CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2831

Heard in Montreal, Wednesday, 12 March 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

EX PARTE

DISPUTE:

Claims on behalf of Locomotive Engineers E.S. Battle, J.B. Alexander, W.H. Baarschers, H.J. Bourret, K.D. Murray, C.H. MacKinnon, D.F. Janes, L.F. LaFond, S.R. Ramsey, P.V. Tuer, T.J. Causley and R.I. Beaudoin in relation to the inclusion of travel allowance payments in the calculation of general holiday payments – article 76.9 of agreement 1.1.

EX PARTE STATEMENT OF ISSUE:

On various dates in 1995 and 1996, the aforementioned locomotive engineers qualified for general holiday payment. As stated in article 76.9, payment for a general holiday "shall be an amount equal to an employee's earnings, exclusive of overtime, for the last shift or tour of duty worked prior to a general holiday". When the Company payroll system generated payment for the general holiday(s), the travel allowance portion of the working claim was not included in the general holiday payment.

The Brotherhood contends that the grievors are entitled to payment of the full amount of the working claim, as stated in article 76.9, including the travel allowance portion, for the general holiday(s).

The Company disagrees with the position put forth by the Council and has declined these claims at step 2 and step 3 of the grievance procedure.

FOR THE COUNCIL:

(SGD.) C. HAMILTON
GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. A. Watson	– Labour Relations Consultant, Montreal
D. Fournier	– Coordinator, Crew Management Centre, Moncton
G. Search	– Assistant Manager, Labour Relations, Toronto
D. MacKenzie	– Labour Relations Officer, Toronto
J. Krawec	– System Transportation Officer, Montreal

And on behalf of the Council:

C. Hamilton	– General Chairman, Toronto

AWARD OF THE ARBITRATOR

The payment for a general holiday is governed by the language of article 76.9 of the collective agreement which reads as follows:

> **76.9** Holiday pay for an employee qualified under paragraph 76.8 shall be an amount equal to an employee's earnings, exclusive of overtime, for the last shift or tour of duty worked by him prior to a general holiday provided such amount shall not be less than the equivalent of a minimum day in the class of service performed on that shift or tour of duty.

The Council's representative indicated at the hearing that the dispute to be resolved is confined to the treatment of employees who are required to travel by taxi between Sarnia and Port Huron, Michigan. It is common ground that they are the subject of Addendum 46 of the collective agreement which reads, in part, as follows:

> It is agreed that:
>
> 1. Sarnia road service employees who are required to report for duty or who are released from duty at Port Huron, Michigan, will be provided free transportation between Sarnia, Ontario and Port Huron, Michigan.
>
> 2. Road service crews referred to in Clause 1 hereof will be required to register, receive train orders, etc., at Sarnia.
>
> 3. Road service crews referred to in Clause 1 above will be allowed an arbitrary of one hour in each direction for such movement at the rate applicable to the service for which called.

The Council claims that in the computation of holiday pay for employees who, on their tour of duty prior to the general holiday received the arbitrary provided for in sub-paragraph 3 above which, since April of 1993 has been increased to one hour and fifteen minutes, those individuals are entitled to the inclusion of the travel allowance as part of their holiday pay.

This is not a case which, in the Arbitrator's view, can be determined on the basis of evidence concerning past practice or estoppel. Neither side has produced compelling direct evidence of the general practice at Sarnia with respect to the computing of holiday pay, as regards the treatment of the travel allowance arbitrary. The Council's representative submits that such payments were common, while the Company's representations, based on information received from payroll managers, is that the travel allowance is not included in the calculation of holiday pay, whether in Sarnia or anywhere else on the system under collective agreement 1.1. In the circumstances, the Arbitrator cannot find that the Council's single record of a claim, apparently made in 1992, which was in fact paid, can be taken as proving a consistent and pervasive past practice.

The case must therefore fall to be determined on the basis of the language of the provisions in question. The language of article 76.9 obviously governs the resolution of this grievance. As is evident from the wording of the article, holiday pay is based on an employee's "earnings" for the "last shift or tour of duty worked …". The issue then becomes whether the travel time to and from Port Huron spent by an employee can fairly be characterized as part of the employee's tour of duty worked. It may be noted at the outset that the parties have not included the travel time as deadheading, which clearly would be part of a tour of duty, as contemplated under article 63.

The language of addendum 46 itself is framed in terms which indicate the understanding of the parties that employees travelling to and from Port Huron, Michigan are not in fact on duty. Clause 1, reproduced above, plainly contemplates that the employees in question either "report for duty or … are released from duty" at Port Huron. Therefore, insofar as the language would indicate, the parties do not appear to consider that an employee who is being transported to and from Port Huron is to be treated as on duty or, in the language of article 76.9, engaged in the process of receiving earnings for a "tour of duty worked".

That conclusion is to some degree reflective of the analysis of this Office in **CROA 2760** of a similar, albeit only analogous, issue. However, in that grievance the Arbitrator dealt with a travelling allowance arbitrary of one hour and fifteen minutes for travel between Niagara Falls and Buffalo where a letter of understanding specifically provided, in part: "It is understood that time spent travelling between these two points is an allowance, and will not be included in time on duty …."

The distinction between arbitrary payments and earnings for work performed on duty was further touched upon in **CROA 415**. That case involved the relationship between arbitrary payments and an employee's monthly guarantee. In sustaining the union's position in that grievance Arbitrator Weatherill commented, in part, as follows:

> The "arbitrary" payments would, in my view, constitute "earnings" in the broad sense of being income derived from employment. They do not, of course, constitute earnings in respect of actual miles run. The payment is made, in conjunction with the provision of transportation, in respect of the time taken to return to a starting point where employees are released at another point within a terminal. The time so occupied, however, is not lumped together with actual "on-duty" time. The "arbitrary" payment is unrelated to the extent of the actual work performed by an employee.

When regard is had to the principles reflected in **CROA 415** and **2760**, and the specific language adopted by the parties in the wording of addendum 46, specifically concerning the Sarnia-Port Huron travel allowance, the Arbitrator is compelled to conclude, on the balance of probabilities, that the parties did not intend travel allowance to be included or computed as part of an employee's working time or on-duty time as a general matter, or, more specifically, as part of a "tour of duty worked" within the contemplation of article 76.9 of the collective agreement. The interpretation of the Company is more compelling that that of the Council.

For all of the foregoing reasons the grievance must be dismissed.

March 14, 1997

(signed) MICHEL G. PICHER
ARBITRATOR