CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2587

Heard in Montreal, Wednesday, 15 February 1995

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

Claim of Douglas W. Thompson, Peterborough Terminal, that the starting time of his assigned position was improperly altered without being cancelled or re-bulletined

JOINT STATEMENT OF ISSUE:

D.W. Thompson was awarded a position of driver representative with an 8:00 a.m. starting time.

This position has been changed five (5) times in the six (6) months preceding this grievance and has resulted in junior employees obtaining and/or remaining at an 8:00 a.m. start, while Mr. Thompson's position is now a 9:00 a.m. start.

The Union contends this to be a violation of the agreement as the contemplation of the agreement is that a position may be moved by a total of one (1) hour. In the instant case the cumulative total of the moves has been five (5) hours.

The Union further contends the Company has abrogated Mr. Thompson's seniority rights by having moved junior employees to the earlier start time of 8:00 a.m., and/or having their start time left unchanged.

The Union's request is that Mr. Thompson be returned to his 8:00 a.m. position, or in the alternative that all positions moved by more than one (1) hours be abolished and reposted in accordance with the agreement.

The Union further requests that Mr. Thompson be paid one (1) hour at the premium rate for every day a junior employee(s) started at 8:00 a.m. until such time as Mr. Thompson is returned to his 8:00 a.m. position, or the aforementioned positions are abolished and reposted.

The Company denies the Union's request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. J. DUNSTER	(SGD.) P. D. MacLEOD
EXECUTIVE VICE-PRESIDENT – TRUCKING	DIRECTOR, LINEHAUL & SAFETY

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Director, Linehaul & Safety, Toronto

And on behalf of the Union:

P. Sadik	– Counsel, Toronto
D. J. Dunster	– Executive Vice-President, Ottawa
J. J. Boyce	– National President, Ottawa

AWARD OF THE ARBITRATOR

It is common ground that the bulletined start time of the grievor's position in the Peterborough Terminal is 8:00 a.m. It is also not disputed that on a number of occasions the start time of his assignment was changed, and that in all instances the start times remained within one hour of 8:00 a.m. For example, in October of 1993 the start time was moved to 7:45 a.m. It was returned to 8:00 a.m. in December of 1993 and again moved to 9:00 a.m. in May of 1994.

The issue at hand is the application of article 5.2.12 in the circumstances disclosed. That article provides as follows:

> **5.1.12** When the hours of a permanent position are changed and effect the starting or ending time by more than one hour and/or the assigned rest days are altered, the position will be rebulletined promptly, but only to the Local Seniority Group concerned.

The Union submits, in part, that the movement of the grievor's start time between the span of 7:45 a.m. to 9:00 a.m., even though it was accomplished in increments between October of 1993 and May of 1994, represents a change in the hours his permanent position by more than one hour. It argues that that requires the rebulletining of his job, in accordance of article 5.2.12. The Union also submits that movement in any direction on the clock can cumulatively be added so as to exceed one hour, as for example by moving the start time back thirty-five minutes, and thereafter restoring it to its original start time. The Union also submits that the Company's actions in its application of article 5.2.12 are in derogation of the grievor's seniority rights, stressing that bulletined jobs, including the grievor's, are bid by seniority, largely based on their start time. In the Union's submission the fact that employees junior to the grievor found themselves working jobs with more desirable start times of 8:00 a.m., while Mr. Thompson was compelled to commence work at 9:00 a.m., is in violation of the intention which underlies article 5.1.12. In support of its position the Union relies on the decision of this Office in **CROA 253**.

In the Arbitrator's view that case does give some guidance to the resolution of the case at hand. The collective agreement there in question, between Canadian Pacific Express Company and the instant Union, under its previous name [Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees] contained article 7.2 in respect of the bulletining of positions, clause (q) of which provided as follows:

> **7.2 (q)** When the regular hours of a permanent position are changed and affect the starting or ending time by more than one hour and 30 minutes and/or assigned rest days are altered the position will be re-bulletined promptly, but only to the local seniority group concerned.

In that case the Union grieved the treatment of an Obico Terminal driver whose starting time was altered from 6:00 a.m., as bulletined, to 8:30 a.m., through a number of incremental steps over a period of years. The Company there argued that the phrase "the regular hours of a permanent position" did not refer to the original bulletined hours, but rather to the regular hours currently in effect at the time any change is implemented. Arbitrator Weatherill rejected that approach, commenting, in part, as follows:

> In my view, this is not a reasonable interpretation of article 7.2 of the collective agreement. That article is clearly intended to provide some sort of protection to the employee who has bid on a job with a particular starting and ending time. Major changes in those times could drastically affect the character of the employment, and the desirability of the job. It would be contrary to the obvious purpose of the provision to allow the company, by a series of changes of times of less than one hour and thirty minutes, to change the schedule without posting the job, where they could not have done so in one change of hours. It seems clear to me that the bulletined hours constitute the hours of the job, and that these may be changed by as much as one hour and thirty minutes without posting, but where the hours are changed in excess of that limit, a further posting is necessary. …

The Arbitrator agrees with Counsel for the Company that the foregoing reflects a determination that reference is to be had to the original bulletined start time for the purposes of the provision being considered in **CROA 253**, that the employer is prohibited from moving an employee's start time by more than one and one-half hours from that original bulletined time, and that that is so whether the change occurs in one step or in several increments. On the other hand, any changes which result in the employee commencing work within a one and one-half hour's range of the original bulletined time falls within the permissible limits of the article, and does not require the rebulletining of the position.

The first issue to be resolved is whether a similar interpretation applies in the case at hand. As can be discerned from the foregoing, the Union is effectively arguing before me the position which the Company asserted unsuccessfully before Mr. Weatherill in **CROA 253**. It argues that the yardstick is not to be based on the bulletined start time, but on any actual start time assigned to the employee, and any subsequent changes from that position. On that basis, the accumulated swing in start time from 7:45 a.m. to 9:00 a.m. would, in the Union's submission, trigger the rebulletining of a position within the meaning of article 5.1.12.

There can be no doubt that article 7.2(q), considered in **CROA 253,** and article 5.2.12 of the collective agreement in the case at hand have a common genesis. There are only two differences which appear in the wording of the provision in the instant agreement: firstly the time limitation for changes is reduced to one hour, rather than one and one-half hours; secondly, article 5.2.12 makes reference to "… the hours of a permanent position" rather than "… the regular hours of a permanent position".

In the Arbitrator's view the approach taken by Arbitrator Weatherill has much to commend it, to the extent that there is a stable and objective bench mark in respect of the hours of any permanent position. That bench mark is the hours established in the original bulletin creating the position. Can it be concluded that the parties to this collective agreement intended any different result by referring to the hours of a permanent position rather than to the "regular" hours of a permanent position? I think not. It is reasonable, I think, to presume that the parties intended a clear point of reference, rather than a sliding scale, in the interpretation and application of article 5.2.12. Bearing in mind that different employees can occupy a given position over time, on relief or otherwise, the logistics of keeping track of the base point for calculating the hours of a permanent position, when they change from time to time, perhaps without any clear recording of such changes, suggests that the parties had a different intention. Absent any language in the collective agreement to the contrary, the Arbitrator is persuaded that by reference to the hours of a permanent position the parties intended to mean the hours reflected in the bulletin describing that permanent position.

When article 5.2.12 is so understood, a balance is struck. The Company retains the discretion to change the hours of work by up to one hour on either side of the bulletined start time, while the employee is left with the protection of knowing that his or her start time will never be more than one hour away from the original bulletined time. The Arbitrator can find no compelling reason to conclude that the parties intended article 5.2.12 to have any substantially different meaning than the similar provision considered in **CROA 253**. It would, of course, have been open to the parties to express the protection in terms of any change in the hours of an "employee" holding a permanent position. They did not do so, however, and retained the focus on the hours of the position, rather than the hours of the employee. In the result, I am satisfied that the interpretation advanced by the Company is correct, and that no violation of article 5.2.12 is disclosed in the case at hand.

February 17, 1995

(signed) MICHEL G. PICHER
ARBITRATOR