CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3324

Heard in Montreal, Tuesday, 11 March 2003

concerning

VIA RAIL CANADA INC.

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

Reduction of guarantee relative to Locomotive Engineer L. Rivers of Winnipeg, MB, as a result the misapplication of article E – Hours of Service and Overtime, paragraph 12 of the MacKenzie award.

BROTHERHOOD'S STATEMENT OF ISSUE:

On June 5, 2001, Locomotive Engineer Rivers accepted a call for an emergency trip on Train No. 1. After returning from Melville, the grievor booked eight (8) hours` rest coinciding with his arrival.

The Corporation subsequently reduced the grievor's guarantee by sixteen (16) hours based on an argument that he was not regularly assigned.

The Brotherhood contended that the grievor was regularly assigned and therefore was not required to protect his regular assignment, Train 693, given that same operated within ten (10) hours from the time the relieving locomotive engineer was required to report for duty.

The Corporation has declined the Brotherhood's request to reinstate the deducted guarantee.

FOR THE BROTHERHOOD:

(SGD.) D. E. BRUMMUND
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

E. J. Houlihan	– Sr. Manager, Labour Relations, Montreal
G. Benn	– Labour Relations Officer, Montreal
A. Iacomo	– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

D. E. Brummund	– Sr. Vice-General Chairman, Edmonton
B. Willows	– Vice-General Chairman, Edmonton

AWARD OF THE ARBITRATOR

The facts of this grievance are not in dispute. Locomotive Engineer Rivers of Winnipeg held a regular assignment in June of 2002 working trains 1, 2, 693 and 692. On June 3 the grievor had no scheduled run, and was asked to work an extra trip on his day off, which he agreed to do. His extra work consisted of operating train no. 1 from Winnipeg to Melville on June 3, laying over at Melville and handling train no. 2 back from Melville to Winnipeg, going off duty in Winnipeg on June 5 at 11:40. The grievor was paid 16.92 hours over and above his guarantee amount for the extra work performed between Winnipeg and Melville in addition to 16.03 hours held away payment for the layover involved.

The grievor's regular assignment was again scheduled to work on June 5, with an on duty time of 18:00. Having returned from Melville and gone off duty at 11:40, Mr. Rivers booked eight hours' rest, as was his right. In so doing, however, he became unavailable for his call for his regular assignment on train 693, and did not work that trip,

requiring the Company to assign an off duty locomotive engineer to cover what would have been the grievor's regular assignment in passenger service from Winnipeg to Dauphin, return. In the circumstances the Corporation reduced the grievor's guarantee of hours by sixteen hours, representing the number of hours of his regular assignment for which he was unavailable by reason of booking rest following his extra assignment on June 5.

At issue is the interpretation of article E-12 of the collective agreement which reads as follows:

> **E-12** Regularly assigned locomotive engineers who book rest at their home terminal, which results in their missing their assignment, will have their guarantee reduced by the hours of the assignment missed, unless the relieving locomotive engineer was required to report for duty within ten hours from the time the regularly assigned locomotive engineer booked rest.

It is common ground that the foregoing provision was newly introduced into the collective agreement by the Mackenzie arbitration award, which converted the payment system from a mileage based system to an hourly based system. To approximate a guarantee of 40 hours of work weekly, the collective agreement establishes a guarantee of 160 hours per month. The Corporation maintains that in the circumstances the grievor was liable to a reduction of his guarantee. The Brotherhood argues that on the strict wording of the article, given that his replacement engineer was required to report for duty within ten hours from the time Mr. Rivers booked rest, there could be no reduction of his guarantee.

While the Arbitrator can appreciate the strict reading of article E-12 which leads to the interpretation advanced by the Brotherhood, a closer examination of the history of this provision, and a purposive appreciation of its operation, lead to the conclusion that the Brotherhood's position cannot be sustained. As the material discloses, prior to the Mackenzie award, there was no article equivalent to article E-12 in the language of collective agreement 1.2. However, collective agreement 1.1, in force in Eastern Canada, did contain a similar provision in what was then article 23.7. It provided as follows:

> **23.7** If a regularly assigned locomotive engineer books rest on arrival at the home terminal thereby causing the loss of a trip, payment of basic day at the minimum rate applicable to the class of service to which assigned will be made (less any amount otherwise earned) for each trip or tour of duty so lost, provided that the locomotive engineer filling such trip was required to report for duty within ten hours from the time the regularly assigned locomotive engineer booked rest.
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> **NOTE (1): The provisions of paragraph 23.7 will not apply when employees book rest on arrival on other than their regular assignment.**
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> **NOTE (2):** The provisions of paragraph 23.7 will not apply to locomotive engineer working split tour assignments such as those in effect for GO train assignments in Toronto.
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> (emphasis added)

As can be seen from the foregoing, Note (1) to the parallel article contained within collective agreement 1.1 denotes the clear intention that regularly assigned locomotive engineers are to be protected against the reduction of their guarantee when booking rest on arrival on their regularly assigned run causes them to lose the next trip on their regular assignment. However, locomotive engineers booking rest on arrival following an assignment other than their regular assignment do not have that protection.

Obviously, the language of article E-12 does not have the clarification of Note (1) contained within it. By the same token, it arguably has an inherent ambiguity, as it is not clear from the language of the article whether the protection against the reduction of guarantee given to regularly assigned locomotive engineers is intended to attach to occasions when they book rest after their regular assignment, or whether it attaches in any circumstance, as the Brotherhood would appear to argue in the case at hand. After careful consideration of the provisions in question, the Arbitrator is satisfied that the position of the Corporation is to be preferred.

Firstly, from the standpoint of interpretation, it is clear that the article is confined to regularly assigned locomotive engineers. It would not, therefore, extend to spare or unassigned locomotive engineers. On its face the language of the article would support the inference that the benefit provided within the article was intended to operate in the context of work normally done by regularly assigned locomotive engineers, that is only in the context of regularly assigned runs. That would obviously be consistent with the historic operation of the parallel provision found within collective agreement 1.1, reproduced above, which I am satisfied is the genesis of article E-12.

Secondly, from a purposive standpoint, the Arbitrator has some difficulty with the position argued by the Brotherhood. It is not disputed that in the month which is the subject of this grievance Mr. Rivers worked a total of some 124 hours. For that period he was paid 160.92 hours, in addition to held away payments, taking into account the extra work which he performed. According to the Brotherhood's interpretation, he should in fact be paid 176.92 hours, being the 16.92 hours of his extra assignment over and above his guarantee of 160 hours.

In the Arbitrator's view the interpretation advanced by the Brotherhood goes beyond the purpose of the monthly guarantee. The amount claimed would be payable had the grievor not booked rest, and had not missed a regularly scheduled run by reason of doing so, and would be equally payable if he had booked rest following a regularly assigned run. However, the Arbitrator has some difficulty appreciating how the grievor can have the full benefit of his monthly guarantee, without a reduction of that guarantee, when he voluntarily booked rest and made himself unavailable for his regular assignment following his performance of the extra assignment which he voluntarily accepted. Given the history of the provisions found in article E-12 of the collective agreement, it is easy to appreciate the basis upon which the parties, or Arbitrator Mackenzie, would have intended that an employee made unavailable for his own regular assignment by virtue of the late arrival of that same regular assignment should not suffer a reduction in his or her guarantee. The same notions of equity do not, however, operate where the employee books rest voluntarily following an extra assignment. It appears to the Arbitrator more persuasive to conclude that the parties would have intended that an employee might well have the benefit of the value of an extra assignment over and above his or her guarantee only where the employee has fully performed their regular assignment or, alternatively, has been frustrated from doing so by reason of a late arrival in the regular assignment itself.

On the foregoing basis, I am satisfied that the interpretation of the Corporation is to be preferred. The reference to "regularly assigned locomotive engineers" found within article E-12 must, in my view, be taken to reflect the understanding that the protections within that article are meant to be confined to the circumstances of a locomotive engineer booking rest following the completion of his or her regular assignment, thereby missing their next regular assignment. To conclude otherwise would result in an interpretation and the payment of monies which, in my view, would be plainly out of keeping with the purpose of the monthly guarantee as applied to the work of regularly assigned locomotive engineers.

For the foregoing reasons the grievance must be dismissed.

March 14, 2003

(signed) MICHEL G. PICHER
ARBITRATOR