CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2464

Heard in Montreal, Thursday, 10 March 1994

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Scheduling of work cycles.

BROTHERHOOD'S STATEMENT OF ISSUE:

This grievance concerns the members of the following Pacific Region Unit Gangs: Alberta Surfacing, Alberta Tie, Alberta Ballast, B.C. Tie and Pacific Thermite. Prior to May 9, 1993 these gangs worked a ten and four schedule. After May 9, 1992, as a result of a unilateral Company decision, the gangs worked a staggered work week of Sunday to Thursday.

The Union contends that: **1)** In thus altering the work cycle schedule the Company has violated Sections 4.1, 5.1, 8.6, 8.7, 18.6 and all other applicable sections of wage agreement #41 and 42.

The Union requests that: **1)** the Company immediately reintroduce the pre-May 9, 1993 work cycle schedule and; **2)** Compensate all affected employees for all lost wages, including P.O.T. for all the Fridays that they otherwise would have worked and for P.O.T. for all the Sundays that they have worked from May 9, 1993 until final resolution.

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

FOR THE BROTHERHOOD:

(SGD.) D. McCRACKEN
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. M. Andrews	– Labour Relations Officer, Vancouver
D. T. Cooke	– Labour Relations Officer, Montreal
M. G. DeGirolamo	– Senior Manager, Labour Relations, Montreal

And on behalf of the Brotherhood:

S. P. Boivin	– Counsel, Ottawa
D. McCracken	– System Federation General Chairman, CP Lines, Ottawa
K. Deptuck	– Vice-President, Ottawa
W. Kirkpatrick	– General Chairman, Pacific Region

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in dispute. For some years, apparently since 1986, the Alberta and British Columbia gangs which are the subject of this grievance worked cycles of ten days on and four days off. The cycle was staged so that they commenced working on a Tuesday and finished on the following Thursday. This gave the employees every other Friday, Saturday, Sunday and Monday off. Although the work cycle so arranged is not specifically contemplated in the terms of the collective agreement, it was implemented by agreement between the parties, apparently on a season by season basis.

Before the 1993 work season began the Company attempted to negotiate with the Brotherhood an agreement implementing a four day work week, with Thursday, Friday and Saturday as assigned rest days. That arrangement, which would have involved four ten hour working days, including Sunday, was not acceptable to the Brotherhood. On May 9, 1993 the Company unilaterally changed the work cycle for the gangs in question to five days on and two days off, with Fridays and Saturdays as rest days. The Company takes the position that the change which it implemented complies with the provisions of article 5.1 of the collective agreement, which governs the scheduling of rest days. That article provides as follows:

> **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

The Brotherhood moved before the Supreme Court of British Columbia to obtain an injunction to prohibit the Company from implementing the work schedule initiated on May 9, 1993. On June 10, 1993 the Court issued an interim injunction, pending the outcome of this arbitration, restraining the Company from changing the "ten and four" schedule previously in operation. In the result, although it is appealing the order of the Court, apparently on jurisdictional grounds, the Company complied with the injunction. Consequently, save for the period between May 9 and June 10, 1993, the gangs in question worked the 1993 work season under the traditional "ten and four" work schedule, with every other Friday, Saturday, Sunday and Monday off.

Before turning to the evidence presented by the Company in justification of its decision, it is useful to reflect briefly on the principles which have emerged in the prior decisions of this Office concerning the interpretation and application of article 5.1 of the collective agreement at hand, and identical provisions in other collective agreements in the industry. The first case to deal with the interpretation of the language of article 5.1 appears to be **CROA 700**, a dispute involving the Brotherhood and the Ontario Northland Railway. The language of article 5.1 in the collective agreement there under consideration is, for all material purposes, identical to the language found in the instant collective agreement. In that case the Company sought a departure from the scheduling of days off, normally on Saturday and Sunday, to Monday and Tuesday for a period of two weeks. This was necessitated by the need to dovetail the work of a crane with that of a work train gang. In considering the language of article 5.1 Arbitrator Weatherill commented, in part, as follows:

> This provision does not prohibit the Company from assigning days other than Saturday, Sunday or Monday as rest days. Rather, it imposes on the Company the burden of justifying the assignment of other days as rest days, where the necessity of such is disputed. In the instant case, that burden has been met. I am satisfied from the material before me that the change in question, which was temporary, was necessary to meet operational requirements (the crane was assigned to assist a work train gang which, in order to work when fewer trains were operated and regular section forces were off, worked weekends) and that, had the change not been made, working on an assigned rest day would have been involved.

As may be noted, the rationale for the decision in **CROA 700** is grounded in the temporary and extraordinary need which was faced by the Company and the Arbitrator's conclusion that absent the change "… working on an assigned rest day would have been involved."

CROA 951 involved the parties to this grievance. The Company changed the assigned rest days of a Thermite Welding Gang on the Prairie Region from Saturday and Sunday to Friday and Saturday, for a period of approximately six weeks. The Arbitrator there found that the actions of the Company were justified because of the

relationship between the work of the Thermite Welding Gang and that of a Rail Change Out Gang. In dismissing the grievance the Arbitrator reasoned, in part, as follows:

> In the instant case I am satisfied from the material before me that the change was necessary to meet operational requirements: the Thermite Welding Gang's work follows immediately that of the Rail Change Out Gang so that newly installed rail strings may be welded without additional delay to that necessarily involved by the operation of the Rail Change Out Machine. Scheduling of the latter machine to work on Saturdays and Sundays is, I am satisfied, a proper operational requirement. Because of this, if Saturday and Sunday remained the rest days, then working employees on assigned rest days would be involved. Thus, the conditions allowing the Company to change the rest days existed, and there was no violation of Article 5.1. Whether or not other gangs were still able to be assigned to schedules having Saturday and Sunday rest days is immaterial to this case.

As in **CROA 700**, the Arbitrator grounded his decision, in substantial part, on the conclusion that the Company would have been required to work employees on assigned rest days, presumably incurring the greater cost of overtime payments, had it been unable to reschedule the days off.

CROA 1008 also involved the rescheduling of days off for a work gang on the Company's Prairie Region. In that case a Rail Change Out Gang saw its scheduled days off changed from Saturday and Sunday to Friday and Saturday. The Arbitrator concluded that there was no violation of article 5.1 of the collective agreement. While the reasoning of the Arbitrator in that award is not extensive, he cites the conclusion reached in **CROA 951,** and notes that in the circumstances the Company was apparently required to schedule work on an overtime basis. The Arbitrator appears to have accepted that for a period of two months the Company was justified in scheduling rest on Friday and Saturday to avoid the payment of overtime.

CROA 1061 involved an adjustment in days off to employees of the Company on the Prairie Region for some six weeks, January through March, by reason of a heavy burden of snow removal. The Arbitrator dismissed the grievance alleging a violation of article 5.1, reasoning in part as follows:

> In the instant case, the Railway has shown that, due to the weather conditions existing at the particular place in time, the grievors' schedule was one which was necessary to meet operational requirements.

As is evident from the foregoing, the circumstance in **CROA 1061** involved a temporary and urgent condition which placed a particular burden on operational requirements.

The final case to which the Arbitrator has been referred is **CROA 1958**. In that case the Company changed the rest days of four of eight work gangs operating on the Lakehead Division, from Saturday and Sunday to Friday and Saturday. The Arbitrator found that the change was justified within the terms of article 5.1, having regard to the seasonal urgency to facilitate prairie grain shipments to Thunder Bay. The award concludes that the actions of the Company in that case were justified "… particularly in the circumstance of a temporary busy period, such as is disclosed in the instant case."

In the Arbitrator's view there is a common theme running through all of the prior decisions relating to the interpretation and application of the language of article 5.1. Arbitrators in this Office have found that the onus which the Company bears to justify a departure from the scheduling of rest days on either Saturday and Sunday or Sunday and Monday is discharged where a temporary and/or urgent circumstance necessitates such a departure, and where the Company would otherwise be compelled to incur the additional cost of relief or overtime assignments.

Bearing the foregoing cases in mind, and noting the observation in **CROA 1958** that "The question of what is or is not an operational requirement sufficient to trigger the exception provided in article 5.1 is inevitably a matter of debate which can only be resolved on a case by case basis, having regard to all of the pertinent facts.". I turn to apply the principles reflected in the prior awards to the facts at hand. In the instant case the Company does not rest its case on the plea of a temporary condition. Rather, it presents data to establish that there has been an increase in rail traffic on the seven subdivisions of the Pacific Region. Specifically, it points to the pattern of traffic, stressing that the frequency of trains is at its highest on Thursday, Friday and Saturday as a general rule. By contrast, it submits that Sunday is day of relatively lighter train traffic. On this basis, the employer submits that greater productivity in track maintenance can be achieved by scheduling the gangs to work on Sunday, when interruptions to train traffic would have less impact, and to schedule the gangs' days off on Friday and Saturday, which are relatively higher in traffic.

The logic of the Company's position is, of course, understandable. It does not appear disputed that it is to the employer's advantage to have the road maintenance gangs working on days when traffic is lighter, and to minimize the disruption of traffic on days of heavier train frequency by scheduling their time off on those days.

On a close review of the data, however, and of the history of the application of article 5.1, the position of the Company appears less compelling. Firstly, the differences in traffic flows as between Saturdays and Sundays are not, in all cases, dramatic. For example, on the Maple Creek Subdivision, in the period from April 12 to May 9, 1993, the average number of trains on a Saturday was 26.5, whereas on Sunday it was 26. On the Brooks and Thompson Subdivisions, for the period in question, the average of train traffic on Sunday was in fact higher than on Saturday. On the other side of the ledger, on the Laggan, Mountain, Shuswap and Cascade Subdivisions Sundays were lighter than Saturdays, on average. Even in those locations, however, during certain weeks Sunday traffic was equal to or greater than Saturday traffic. For example, in the second week of the period from April 12 to May 9, 1993 on the Laggan Subdivision twenty-three trains ran on Sunday whereas twenty-two trains ran on Saturday. During the same week on the Mountain Division twenty-six trains operated on both Saturday and Sunday. On the whole, while the data tends to support the Company's assertion with respect to the greater volume of traffic on Friday and Saturday, the data reveals that there are significant inconsistencies in the pattern, and that overall the difference between Saturday and Sunday traffic is not that significant, as compared with other days such as Monday and Tuesday, which are substantially lighter on almost all of the subdivisions involved.

A second, and in the Arbitrator' view still more significant, factor militates against the position advanced by the Company. As noted above, it is common ground that the "ten and four" schedule has been in place, by mutual agreement, since 1986. It is agreed that from 1986 to the present the comparative traffic flows, on a day to day basis over the week, have remained consistent. In other words, the difference in traffic on any given subdivision as between Saturday and Sunday, or as among any other days of the week, has been consistent year after year. There was no change in the weekly pattern of relative traffic volumes in 1993, as compared with previous years. What appears to have changed is the increase in traffic on all days on all the subdivisions of the Pacific Region in recent times. This appears to be the result of a number of factors, including in the nature of the Company's service to customers, including the introduction of shorter and more frequent direct delivery trains, referred to as DDT trains. It does not appear disputed that the DDT concept has been successful in attracting and servicing customers whose business is time sensitive in respect of deliveries. In the result, there has been an increase in the number of trains running on the subdivisions, although no real change in the relative flows of traffic in the various days of the week.

It may be true that the Company's convenience and productivity would be better served by never scheduling days off for work gangs on Sundays and that efficiencies would be maximized by always scheduling the days off of the work gangs on Fridays and Saturdays. As is evident from the text of article 5.1, however, the Company's natural desire for efficiency and productivity is not the sole consideration governing the scheduling of days off. Significantly, the language of the provision makes it clear that the parties agree that Sundays off are a matter of primary importance, and that any departure from a schedule which involves Sunday as a day off must be shown, by clear and cogent evidence, to flow from a necessity to meet operational requirements. In the Arbitrator's view the exceptional provision for the necessity to meet operational requirements involves the kind of irregular circumstances noted in the prior decisions of the Office, reviewed above. Schedules designed solely to permit better, more efficient or more profitable ways of operating are a legitimate employer concern, but they do not, by that reason alone, satisfy the conditions of article 5.1 of the collective agreement.

In the Arbitrator's view the material presented does not satisfy the onus upon the Company of establishing that the departure from the scheduling of days off on either Saturday and Sunday or Sunday and Monday is "necessary to meet operational requirements" as that phrase is understood and has been interpreted by this Office within the context of article 5.1 of the collective agreement. When the "ten and four" schedule was first agreed to in 1986 the comparable frequency of train traffic as between Saturdays and Sundays was essentially the same as it is today, and as it was at the time the Company implemented the change in scheduling on May 9, 1993. In the circumstances the Arbitrator has some difficulty in understanding how there has been any substantial change which would, in any meaningful way, justify a departure to meet operational requirements. In my view, absent clear and unequivocal language in the text of article 5.1 of the collective agreement, the mere increase in the flow of traffic, spread evenly over all days, is not the kind of change which would justify a departure necessary to meet operational requirements within the meaning of the article.

Secondly, the factor of requiring additional relief, or utilizing employees on what would otherwise be assigned rest days, is clearly not satisfied in the case at hand. It is common ground that during the period of the interim

injunction the Company did not resort to hiring additional employees to work on a relief basis, and did not schedule the gangs in question to work overtime in a manner or in a frequency which departed from traditional patterns. The evidence adduced by the Company confirms that no significant change in hiring or scheduling was undertaken as a result of the employer reverting to the "ten and four" schedule for the balance of the 1993 season, following the injunction of the Supreme Court of British Columbia. For the foregoing reasons the Arbitrator is satisfied that the Company has not discharged the onus of justifying the departure from either Saturday and Sunday or Sunday and Monday as scheduled days off within the contemplation of article 5.1 of the collective agreement, and on that issue the grievance must succeed.

I cannot, however, accept the submission of the Brotherhood that there is any obligation upon the Company to schedule working days and days off on the basis of the "ten and four" cycle which was previously in place by agreement, on a season by season basis. Article 4.1 of the collective agreement governs the work week, and provides as follows:

> **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 Railway's 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.

In light of the foregoing the Company is at liberty to institute a change in the scheduling of employees, from the "ten and four" rotation, to a "five and two" rotation, consistent with the terms of the work week as agreed within the collective agreement. That is so even though it may be true that a "ten and four" rotation can be construed as two "five and two" rotations, back to back. In the circumstances the Arbitrator cannot sustain the argument of the Brotherhood that the Company violated the agreement by reverting to a "five and two" cycle with the "five and two" periods being successive rather than back to back. Nor can the Arbitrator find any violation of the terms of articles 8.6, 8.7 and 18.6 of the collective agreement.

For the foregoing reasons the grievance must be allowed, in part. The Arbitrator finds and declares that the Company violated the provisions of article 5.1 of the collective agreement by purporting to implement a work schedule which did not include Sunday as one of two consecutive days off, commencing on May 9, 1993. The Company is directed to reinstate either Saturday and Sunday or Sunday and Monday as rest days for the gangs which are the subject of this grievance, for the duration of the collective agreement, save, of course, as may otherwise be justified from time to time by the proper application of the exceptional conditions contemplated in article 5.1 of the collective agreement.

The issue of compensation for employees affected by the change in scheduling implemented by the Company between May 9 and June 10, 1993 was not fully addressed in evidence, nor in the arguments of the parties. In the circumstances the Arbitrator retains jurisdiction with respect to the issue of the amount of compensation, if any, to which the employees affected would be entitled, in the event that the parties should be unable to reach agreement on that question.

11 March 1994

(sgd.) MICHEL G. PICHER
ARBITRATOR