CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1629

Heard at Montreal, Tuesday, March 10, 1987

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Guarantee claim, dated August 8, 1985, of Conductor A. A. Alkerton, Hamilton, Ontario.

JOINT STATEMENT OF ISSUE:

During pay periods 15 and 16 (July 12 to August 8, inclusive of 1985, which constituted a single guarantee period, Mr. Alkerton was employed as Conductor on three different road switcher assignments, Trains 555, 559 and 562. At the end of the guarantee period, Conductor Alkerton submitted a claim for $288.11. The Company declined the claim on the basis that Conductor Alkerton's total earnings on the three assignments exceeded the amount guaranteed for the 28 day guarantee period.

The Union appealed the matter contending that, for the nine days he was assigned to Train 562, Conductor Alkerton was guaranteed wages in the amount of $818.91 pursuant to Article 12.1 of Agreement 4.16. Since his earnings amounted to only $530.80, Conductor Alkerton was, therefore, entitled to the difference of $288.11.

The Company declined the Union's appeal.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) R. A. BENNETT	(SGD.) D. C. FRALEIGH
GENERAL CHAIRMAN	ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

D. W. Coughlin	– Manager Labour Relations, Montreal
J. B. Bart	– Labour Relations Officer, Montreal
J. F. Polley	– Transportation Officer, Montreal
D. Huston	– Project Analyst, Montreal

And on behalf of the Union:

T. G. Hodges	– Vice General Chairman, Toronto
R. A. Bennett	– General Chairman, Toronto
W. G. Scarrow	– General Chairman, Sarnia

AWARD OF THE ARBITRATOR

The Collective Agreement makes provision for the payment of guaranteed miles or hours for various types of service, including road switching. Article 12.1 of the Collective Agreement provides, in part, as follows:

> 12.1 Employees operating in turnaround Road Switcher type service within a radius of thirty miles from the point required to report for duty will be paid in accordance with paragraph 2.2 of Article 2 (Rates of Pay) and will be governed in the performance of their duties as follows:
>
> (b) employees regularly assigned to Road Switcher service will be paid not less than the equivalent of 2400 miles at Road Switcher rates per guarantee period. Employees who work or are available for duty only a portion of the month on any run which is regularly assigned or regularly set up will be paid their full proportion of the monthly guarantee provided for such run;

It does not appear disputed that the guarantee provision is established to insure minimum wage payments to employees whose assignments may vary within a pay period and who may, in fact, not work at all even though they are available for work.

On August 8, 1985, Conductor Alkerton made a guarantee claim for $288.11. During a period of nine days, from July 27 to August 4 inclusive, he had been required for service by the Company for five days, accumulating earnings of $530.80. Based on the guaranteed payment of $2,400 for a 28-day pay period, applied rateably to nine days, the grievor calculated that his guarantee entitlement was $818.91. He therefore claimed the difference between the guarantee and the monies actually earned, being $288.11. His claim is based on the provisions of Article 12.1 (b) which provides:

> Employees regularly assigned to Road Switcher service will be paid not less than the equivalent of 2400 miles at Road Switcher rates per guarantee period. Employees who work or are available for duty only a portion of the month on any run which is regularly assigned or regularly set up will be paid their full proportion of the monthly guarantee provided for such run.

The Union relies upon the second sentence of the foregoing provision. It maintains that the Article is explicit in providing entitlement to the guarantee based on the proportion of time that the employee is assigned to a given run. It is common ground that the grievor was assigned to three separate runs during the 28-day pay period between July 12 and August 8, 1985. The nine day period in dispute is entirely in respect of his service in road switching assignment 562, no claim being made for the other two road switching assignments which he worked during that pay period.

The Company disputes the Union's segmenting of the pay period on the basis of separate road switching assignments for the purposes of calculating the guarantee. It maintains that the guarantee is meant to apply on the total of the 28-day period, to a maximum of $2,400, and that an employee cannot use the guarantee for a portion of the month on a specific assignment, to ultimately claim a total amount in excess of $2,400 for the pay period. To put it differently, the Company maintains that the guarantee is a 28-day protection, and not an assignment by assignment protection. In the case of the grievor it maintains that his earnings in the remainder of the pay period, which were in excess of the guarantee, must be applied in reduction of his claim for the nine days. The Company notes that during the pay period the grievor took three days' annual vacation and one day off. He was therefore available for 24 of the 28 days. In the Company's view he was entitled to 24/28 of the monthly guarantee, being 2057 miles. In fact he was compensated 2477 miles, an amount in excess of the guarantee. Therefore, according to the Company, he was not entitled to any additional guarantee claim.

In a grammatical sense the language of the Collective Agreement might lend itself to either of the two interpretations placed before the Arbitrator. The Union maintains that the past practice of the Company is consistent with its position. In this regard it refers the Arbitrator to the settlement of two earlier grievances, the first concerning Brakeman T.V. Loveys, of Hamilton in June of 1974 and the second, Trainman T.M. Chodkiewicz of Toronto in May of 1985. It is clear that in the settlement of both grievances the Company acknowledged that the employees were entitled to a proportion of the road switcher guarantee being calculated on the fraction of 28 days (or 31 days as was the case in 1974) for the period of time the employees either worked in road switcher service or were available to work. Critically, however, the material fails to disclose whether either of the employees in those cases worked exclusively on other road switching assignments during the same pay period and, if they did, whether their earnings would have exceeded the guarantee for those periods. In other words, it is impossible to know whether the

settlements agreed to by the Company were anything more than an acknowledgement that the guarantee must be applied on a proportionate basis for that segment of the pay period worked in road service. Moreover, it is not clear what gave rise to those claims, although some doubt is cast on the weight to be given to them in light of the fact that Brakeman Loveys' claim involved two statutory holidays and Trainman Chodkiewicz's claim was reduced from nine days to seven days on account of the two days for which he was not available. The two cases cited by the Union do not, on their face, appear clearly to deal with the precise issue raised in this grievance, and therefore cannot be ascribed the value of a practice that resolves an ambiguity in Article 12 (b) of the Collective Agreement. If the Union, which bears the burden of proof in this grievance, seeks to establish that its interpretation "has long been established and accepted by both parties" as it asserts in its brief, it must do so by clear and cogent evidence.

The meaning and intent of Article 12.1 (b) of the Collective Agreement falls, therefore, to be determined on the language of that provision. At first blush there is a certain logic to the interpretation advanced by the Corporation. If the Union is correct, if the grievor had worked on a single assignment rather than several assignments over the entire pay period, with the identical hours of active duty and availability, he would have earned less than if he had been assigned to several different runs. The logic of that result is not readily apparent to the Arbitrator. If road service is road service, to be paid at a guarantee rate, it is not clear why there should be a premium for employees who have the fortune to obtain several road service assignments during a given pay period.

Logic not-withstanding, however, ultimately the provision must be construed on its plain language. The second sentence of paragraph 12.1 (b) of the Collective Agreement can be reduced to the following statement: "Employees who work ... only a portion of the month on any run ... will be paid a full proportion of the monthly guarantee provided for such run." The Arbitrator must agree with the representatives of the Union that the focus of the foregoing language is specific to the run. It does not, in other words, address the possibility of an employee working in road service for only part of a month. On the strength of the language so framed, the Arbitrator is compelled to conclude that the guarantee was meant to be calculated and applied on a run-by-run basis, according to the proportionate calculation advanced by the Union. Therefore, the grievance must be upheld, subject to the following *proviso*. It appears to the Arbitrator on the material filed that two of the nine days for which the grievor sought the application of the guarantee were Sundays, being rest days for which he does not appear to have been available. While I make no conclusive finding in this regard, I remit this aspect of the matter to the parties for their determination as to whether his entitlement should be reduced from nine days to seven days on the theory that the grievor was not working or available for duty on those days. I retain jurisdiction in the event of any dispute between the parties respecting that issue, or any other aspect of the interpretation or implementation of this award.

(signed) MICHEL G. PICHER
ARBITRATOR