.1.

It suggests that, on the above basis, the last shift for the employees at issue began at 19:00 (or 22:00) and constituted a “regular shift” in their work cycle as contemplated by Article 2.4. It argues therefore that the first eight hours of the shift constituted a days’ work and were to be paid at a regular rate of pay. Overtime would only ensue if the employees worked more than *“eight hours per day”.*

Alternatively, the Company argues that – based on a long-established practice the rest period for gangs does not, in fact, begin until the end of their last shift. Accordingly, when that last shift is scheduled to begin on Thursday night to finish on Friday morning, it remains a regular day’s shift in the work cycle for which the first eight hours are paid at a regular rate and overtime commences only after the eight hours are worked, irrespective of whether that shift is completed on a rest day.

Dealing with this alternative argument first. The affidavit submitted - and argument contained in the Company’s brief - do not, in and of themselves, provide sufficient evidence to support a finding of estoppel (see: *Collective Agreement Arbitration in Canada (4th Edition); Snyder et. al.; at p. 45 para. 2.57)*. Neither do they establish a past practise which might assist in interpreting the Agreement’s language even if there was an ambiguity (which there is not). Nor, finally, do they serve to otherwise override the plain and unambiguous meaning contained in the language of the Collective Agreement as I have concluded below.

Decision

As stated in *Brown and Beatty Chapter 4:2100:*

> *In the interpretation of collective agreements, the words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object and the intention of the parties.*
>
> *And, in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions.*
>
> …
>
> *In searching for the parties' intention with respect to a particular provision in the agreement, arbitrators have generally assumed that the language before them should be viewed in its normal or ordinary sense unless to do so would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense. … where there is no ambiguity or lack of clarity in meaning, effect must be given to the words of the agreement…"*

Here, the Company scheduled eight hours of work to start so late on the last scheduled calendar day of work as to interfere with the employees' first calendar day of scheduled rest. It argued that, in doing so, it complied with Article 2 and that the eight hours of work performed - which ran into the employees' day of rest – was therefore part of the eight consecutive hours which constituted regular "day's" work and was to be compensated at regular rates irrespective of whether that work was performed on the last scheduled day of work or ran into the rest day.

However, the Company's reliance on Article 2.1 must be read in conjunction with all of the language in Article 2 as well as the remaining agreement. It is apparent, from reading Article 2, that the reference in Article 2.1 to eight consecutive hours constituting

a day's work presupposes a shift that normally begins between 0500 and 1000 hours. By virtue of Articles 2.3 & 2.4, the parties anticipated that start times could depart from those regular parameters when operational requirements dictated.

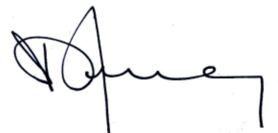
Article 1.2 makes it clear that *"days"* will mean "*calendar days"* unless otherwise indicated. Having regard to the fact that "rest days" are addressed separately in Article 5, it does not follow – as argued by the Company – that a change in start times, pursuant to Article 2, would permit the eight hour re-scheduled work day to extend into an assigned rest day absent the payment of overtime.

The language of Article 5 makes it apparent that the parties both turned their minds to the assignment of work on rest days and the importance of rest days in the scheduling scheme. Where employees are scheduled to work on assigned rest days the Article specifically makes it: *"… incumbent on the Company to show that such departure is necessary to meet operational requirements …".* This obligation is intended to be one that applies to the Company specifically in reference to scheduling rest days and applies in lieu of – or at least over and above - the "*requirements of the service*" as referred to in Articles 2.3 and 2.4. Failure to conclude otherwise would render the reference in Article 5.1 redundant or inconsistent. The language of Article 5 underscores the parties intention that when work is assigned on days of rest it is to be dealt with in a manner that is separate and distinct from the manner of re-scheduled start times addressed in Article 2.

While it is incumbent on the Company to demonstrate that operational requirements make it necessary, Article 5 does not prevent the Company from scheduling work on assigned rest days. Rather, the consequences of so scheduling work are set out in Article 8.9, which specifically addresses the payment of over time at a rate of time and a half for "*regularly assigned rest days…*"

For the reasons above, I conclude that the Company cannot schedule regular shift start times so as to compel employees to work into a scheduled calendar day of rest without paying them the required overtime to work on such day of rest.

The grievance is allowed. I shall remained seized with respect to the application, interpretation and implementation of this award.



January 11, 2019

RICHARD I. HORNUNG, Q. C.
ARBITRATOR