CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 957

Heard at Montreal, Tuesday, June 8, 1982

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

The Union alleges that the Company improperly re-assigned employees covered by Wage Agreement No. 17, Supplemental Agreements applicable to Machine Operators and Work Equipment Shop Employees and Wage Agreement No. 18 employed on the Alberta Surfacing Gang to work 10 consecutive days and four days off during the period April 16 to June 15, 1981.

JOINT STATEMENT OF ISSUE:

Sections 4.1, 5.1, 8.6 of Wage Agreement No. 17 when it changed rest days from Saturday, Sunday each week to Thursday, Friday, Saturday, Sunday, in a two week cycle between April 16, 1981 and June 15, 1981.

Sections 8.2 and 8.3 of Wage Agreement No. 17 when in each two week cycle the employees were required to work 6 days in one week at straight time rates of pay and in excess of 40 hours at straight time rate of pay.

Section 8.7 of Wage Agreement No. 17 when employees were required to suspend work Thursday and Friday and work on a Saturday, Sunday once in each two week cycle.

Section 9.1 of Wage Agreement No. 17 when employees were required to work on regular assigned rest days, Saturday, Sunday, every other week at straight time rates of pay.

That each employee be paid 8 hours at the straight time rate of pay for each Thursday, Friday they had to suspend work (April 23-24, May 7-8, 21-22, and June 4-5, 1981). Overtime rate for each Saturday, Sunday required to work and paid at straight time rate of pay (April 18-19, May 2-3, 16-17, 30-31, and June 13-14, 1981).

The Canada Labour Code, Part III, Section 29.1, when no permit was requested for a modified work week.

The Company denies the Union's contentions and declines payment of claim.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) H. J. THIESSEN	(SGD.) L. A. HILL
SYSTEM FEDERATION GENERAL CHAIRMAN	GENERAL MANAGER, OPERATION AND MAINTENANCE

There appeared on behalf of the Company:

I. J. Waddell	– Labour Relations Officer, Montreal
F. R. Shreenan	– Assistant Supervisor, Labour Relations, Vancouver

And on behalf of the Brotherhood:

H. J. Thiessen	– System Federation General Chairman, Ottawa
F. L. Stoppler	– Vice-President, Ottawa
R. Wyrostok	– Federation General Chairman, Edmonton

E. J. Smith – General Chairman, London
R. Lunn – General Chairman, Vancouver

AWARD OF THE ARBITRATOR

The allegation of violation of the **Canada Labour Code** is not one which I have jurisdiction to consider. While it may from time to time be necessary to consider the provisions of the **Code** or other legislation in the course of deciding matters arising under the Collective Agreement, allegations of violation of the **Code** are not, as such, matters over which the Canadian Railway Office of Arbitration has jurisdiction.

The material provisions of the Collective Agreement are as follows:

> **WORK WEEK**
> **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 Railways' operational requirements. This clause shall not be construed to create a guarantee of any number of hours or days of work not provided for elsewhere in this agreement. (See Clause 8.6 for definition of work week.)
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> **ASSIGNMENT OF REST DAYS**
> **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. 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, it shall be incumbent on the Railway 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.
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> **OVERTIME AND CALLS**
> **8.2** Except as otherwise provided, work in excess of forty straight time hours in any work week shall be paid for at one and one-half times the basic straight time rate, except where such work is performed by an employee moving from one assignment to another, or to or from a laid-off list, or where rest days are being accumulated under Clause 5.2.
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> **8.3** Except as otherwise provided, employees working more than five days in a work week shall be paid one and one-half times the basic straight time rate for work on such sixth and seventh days worked in any work week, except where such work is performed by an employee due to moving from one assignment to another, or to or from a laid-off list, or where rest days are being accumulated under Clause 5.2.
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> **8.6** The term "work week" for regularly assigned employees shall mean a week beginning on the first day on which the assignment is bulletined to work, and for laid-off or unassigned employees shall mean a period of seven consecutive days starting with Monday.
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> **8.7** Employees shall not be required to suspend work in regular working hours to equalize overtime.
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> **WORK ON REST DAYS**
> **9.1** Employees required to work on regularly assigned rest days, except when these are being accumulated under Clause 5.2, shall be paid at the rate of time and one-half.

It is clear that the Collective Agreement contemplates that the work week shall generally be of five days, with two consecutive rest days. The rest days are, generally, to be Saturday and Sunday, or Sunday and Monday. Where there are variations from this, there may be an onus on the Company to show the need therefor.

The change in schedule made in the instant case was not a "staggering" of work weeks as contemplated by Article 4.1, nor has it been shown that the change in rest days (to include Thursdays and Fridays every second week) was "necessary to meet operational requirements" within the meaning of Article 5.1. Indeed, the reason for the change appears to have been an accommodation of the request of the employees concerned.

Understandable, or even desirable as such accommodation may be, the Company may not properly change the application of the Collective Agreement without the consent of the Bargaining Agent, except of course in situations coming (as the instant case does not) within the contemplation of the Collective Agreement itself. It is not open to the Company to deal separately with employees in such matters. It follows that the changes were not authorized, and that the employees should be treated as though their work weeks were as the Collective Agreement require namely from Monday to Friday, with Saturday and Sunday rest days. The provision for accumulation of rest days set out in Article 5.2 is not one which applies in the circumstances of this case. This was not a case of difficulty in providing regular relief.

It would appear that, under the changed schedule, employees worked in excess of forty hours every second week. They would be entitled to payment at time and one-half for such excess hours, under Article 8.2, and at time and one half for work on a sixth and seventh day in a work week, under Article 8.3. They would, as well, be entitled to time and one-half for work on regularly assigned rest days, under Article 9.1. The excess hours, sixth and seventh days and rest days were, in the circumstances, coterminous. There is, generally, to be no pyramiding of overtime (Article 8.4), and the Union simply claims payment at time and one-half for time worked on Saturdays and Sundays, pursuant to any or all of the above Articles. Subject to what is set out below, that claim is well founded.

It is also argued that employees should be paid, at straight time, for those Thursdays and Fridays when they did not work, such claim being based on Article 8.7. I do not consider, however, that the "suspension of work" (more properly, the scheduling of rest days) on those days was done "to equalize overtime". It was done for no such ulterior purpose, but simply in the course of a full, but altered, work schedule which the employees preferred. This claim for payment, therefore, is dismissed.

It is the Company's contention that the Union is estopped from advancing the claim. It would appear that the Union did not have any substantial objection to the revised schedule, and that it had agreed with such revisions in past years. The Union had suggested, in a letter dated May 27, 1981, that the parties jointly apply for a Ministerial permit (in what would appear to have been the mistaken belief that such permit was required). The mere fact that the Union might have found the change acceptable, or that it had agreed to such changes in the past does not, however, create an estoppel. The Union can, in my view, be taken to have represented to the Company that it consented to that particular change of schedule, and the Company certainly did not rely on any such "consent" in making the schedule change, since the change was made well before the Union's attitude in the matter had become known at all. These were not circumstances in which an estoppel can be said to arise.

While the employees concerned, whose wishes in the matter were accommodated, cannot be said to have any moral entitlement to the extra payments, the point is that such payments are called for under the Collective Agreement between the employer and the bargaining agent, and that alterations in the application of the Collective Agreement were made (with whatever good intentions) by one party without the prior agreement of the other.

For the foregoing reasons it is my award that the employees concerned be paid at premium rates for work performed on Saturdays and Sundays on the dates mentioned.

(sgd.) J. F. W. WEATHERILL
ARBITRATOR