AH890

IN THE MATTER OF AN ARBITRATION

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
(SYSTEM COUNCIL NO. 11)

("Union")

and

CANADIAN NATIONAL RAILWAY

("Company")

Re: Policy Grievance: Dispute Re Overtime Hours; Walker Call Desk

No. 2049-2023-001

Arbitrator: Cheryl Yingst Bartel
Hearing Date: May 29, 2024
Decision Date: September 16, 2024

Appearances:

For the Union:
Denis Ellickson, Counsel
Daniel Blakeney, Western Regional Chairman, Advisor
Gurpal Badesha, General Chairman
Steve Martin, International Representative

For the Company:
Jeff Landmann, Counsel
Hannah Buckley, Co-Counsel
Saveria Poletto, Co-Counsel
Maud Boyer, Sr. Manager, Labour Relations, Advisor

AWARD OF THE ARBITRATOR

Background, Issue & Summary

[1] The parties have consented to my appointment and agree I have jurisdiction to hear and determine the matters at issue in this Grievance.

[2] This is the second of two Grievances between these parties, which were heard on the same day. Both Grievances arise under Collective Agreement No. 11.1 ("The Agreement"). Both hearings were conducted according to an agreement of the parties to follow an expedited process, similar to that used in this industry by the CROA&DR[1].

[3] The parties did not agree on a Joint Statement of Issue. Rather, each party filed an *ex parte* Statement of Issue, appended to this Award. Both parties also filed written arguments, including rebuttal arguments, which were all reviewed by this Arbitrator, prior to the hearing. The Grievance was heard in one hour. No oral evidence was presented.

[4] This Grievance involves employes who work on what is known as the "Walker Yard Call Desk" in Edmonton Alberta, in the Signals and Communications ("S&C") Department of the Company.

[5] Both Grievances raise issue with what must be considered when these employees take a "paid" paid personal leave day(s) and medical leave day(s) ("PLD", "MLD" or "Leave Days") under the *Canada Labour Code* (the "*Code*")*.*[2] It is not disputed there is no entitlement to paid leave days of this type in the Agreement. The entitlement arises from the *Code.*

[6] As background, in 2018, the parties agreed to two modified work schedules for S&C employees; one for Eastern Canadian employees and one for Western Canadian employees (the "Work Cycle Agreement(s)"). Such modifications are permitted by the

[1] Canadian Railway Office of Arbitration, & Dispute Resolution; established by Memorandum of Settlement ("CROA Agreement"); as amended.
[2] By sections 206.6(2) and 239(1.3); RSC 1985, c. L-2, as amended.

Canada Labour Standards Regulations.[3] A portion of the Western Canada Modified Work Agreement has been reproduced, below.

[7] A further schedule modification was negotiated for employees who work on the Walker Call Desk, in Edmonton (the "Walker Schedule Agreement"). A portion of this agreement is also reproduced below. That document is undated, but the parties agreed it was entered into after the Eastern and Western work modification agreements, which were both dated March 15, 2018.

[8] The Walker Schedule Agreement provides that the Walker Yard Call Desk employees will work seven 12 hour shifts in a two week period, for a total of 84 hours. This is achieved by employees working a two week cycle of 5 days on and 2 days off one week (60 hours worked) and 2 days on and 5 days off the second week (24 hours worked), for a total of 84 hours worked.

[9] As this Schedule requires in excess of 80 hours worked in a two week period, the parties have agreed that the four extra hours are paid to these employees at the overtime rate.

[10] The issue in this Grievance is whether the Company has violated the *Canada Labour Code* by considering that employees who take a Leave Day during a two week cycle have "worked" less than their modified work cycle and are not owed monies for overtime.

[11] At issue is the interpretation to be given to Article 6, 7.10, and 7.13 of the Agreement; the amendments to Article 6.1 in the Work Cycle Agreement; and several sections of the *Code.*

[12] In the Union's framing of the issue, it argued the overtime hours worked under this modified work schedule were "guaranteed" and it was not the intention of the legislature that employees suffer a "loss in pay" from that schedule, when taking a Leave Day. The Company argued those hours were not "guaranteed" but were only paid when overtime was "actually worked".

[3] C.R.C., c. 986

Relevant Provisions and Legislation

Agreement 11.1

Article 6 Overtime and Calls

6.1 Except as otherwise provided, time worked in excess of eight hours, exclusive of meal period, shall be considered overtime and paid on the actual minute basis at the rate of time and one-half

[note this Article was modified by the parties in the Work Cycle Agreement, below]

…

6.5 All overtime earned shall be shown as a separate item on the pay cheques of employees.

6.6 The following guidelines will be used to assign overtime work other than the following: regular call-outs for employees to protect calls on their territories, on-call assignments (e.g. adjacent territory under 4.6 vacation relied, etc.) or for incidental overtime worked by individuals or gangs in the normal course of their duties, continuous with their normal work day (before or after).

Two categories of overtime are contemplated.

1. Planned work where the scope of the work is known in advance and/or where the workload is too large for the assigned work group to handle.
2. Emergency situations where the nature of the work cannot be handled solely by the on-call employee who is responding.

…

Article 7

7.1 Unless otherwise provided, a work week of forty (40) hours consisting of five (5) days of eight (8) hours each is established.

…

7.10 There shall be no overtime on overtime; neither shall overtime hours paid for, other than hours not in excess of eight paid for on holidays or for changing shifts, be utilized in computing the forty (40) hours per week, nor shall time paid for in the nature of arbitraries or special allowances such as attending court, deadheading, travel time, etc. be utilized for this purpose, except when such payments apply during assigned working hours in lieu of pay for such hours, or where such time is now included under existing rules in computations leading to overtime.

…

7.13 Various work cycle arrangements may be established by mutual agreement between the proper officer of the Company and the Union. Such work cycle variations may include 10 hour days followed by 4 rest days, 15 work days followed by 6 rest days, 8 work days (10 hours each) followed by 6 rest days, etc. Where such agreement is reached the parties will make a joint application to the Minister of Labour in accordance with the provisions of the *Canada Labour Cde.*

It is understood that the various work cycle arrangements are for the purpose of meeting the Company's operational requirements or to provide employees working long distances from home sufficient time to return home on their rest day.

…

Article 20 Bereavement Leave

20.1 Upon the death of an employee's spouse, child, still-born child, step-child or parent, the employee shall be entitled to five (5) days bereavement leave without loss of pay provided he/she has not less than three months cumulative compensated service

…

Canada Labour Code

Part III

Definitions

Section 166

…

overtime means hours of work in excess of standard hours of work;

…

standard hours of work means the hours of work established pursuant to section 169 or 170 or in any regulations made pursuant to section 175.

…

wages includes **every form of remuneration for work performed but does not include tips and other gratuities…**[4]

…

Maximum hours of work

170(1) *An employer may, in respect of one or more employees subject to a collective agreement, establish, modify or cancel a work schedule under*

[4] Emphasis added.

which the hours exceed the standard hours of work set out in paragraph 169(1)(a) if

(a) *the average hours of work for a period of two or more weeks does not exceed forty hours a week; and*

(b) *the schedule, or its modification or cancellation, is agreed to in writing by the employer and the trade union.*

171(1) *An employee may be employed in excess of the standard hours of work, but, subject to sections 172, 176 and 177, and to any regulations made pursuant to section 175, the total hours that may be worked by any employee in any week shall not exceed forty-eight hours in a week or such fewer total number of hours as may be prescribed by the regulations as maximum working hours in the industrial establishment in or in connection with the operation of which the employee is employed.*

Maximum hours of work – collective agreement

172(1) *An employer may, in respect of one or more employees subject to a collective agreement, establish, modify or cancel a work schedule under which the hours exceed the maximum set out in section 171 or in regulations made under section 175 if*

(a) ***the average hours of work for a period of two or more weeks does not exceed forty-eight hours a week***[5]*; and*

(b) *the schedule, or its modification or cancellation, is agreed to in writing by the employer and the trade union.*

Overtime pay or time off

174(1) *Subject to any regulations made under section 175, when an employee is required or permitted to work overtime, they are entitled to*

(a) *be paid for the overtime at a rate of wages not less than one and one-half times their regular rate of wages; or*

(b) *be granted not less than one and one-half hours of time off with pay for each hour of overtime worked, subject to subsections (2) to (5).*

…

[5] Emphasis added.

Division VII Maternity-related Reassignment and Leave and Other Leaves

Personal Leave

…

Section 206.6

(1) Every employee is entitled to and shall be granted a leave of absence from employment of up to five days in every calendar year for… [enumerated grounds]

(2) *If the employee has completed three consecutive months of continuous employment with the employer, the employee* ***is entitled to the first three days of the leave with pay at their regular rate of wages for their normal hours of work, and such pay shall for all purposes be considered to be wages.***[6]

…

Division XIII Medical Leave

Entitlement to Leave

Section 239

Rate of wages

(1.3) If the employee has completed three consecutive months of continuous employment with the employer, the employee ***is entitled to the first three days of the leave with pay at their regular rate of wages for their normal hours of work,*** *and such pay shall for all purposes be considered to be wages*[7].

Canada Labour Standards Regulations[8]

4 *If, in accordance with subsection 170(1) or 172(1) of the Act, the parties to a collective agreement have agreed in writing to a modified work schedule, the agreement shall be dated and contain the information set out in paragraphs (a) to (m) of Schedule III.*

…

Schedule III Notice of Modified Work Schedule:

[(a) to (m) of Schedule III requires that the modified work schedule contain the hours of work in each work day and in each work week (d); l as the number of work days in

[6] Emphasis Added.

[7] Emphasis added.

[8] CRC, c. 986; (the "*Regulations*") .

the schedule (e); the number of weeks in the work schedule (f); the number of days of rest in the work schedule (g); how the weekly standard hours are reduced when general holidays occur in a week (h); and the method of calculating general holiday pay (k)].

Section 1

Any hours worked in excess of the daily hours of work set out in paragraph (d) and in excess of a weekly average of 40 hours over the work schedule are payable at the overtime rate.

…

…

***17** For the purposes of subsections 206.6(2), 206.7(2.1), 210(32) and 239(1.3) of the Act, the regular rate of wages of an employee **whose hours of work differ from day to day or who is paid on a basis other than time shall be…**[9]*

Interpretation Act[10]

Section 12

Every Act is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Western Canada Modified Work Cycle Agreement

This letter is with reference to a "Modified Work Cycle" arrangement, as per Article 7.13 of Agreement 11.1 for Signals and Communications employees working under the jurisdiction of Western Region Engineering. It is understood that unless otherwise agreed upon, the standard work cycle will be in accordance with Article 6.1 and the acknowledged historical practice.

Pursuant to Article 7.13 of Agreement 11.1, and in accordance with our past practice, the parties signatory hereto agree to the following Modified Work Cycle provision, covering employees working for Western Region Engineering. It is understood that the various work cycle arrangement are for the purpose of meeting the Company's operational requirements or to provide employees working long distances from home sufficient time to return home on their rest days.

Other than the normal 5/2 cycle outlined in 7.1, the work cycles agreed upon as per 7.13 shall consist of the following:

[9] Emphasis added.

[10] R.S.C. 1985, c. I-21

[several cycles are then set out]

…

Pursuant to Article 6.1 of Agreement 11.1, except as otherwise provided time worked in excess of eight hours, exclusive of meal period, shall be considered overtime and paid on the actual minute basis at the rate of time and one-half. *[reproducing Article 6.1 from the Agreement].* ***Notwithstanding the foregoing, employees will be paid overtime in excess of the normal hours required by their modified work cycle.***[11]

Should a statutory holiday occur on any date of the modified work week, qualified employees will be compensated in accordance with Articles 19.5 of Agreement 11.1, for eight (8) hours pay if not required to work on the holiday. If required to work on the holiday, employees will be compensated for the time worked in accordance with the modified work cycle and the holiday will be deferred and taken concurrent with the rest days. **Nothwithstanding the foregoing, an employee whose wages are calculated on a daily or hourly basis shall, for a general holiday on which he/she does not work, be paid at least the equivalent of the wages he would have earned at his regular rate of wages for his normal hours of work.**[12]

…

Walker Yard Call Desk 84 Hours Work Schedule

In order to comply with Labour Code guidelines, ESDC work permits and overtime restrictions, ***IBEW and CN agree to the following work schedule in order to meet the requirements of the Walker S&C Call Desk to operate 24/7***[13] *with the current 8 employees on 12 hour shifts in compliance with the IBEW Agreement Article 7.13…*

The new schedule is to replace the current 12 hrs shifts on 4 days ON, 4 days OFF work cycle for the S&C Call Desk employees. This schedule is based on 8 days, it provides the following inconsistencies with the 7 day and the 14 day pay period:

- *Work days and off days shift by one day every week, providing a shifting work schedule throughout the year.*
- *The hours worked per pay period changes from 84 hrs, 72 hours, 84 hours and 96 hours every 4 pay periods (over 8 weeks) and repeats thereon. This provides a short pay on the 72 hour pay period and a large pay with 16 hours OT on the 96 hours pay period.*

[11] Emphasis added.
[12] Emphasis added.
[13] Emphasis added.

> ***The schedule will be 12 hrs shifts on a 5 & 2 day cycle providing 84 hr pay period with alternating weekends and Mondays off for everyone[14].*** *The following table represents the 5 & 2 work days cycle for all 8 Call Desk employees (4 coordinators and 4 technicians[*
>
> *[graphic not reproduced]*
>
> *…*
>
> *It is expressly understood that this Agreement is based on the unique facts of this situation.*

Facts

[8] On September 1, 2019, amendments to the *Canada Labour Code*[15] came into force to provide for PLD's in certain circumstances, as outlined in section 206.6(2).

[9] In the Fall of 2021, the parties commenced the bargaining for a renewal of the Agreement.

[10] A short work stoppage occurred, which ended on July 5, 2022. The few remaining issues were sent to binding arbitration, with a decision issued in October of 2022.

[11] No changes were either negotiated or awarded regarding the Walker Call Desk employees, the overtime provisions, or the Walker Schedule Agreement in that round of bargaining.

[12] In December of 2022 - after the Agreement was finalized - further changes to the *Canada Labour Code* became effective, providing for paid MLD's, in certain circumstances: s. 239(1.3). The wording of that entitlement mirrors that in s. 206.6(2) for PLD's.

[13] The Company's payroll operates on an "honour system", where employees put in their entitlements, and they are then paid out without needing approval. Random audits are undertaken by the Company, and amounts are subject to claw back if found to be overpaid.

[14] Emphasis added.
[15] R.S.C. 1985, c. L-2.

[14] The Company stated it became aware in July of 2023 that some employees were claiming overtime hours for pay periods when Leave Days had been taken – under this honour system - and that it moved to correct this error immediately in August of 2023, to ensure no overtime amounts were claimed.

[15] Some discussions then ensued between the parties, and it became apparent there was a disagreement over what employees who worked the Walker Schedule were entitled to be paid when they took a Leave Day under the *Code.*

[16] The Union filed this Grievance, alleging that the Company was violating the Agreement and the *Code* by not paying appropriately when an employee took a Leave Day.

Arguments

The Union

[17] The Union argued the Company had failed to comply with its obligations under the *Code* and the Agreement by not considering as owing the overtime, which was included in the Walker Schedule Agreement, when an employee used a paid Leave Day, as the Company had considered those employees had not physically worked over 80 hours in a two week cycle and overtime was not therefore payable.

[18] It was the Union's position that by Article 7.13, the parties agreed to establish work cycle arrangements and thereby determined what was the "regular hours of work" for employees working under the Walker Schedule Agreement. It pointed out that Schedule was based on the Company's operational need. It noted employees had an expectation of what salary they would receive over that two week period, under this Schedule.

[19] It noted this was a "fixed schedule" which included four hours of overtime for each two week period, as the schedule was four hours beyond an 80 hour work week in that two week period.

[20] The Union argued that the *Code* defined "wages" in s. 166 to include all forms of remuneration, except for tips or gratuities. It argued that if Parliament had intended to

exclude overtime for employees on modified work schedules, it would have done so expressly, as it did for tips and gratuities. It argued Parliament did not exclude overtime in this definition. It argued the overtime under this Schedule was work "performed", which brought overtime into the purview of "wages" under the *Code.*

[21] It was the Union's position that the amendments to the *Code* adding the entitlement to take paid Leave Days were intended to modernize the *Code* and improve working conditions. It argued the legislative intent was clear that employees were not to be "financially disadvantaged" or "penalized" (to use its language) when utilizing a Leave Day. It relied on the *Hansard* debates, to support its arguments. It also urged the word "regular" as used in s. 206.6(2) and s. 239(1.3) of the *Code* implied a sense of regularity, repetition or frequency, and did not mean a "minimum" level of wages: **CROA 4816**[16].

[22] The Union argued there was no support for the Company's position that a Leave Day was not time physically "worked" for the purposes of calculating overtime. It argued the Company had not identified any provision of the Agreement or *Code* that would limit payment only to circumstances where an employee has "worked". It was the Union's position that overtime in these circumstances met the requirement of pay provided for "normal hours of work", as described in s. 206.6(2) and s. 239(1.3) of the *Code*, as the days were "usual, standardized or expected" days of work.

[23] The Union also argued that Article 7.10 of the Agreement provided for two categories of circumstances where paid time is included in the computation of overtime, which are two exclusions from the general rule that the computation of overtime does not include overtime hours. The Union maintained that under Article 7.10, the computation of overtime included up to eight hours paid for holidays or changing shifts, as well as time spent for deadheading, attending court, "etc."

[24] In further support of its arguments, the Union pointed out that the Company was compensating employees using the Union's interpretation, noting several situations where the Company paid overtime to individuals who had worked more than 12 hours per day, but less than 40 hours in a particular week, or less than 84 hours in a two week

[16] Upheld on judicial review: *CN v. TCRC and Michelle Flaherty* 2023 ONSC 3365 (CanLII).

period, for those on the Walker Schedule. It also pointed to the example of pay for bereavement leave. It pointed out that Article 20 relating to bereavement leaves provided payment of "regular wages". It argued this mirrored the requirement in the *Code,* for payment of "regular wages". It argued these were wages an employee would have expected to earn.

[25] It also relied on the purpose of personal leave days as noted in *British Columbia Maritime Employers' Association v. Int'l Longshore and Warehouse Union.*[17] It argued that to deny overtime entitlements was anti-thetical to this purpose. It argued its position was also consistent with the "fair, large and liberal" construction that should be given to the *Code as* required by s. 12 of the *Interpretation Act.* It also argued its interpretation was consistent with s. 168 of the *Code*, and with the recent decision of the Federal Court.

[26] The Union relied on *CN Rail and IBEW,* (Kaplan, Interest Arbitration), October 7, 2022; *Debates of the Senate Official Report (Hansard)* December 4, 2018; *B.C. Maritime Employers' Association v. International Longshore and Warehouse Union – Canada* 2021 CanLII 772620 (BCLA); and *Moday v. Bell Mobility Inc.* 2013 CarswellNat 393.

The Company

[27] The Company's position was that it had met its obligations both under the *Code* and the Agreement. It was the Company's position that the factual matrix is relevant and is an essential consideration in this case. That matrix includes that the Articles which govern overtime in the Agreement were established long before the introduction of Leave Days into the *Code.* It argued it is not controversial that the parties could not have contemplated or agreed that overtime applied to Leave Days.

[28] The Company argued that the *Code* and *Regulation* requirement to pay for the "regular rate of wages" for "normal hours of work" as used in sections 206.6(2) and 239(1.3) do not include overtime. It argued that "overtime pay" is set out in s. 174 of the *Code,* which language refers to "permitting" an employee to work overtime; and that

[17] 2021 CanLII 72620

overtime is paid at one and one-half times the employee's "regular rate of wages", which implies overtime is not included in the phrase "regular rate of wages" in the *Code.* It argued the most logical conclusion is that the *Code* contemplates that employees are paid their "regular rate of wages" which is the rate of wages *prior to* additional payments such as overtime.

[29] The Company further argued that section 166 of the *Code* defines overtime as "hours of work in excess of standard hours of work", and also defines "standard hours of work" in s.170, which it argued applies to this case. It refers to hours which are 'worked' not in excess of 80 hours. It argued that overtime only occurs in circumstances that exceed an employee's "normal hours of work". It argued that overtime hours are not "normal" in the ordinary sense of the word, but are hours *in excess* of regular hours. The Company further argued s. 17 of the *Regulations* does not apply.

[30] The Company argued that even if s.17 of the *Regulations* applied, then subsection (b) governs, as the amounts established in Article 3 of the Agreement are what an employee regularly earns and are entitled to, and are the rates that must apply on a Leave Day.

[31] The Company relied on *Re Raillink Canada Ltd. and TCRC* where the Arbitrator found that "Parliament never intended to include overtime when calculating an employees "regular wages for his normal hours of work"[18].

[32] The Company argued that "overtime can only be earned on time actually worked"[19] under this Agreement. It argued the intention of the parties at the time of drafting the Agreement was never to provide overtime pay to days not actually worked. It argued the Union was asking the Arbitrator to improperly amend the Agreement to require the Company to pay overtime on Leave Days, when an employee was not "working" even though the parties had not made that agreement themselves.

[33] It argued that the Agreement under Article 6.1 provides that overtime is "earned"; it is only provided for "time that is worked, not hours taken off of work. If no hours are

[18] 2005 CarswellNat 7935 at para. 12.

[19] Company submissions, para. 39.

worked, then no time is earned and no overtime is paid".[20] It pointed out that under Article 6.1, overtime is to be paid on the actual *minute* basis, which only makes logical sense in the context of time spent actually working. While the Company did acknowledge that the Western Canada Modified Work Cycle Agreement of the parties[21] amended Article 6.1, its position was this amendment did not negate the language in Article 6.1 that overtime only applies to hours actually worked and must be earned. It argued that the ordinary dictionary meaning of the term "earned" is to "…receive as return for effort and especially for work done or services rendered. It also pointed out that "earn" is defined in *Black's Law Dictionary*[22] as "to acquire by labour, service or performance". The Company urged that the Union is seeking a "betterment" of the situation of its employees, and not that they remain financially whole.

[34] The Company pointed out that Article 6.5 in the Agreement refers to overtime as "earned", to reflect it is paid when the employee works more than they are required to do. It was the Company's position that the requirement to work to earn overtime was supported by arbitral jurisprudence: *Brookfield Foods v. B.C.T.W. Local 446*[23] where the Arbitrator determined that "hours worked" means "hours actually worked" and not "paid sick leave". It also pointed out there is no dispute between the parties that overtime is not paid on "unpaid" personal leave days under the *Code.* Its position was it does not make sense to pay an employee on a Leave Day extra compensation for *not* working.

[35] The Company also cited Article 6.6 as the guideline for assignment of overtime work, and for limiting the circumstances where overtime work is contemplated under the Agreement. It also argued Article 7.10 supported its position as Leave Days are not "special allowances" under that Article. It pointed out the other requirements mentioned are incidental to performing work. Further that Article sets out limitations on incurring overtime.

[36] The Company argued it only owed employees who took a Leave Day the "regular rate of wages" for those days, and it was entitled to consider that 84 hours had not been

[20] Company submissions, para. 27.
[21] Dated March 15, 2018
[22] 10th ed.
[23] 1987 CarswellNS 600

worked in a two week period when those days were used. It argued there is no circumstance where an employee could incur in excess of eight hours, when on a Leave Day. It pointed out that as soon as the Company became aware of the claim of employees for overtime in pay periods which included a Leave Day, it moved to correct this error and ensure no overtime claims were paid for Leave Days.

[37] It further argued its position was supported by the "Interpretations, Policies and Guidelines on "Hours of Work" ("Hours of Work IPG"), published by the Government of Canada. It argued that document was created to clarify whether certain, less obvious forms of work are "work" under the *Code.* It noted that neither Leave Days nor any other forms of "days off work" are discussed as 'work' in that document.

[38] The Company relied on *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing* 2017 ABCA 157; *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53; CROA 4481; CROA 4884; *AUPE v. AHS* 2020 ABCA 4; *Brookfield Foods v. B.C.T.W., Local 466* 1987 CarswellNS 600; *Government of Canada Interpretations, Policies and Guidelines (IPG's) "Hours of Work"; Black's Law Dictionary, 10th ed; AH816; CUPE v. Air Canada, (Policy Grievance CAMS Program)* SOQUIJ 2024; *Re Raillink Canada and Teamsters Canada Rail Conference* 2005 CarswellNat 7935 and **CROA 4606**.

Rebuttal Arguments

[39] In rebuttal, the Union argued the Work Cycle Agreements are entirely separate from the Walker Schedule Agreement; that the Company had authorized payment for overtime when someone took a Leave Day; that it was unbelievable the Company had not discovered the payments for more than three years following the *Code amendments;* that Article 7.10 provides exceptions to Article 6.1, which are broadened by the use of "etc."; that the Company has interpreted this in a broad and liberal manner by paying overtime for bereavement leave days; that the parties have expressly negotiated a more generous definition of overtime than that in the *Code,* which is a minimum level of standards, so this more generous definition governs as a greater benefit; that section 206.6 does not expressly exclude overtime, nor is it excluded by the definition of "wages" in section 166; that employees who are on the modified work

schedule routinely work overtime hours and it is part of these employees' normal hours of work; that section 17 of the *Regulations* is not informative for this Grievance as it only applies to employees whose hours of work vary, so the circumstances contemplated are not before this Arbitrator; and that the purpose of the Work Cycle Agreement and the *Code* is met if overtime is included for a Leave Day.

[40] In its rebuttal, the Company noted that it was only after bargaining was completed and the Award settling the terms of the Agreement had been issued that it became aware employees were claiming overtime in periods where the MLD's were being taken; that employees are not penalized by its interpretation; that the Union is seeking a greater benefit than that provided by the Agreement; that simply because employees works a set schedule does not mean they are entitled to overtime when they work less than the required hours set on that schedule; that when employees take a Leave Day, they are not working their scheduled hours, so no overtime arises; that the use of the words "regular rate" preceding the word "wages" indicates it was the intention of the legislature to limit the scope of that definition; that "wages" are for "work performed"; that there is a connection between the phrase "work performed" and "overtime"; that the Union's interpretation conflicts with s. 174 and the definition of "overtime" in the *Code,* which it argued establishes the "regular rate of wages" is exclusive of "overtime"; that Article 7.10 cannot be the only means of excluding overtime hours from the calculation of pay as its purpose was to give express clarification regarding specific circumstances where overtime cannot be claimed and that those circumstances are different than Leave Days as they are work activities for the employer; that it is absurd and illogical to conclude that Article 7.10 means overtime is paid for days off work; that past practice cannot be considered in this case, given the clear and unambiguous wording of the Agreement, nor has estoppel been argued; and that even if past practice is admitted, the Union's reliance on four instances is not determinative of a past practice and pre-dates when the Company became aware of this issue. The Company again emphasized that overtime only applies to time worked and that Agreements must be read as a whole. It pointed out the Union has not mentioned Article 20 (bereavement leave) in its Statement of Issue.

Analysis and Decision

[41] This is an interpretation Grievance. The "modern principle" to be applied to both contract and legislative interpretation was recently canvassed by this Arbitrator in **CROA 4884**, as well as in this Arbitrator's decision in **AH889,** between these parties, which was heard on the same day[24]. That analysis is adopted here.

[42] To summarize, the same principles apply to both contract interpretation and legislative interpretation, which is that primacy is to be given to the words used – whether by the legislature or the parties. In contract interpretation, those words are to be considered within the context of the surrounding circumstances which existed at the time the contract was made. The ends sought to be achieved – by the contract or the legislation - must be considered, along with its scheme.

[43] For both legislative and contract interpretation, several "canons of construction" are regularly applied, including that the provisions are assumed to work together harmoniously, and parties/government are not presumed to have used words superfluously.

[44] It is well-accepted that it is not open to a rights Arbitrator to change the parties' deal by means of a creative interpretation. Any changes to the contract must either be bargained, or imposed by interest arbitration.

[45] With respect to the Company's argument, s. 170 of the *Code* does not apply to this situation. While that section refers to a modified work schedule, s. 170(1)(a) states that section applies if "the average hours of work for a period of two or more weeks does not exceed *forty* hours a week".[25] In this case, the average hours of work of the Walker Schedule *does* exceed 40 hours a week over a two week period, as these employees work 84 hours over two weeks.

[46] As such, s. 172(1)(a) applies, as the average hours of work exceed 40 hours a week, but do not exceed 48 hours a week.

[24] And issued on the same day.
[25] Emphasis Added.

[47] There is no dispute that the entitlement to paid Leave Days arises only under ss. 206.6(2) and 239(1.3) of the *Code.* Agreement 11.1 does not contain that entitlement. As noted in **AH889**, there are three qualifications under ss. 206.6(2) and 239(1.3) for overtime to be included when considering the appropriate payment for a Leave Day:

a. Overtime must be for "***wages***" as defined in s. 166;
b. Overtime must qualify as being part of the "***regular rate***" of those "wages"; "**for**"
c. ***"their normal hours of work***" [26]

(the latter two qualifications arising from Articles 206.6(2) and 239(1.3))

[48] As noted and discussed in **AH889**[27], there are also three sub-requirements for a payment to meet the definition of "wages" under section 166 of the *Code:* the payment must be part of [a] "every form of remuneration"; [b] "for work performed"; and [c] not a "tip or gratuity".

[49] This first, broader determination of whether a payment is "wages" under section 166 is a threshold question, meaning if overtime is *not* "wages" under the *Code* for the Walker Yard Call Desk employees, the analysis need not continue to the other two specific qualifications under ss. 206.6(2) and 239(1.3).

[50] Before looking at these requirements in turn, the Company argued that the Government of Canada's own interpretation document – the "Interpretations, Policies and Guidelines (IPG)" - is relevant to this interpretive exercise.

[51] I find I cannot agree. That document indicates its purpose is to "clarify the definition of hours of work"…and specifically "what is meant by the term "work"; whether time-off in lieu of overtime is allowed, and whether certain terms fall within the definition of "hours of work".

[52] Notably, the term "overtime" is not among those terms.

[53] The only reference to overtime in the IPG is in the context of compensating overtime as time off in lieu. Further, it was also noted in that section that "…*this IPG is*

[26] Emphasis Added.
[27] Beginning at para. 68.

intended for arrangements that are not contained in a collective agreement". I therefore find no relevance in that document to the issues at play in this Grievance.

[54] The key fact for the resolution of this Grievance is that the Walker Call Desk employees work a *modified* work schedule, which is subject to both the Western Canadian Modified Work Agreement, and the Walker Schedule Agreement. This is not a case where an employee may – or may not – work overtime in any particular week(s); where an employee "often" works overtime as part of their employment; or even a case where an employee has been required by an employer to regularly work overtime over a certain period of time. Rather, in this case, the parties have agreed that the Walker Call Desk employees are required to work a *modified* schedule, which schedule *includes* four hours of overtime every two week period.

[55] This type of modification is permitted by the *Code* and is regulated by *Schedule III* of the *Regulations.*

[56] Returning to the three qualifications, the first question is whether "*overtime"* is included as "*wages"* as that term is defined in section 166 of the *Code*.

Is Overtime "Wages" Under Section 166?

[57] The first requirement is that overtime be part of "every form of remuneration" received by an employee.

[58] As noted in **AH889**:

> The word "remuneration" is not defined in the *Code.* Neither is any specialized meaning apparent from the legislation.
>
> Black's Law Dictionary states that "remuneration" is: "Reward; recompense; salary." Its digest notes the word "*remuneration means a quid pro quo. If a man gives his services, whatever consideration he gets for giving his services seems to me a remuneration for them*". I am satisfied that "remuneration" is an expansive word. I am further satisfied that its breadth is further emphasized by the legislative choice of the word "every" which was used to describe that remuneration. The descriptor of "every" must be given meaning. I am satisfied that in using the word 'every', it was the intent of the legislature to include all forms of remuneration received from an employer – *all* forms of recompense to an employee for services rendered. The only exception is specifically set out as tips and gratuities. Both of those exceptions

> are irregular payments *which are not paid by an employer, but may be paid to an employee by third parties*.
>
> I am persuaded by the Union's position that as the legislature specifically set out these two exceptions in s. 166, it was obviously alive to the ability to create exceptions to the *types* of remuneration that should be included in the term "wages*" for the purposes of entitlements under the Code.*
>
> It did not create any further exceptions beyond these two[28].

[58] I am satisfied that giving the phrase "every form of remuneration", a plain and ordinary meaning, overtime *is* a form of recompense which an employee receives from an employer. I am satisfied overtime meets the requirement of being a "form of remuneration" from an employer to an employee.

[59] The second sub-requirement under "wages" is that the payment must be for "*work performed*".

[60] As noted in **AH889**, the decision in *Re Unifor, Local 2411 and St. Lawrence Seaway Management Corp.* considered that the word "performance" as used in a Pension Plan suggested there was an "act" of "doing something on a regular basis with the goal of achieving or accomplishing some objective or making or completing or producing some outcome or thing", which was described as the "very notion of work – work is the effort one makes or performs in order to produce a result"[29].

[61] Giving the phrase "work performed" its plain and ordinary meaning, I find this same reasoning persuasive. I am satisfied that payment for overtime under the Walker Schedule Agreement *does* qualify as remuneration which an employee receives "for work performed", as overtime achieves or accomplishes "…some outcome or thing"; it "produces a result". Overtime is something that produces value, and it is "work" as that term is ordinarily understood.

[28] Paras. 68 to 71; emphasis in original.
[29] See paras. 88 and 89 of **AH889**

[62] While the Allowance in **AH889** *was* a "form of remuneration" - and so met the first requirement - it was found it did not meet this second requirement as it was not "for work performed". The same cannot be said of "overtime".

[63] The Union has satisfied the second sub-requirement to establish overtime as "wages".

[64] The third sub-requirement is that overtime must not be a "tip or gratuity".

[65] I am satisfied that overtime is not a tip or gratuity. Tips or gratuities are received by employees *from third parties*, and are not a form of remuneration received by an employee from an employer. If received from an employer, they are not a form of "wages".

[66] I therefore agree with the Union that "overtime" meets the definition of "wages" in section 166, for *Code* entitlements. This interpretation is supported by section 174(1)(a) of the *Code,* which states that when an employee is "required or permitted to work overtime, they are entitled to (a) be paid for the overtime *at a rate* ***of wages***…..".[30]

[67] While the Company argued the words "required or permitted" in s. 174 meant overtime must be "time actually worked", I cannot agree with that conclusion. While arguably the word "permitted" could refer to "time worked", the word "required" is not so limited.

[68] As noted in *Black's Law Dictionary,* to "require" something is to "direct, order, demand, instruct, command, claim, compel, request"[31]. A "requirement" to work overtime is an *obligation* to work overtime. In this case, that obligation exists by virtue of the Walker Schedule Agreement. The actual "time" which is *spent* working overtime under that Schedule is independent of the *obligation* to do so. The parties have agreed that the Walker Call Desk employees are "required" to work overtime, under their modified work schedule.

[69] The Company also argued that it is not logical to pay "overtime" for time an employee is not physically working and "earning" that wage. With respect to that

[30] Emphasis added.
[31] *Black's Law Dictionary*

argument, the nature of a "paid day off" is that an employee receives payments, *even though they are <u>not</u> providing any work to an employer.* The employee is not "doing" any work to "earn" any wage on that day. That result is not illogical as argued by the Company, but is the nature of receiving "paid" time off under these Leave Days: no services are provided, yet wages are being received.

[70] The next two qualifications under ss. 206.6(2) and 239(1.3) are connected, and so will be considered together.

<u>Is Overtime part of the "Regular Rate" of Wages" "For" "Their Normal Hours of Work"?</u>

[71] Turning to ss. 206.6(2) and 239(1.3), the remaining two qualifications are noted in both of these clauses. These qualifications will be analyzed together, as there exists a connection between them through the use of the word "for":

a. Overtime must be part of the "***<u>regular rate</u>***" of "wages", which are paid "for"
b. "their ***<u>normal hours of work</u>***".[32]

[72] Both emphasized phrases are important in considering these sections. The phrase "regular rate" informs the word "wages" in both ss. 206.6(2) and 239(1.3) of the *Code*. Meaning must be given to that phrase.

[73] The Federal Court in *CN v. TCRC and Michelle Flaherty* upheld the decision of the arbitrator in **CROA 4816**. That Court determined that the "regular rate" [of wages" referred to in s. 206.6(2)] "*should indicate some degree of frequency*".[33]

[74] This finding is consistent with the meaning given to the word "*regular*" in Black's Dictionary, as "steady and uniform in practice…not subject to unexplained or irrational variation. Usual, customary or general". I am satisfied that the word "*rate*" when used

[32] Emphasis added.
[33] At para. 31.

in conjunction with the word "*regular*" refers to a manner of *measuring* that usual, standard, uniform amount of wages.

[75] Section 174(1)(a) stipulates that overtime is to be paid at time and one half of the "regular rate of wages". The Employer argued this supports that the "regular rate of wages" does not include overtime. The difficulty for this argument is that the sentence does not end there, in either section. Rather, Parliament chose to describe that the "regular rate of wages" in both ss. 206.6(2) and 239(1.3) is the "regular rate of wages" which is paid to an employee "*fo*r" "*their normal hours of work*". I am satisfied the word "*normal*" modifies the phrase "*hours of work*", to which the "regular rate of wages" refers.

[76] The legislature did not describe the "*actual* hours of work" or "time actually worked" in either s. 206.6(2) or 239(1.3). Parliament used the phrase "*normal* hours of work". That phrase must be given meaning.

[77] While I agree with the Company that the "regular rate of wages" referred to in s. 174 does not include any overtime that may – or may not – be worked by an employee on any irregular or one-off basis, I cannot agree the same is true when the parties have chosen to enter into an agreement that *obligates* the employee to work a set amount of overtime, as part of a modified work schedule.

[78] While Agreement 11.1 does not contain the entitlement to the Leave Days, the parties' own agreements have relevance for determining what are the "normal hours of work" *are* for the Walker Call Desk employees.

[79] Consideration must be given at this juncture to two important cases in this area, both in this industry, which illuminate the meaning of the phrase "normal hours of work": *Re Raillink and TCRC,* which was relied upon by the Company*;* and **AH513**, which was referred to in that decision.

[80] In *Re Raillink,* a locomotive engineer claimed 12 hours of pay for a general holiday which he did not work, on the basis that he worked a four day cycle (4/3) and "often" worked overtime. His claim was reduced to eight hours by the employer. The employer was successful when the employee grieved. The Arbitrator held that as a

locomotive engineer, the Grievor was an employee to whom s.17 of the Regulations applied, as his hours of work differed from day to day. *As s.17 of the Regulations specifically excluded overtime in the calculation of general holiday pay,* the Arbitrator determined overtime was not to be included.

[81] While the Company argued this Award supports the proposition that overtime should not be included in the calculation of wages, the *ratio* of that case is not that broad. It is *only if s. 17 of the Regulations applies* that overtime is not to be included, and then only because of the specific terms of that section of the *Regulations*. In the case before me, the employees in the case before me work the *same* schedule each day and each week, under the terms of the Walker Schedule Agreement. Given that schedule, this is not therefore a case which attracts s. 17 of the *Regulations,* with its accompanying restrictions.

[82] The application of *Re Raillink* to whether overtime should be included is therefore distinguishable. There is, however, a broader proposition in *Re Raillink* that is important for the determination of what is meant by the phrase "normal hours of work".

[83] The existence of s. 17 of the *Regulations* was the reason the Arbitrator in *Re Raillink* did not apply **AH513**.

[84] In **AH513**, Arbitrator Picher agreed with the Union that the "*normal hours of work*" *were the 10 hours per day worked*, and that the Employer had therefore violated the *Code* by failing to pay employees who worked on four/three and six/eight rotations 10 hours' pay for statutory holidays *at that rate*.

[85] In *Re Raillink and TCRC,* the Arbitrator noted that Arbitrator Picher did not have s. 17 of the *Regulations* before him when deciding **AH513**, which case also involved a locomotive engineer.

[86] While s. 17 of the *Regulation*s resolved the issue in *Re Raillink and TCRC,* as it directed overtime was *not* to be used in the calculation owing, the Arbitrator in *Re Raillink also* commented that he agreed that the "*normal hours of work*" for the Grievor in that case *were as Arbitrator Picher had found in* **AH513:** "…the normal hours of work

at regular wages is 10 hour day for each tour of duty".[34] The Arbitrator in *Re Raillink and TCRC* went on to state:

> As noted by the employer in its submission, *this average of 10 hours for each tour of duty* ***are the grievor's normal hours of work*** *in the same way that an employee working a five day work week assignment has "normal hours of work" of eight hours per day.*[35]

[87] This statement in *Re Raillink and TCRC* - which itself supports the finding in **AH513** - is supportive of the Union's position. I find the above reasoning compelling.

[88] The plain and ordinary meaning of "*normal*" is something that is average and which conforms to an established norm or rule. I am satisfied it is something that does not deviate from a schedule; it is something that is "standard" and predictable[36]. I am satisfied that the plain and ordinary meaning of the word "*normal*" was intended by Parliament to capture the broad remuneration that an employee receives *on a regular or established basis, for each shift, for work performed for the Company.*

[89] Section III of the *Regulations* allows the parties to *modify* the hours of work, which I am satisfied these parties have done, in the Walker Schedule Agreement. The parties have chosen to modify what are the "normal" hours of work for the Walker Yard Call Desk employees *to 84 hours*, over a two week period.

[90] In the *Code,* the definition of "overtime" is "hours of work in excess of standard hours of work" It is not defined as work done in excess of the "normal hours of work". The definition of "standard hours of work" is the "hours of work established pursuant to section 169 or 170 or in any regulations made pursuant to section 175." However, as earlier noted, the hours of work in this case are *not* established for the Walker Yard Call Desk employees *by either s. 169 or s. 170*, which would then attract that definition. Section 170 only applies to work up to 40 hours a week.

[91] Rather, the hours of work conform to s. 172. Section 172(1) states that an employee may be employed "*in excess of the standard hours of work*" and section

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[34] At para. 13

[35] At para. 13, emphasis added.

[36] *See Black's Law Dictionary* which supports this interpretation.

172(1)(a) applies when that work is in excess of 40 hours, but less than 48 hours in a week.

[92] The argument of the Company relating to 'standard hours of work' resulting from the application of section 170 is therefore not compelling.

[93] That the overtime hours are considered *by these parties themselves* as part of the "normal hours of work" of these employees is evident in the Western Canada Modified Work Cycle Agreement.

[94] First, it must be noted that the Walker Schedule Agreement appends the Work Cycle Agreement, for this group of employees. Both agreements have application. The Walker Schedule Agreement does not cover issues like payment on a general holiday, for example. That is covered in the Work Cycle Agreement. In reviewing this Work Cycle Agreement, it set out certain schedules, but did not include the schedule which is now worked by the Walker Yard Call Desk employees. The Walker Schedule Agreement set the modified work schedule that these employees were to follow. Therefore, I am satisfied that both the Work Cycle Agreement and the Walker Schedule apply to the Walker Yard Call Desk employees.

[95] In the Work Cycle Agreement, the parties agreed to amend Article 6.1 of Agreement 11.1. In doing so, the parties made *specific reference* to what the "*normal hours*" are for S&C employees. Looking at the modification to Article 6.1 agreed upon in the Work Cycle Agreement, the first sentence - from the word 'except' to the end of that sentence - is what is ***already*** contained in Agreement 11.1; the ***second*** sentence, beginning with the phrase "Notwithstanding…" is the amendment agreed to by the parties:

> Pursuant to Article 6.1 of Agreement 11.1, except as otherwise provided time worked in excess of eight hours, exclusive of meal period, shall be considered overtime and paid on the actual minute basis at the rate of time and one-half. [reproducing Article 6.1 from the Agreement]. Notwithstanding the foregoing, employees **will be paid overtime *in excess of the normal hours* required by their modified work cycle.**

[96] The Company argued the second sentence makes no modification to the requirement under Article 6.1 that overtime be paid on "minute" basis – and therefore supports that overtime is "time worked" even for this modified schedule. I cannot agree that is the case.

[97] It is a principle of collective agreement interpretation that parties are not presumed to use superfluous words. Rather, each word is assumed to have meaning. While the Company focused on the first sentence, the phrase in the Work Cycle Agreement does not end at that sentence. I am satisfied that the *second* sentence - which was added by the parties in the Work Cycle Agreement - is key. Giving that sentence its plain and ordinary meaning, I am satisfied it was intended to ensure that Walker Call Desk employees who work overtime *over and above the overtime that is already included in their modified cycle – which the parties referred to as their "normal hours required by their modified work cycle"* - would *also* be entitled to be paid *that* extra time as overtime, at the rate of 1.5x, on a "*per minute*" basis. I am satisfied that by this second sentence in the amended Article 6.1, the parties recognized that a *certain amount of overtime* was *already included* in what they described as the "*normal hours* required by their modified work cycle" under the Walker Schedule Agreement. There would be no need to add the sentence that begins with "notwithstanding the foregoing" if in fact the "normal hours" referred to was limited to eight hours *for all work cycles*.

[98] Put another way, the Walker Schedule Agreement determines what the "normal hours required by the modified work cycle" looks like for the Walker Yard Call Desk employees. I am satisfied that the parties recognized by their amendments to Article 6.1 for Western Canadian S&C employees, and in their consideration of how general holidays would be paid, that the "normal hours of work" for employees who work modified work cycles *includes* the overtime which is "baked into" those cycles, by the Walker Schedule Agreement.

[99] The Company argued it could not have been the parties' intention to pay overtime, as the *Code* provisions were not in place when the Walker Schedule Agreement was drafted. However, it is relevant that the parties chose not to modify Article 6.1 when they had the opportunity to do so during bargaining in 2021 and 2022.

At that point in time, the PLD provision had already come into force, using the phrase "*regular rate of wages for their normal hours of work*" to determine entitlement of pay when a Leave Day was taken. The parties would be presumed to have an awareness *by that point in time* of the ability of employees to take PLD days, and to understand that they had used the *same* wording in their amended Article 6.1 in their Work Cycle Agreement, as Parliament had chosen to use in the PLD provisions ("normal hours").

[100] I therefore do not find that argument to be compelling.

[101] I have found that the "normal hours of work" for the Walker Call Desk employees is *greater* than eight hours and *includes* the hours of the modified work cycle. That "normal hours of work" can be different than eight hours a day is the same conclusion reached by the Arbitrators in **AH513** and *Re Raillink and TCRC.* Like those Arbitrators, I have determined that the hours set out in the Walker Schedule Agreement are the "...*normal hours of work in the same way that an employee working a five day work week assignment has "normal hours of work" of eight hours per day*".

Conclusion

[102] The Grievance is upheld.

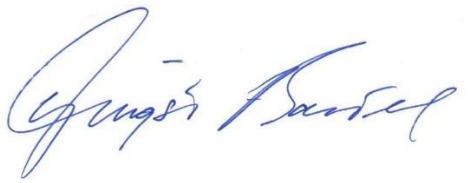
[103] A declaration will issue that the use of a Leave Day does not reduce the "normal hours" of Walker Yard Call Desk employees who work under the Walker Schedule Agreement.

[104] A declaration will also issue that the four overtime hours over a two week period - which is part of the Walker Schedule Agreement - must therefore be considered part of these employees' "normal hours of work", regardless of whether a Leave Day is taken during the same cycle.

The matter of the remedy arising from this declaration is remitted to the parties for their discussion and resolution. I remain seized with jurisdiction to determine that issue, should the parties be unable to agree.

I also reserve jurisdiction to correct any errors and address any omissions, to give this Award its intended effect.

DATED and issued this 16 day of September 2024 at Wheatland County, Alberta.



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CHERYL YINGST BARTEL
ARBITRATOR

Appendix A

IN THE MATTER OF AN ARBITRATION

BETWEEN

INTERNATIONAL BROTHERHOD OF ELECTRICAL WORKERS (SYSTEM COUNCIL NO. 11)

(the "Union")

and

CANADIAN NATIONAL RAILWAY COMPANY

(the "Company")

EX PARTE [Union]

DISPUTE:

The alleged violation of the *Canada Labour Code* Section 239 in the application of employees' entitlement to full compensation for lost wages under the provisions of Agreement 11.1 including Articles 7.10 and 7.13 while on approved Personal or Medical Leave days.

JOINT STATEMENT OF ISSUE:

All IBEW members covered under the provisions of Articles 7.10 and 7.13 of Agreement 11.1. The employees working under this modified work cycle have a guarantee including 4 hours of overtime pay at the rate of time and one-half per two week pay period. The Company began denying to pay this provision in August of 2023 as provided under the *Canada Labour Code*, as well as the CA.

UNION POSITION:

It is the Union's position that Personal Leave and all medical leave days are paid, as per the *Canada Labour Code* and Agreement 11.1, and as such employees exercising their rights to these paid leave days are intended to be without any loss in pay. The modified shifts at S&C Walker Yard Call Desk positions are bulletined on a guarantee of 4 hrs overtime at time and one-half over a two-week period.

It is the Union's position that the Company's refusal to pay the 4 hours overtime pay is in violation of the *Canada Labour Code*, including Section 239, as well as Agreement 11.1.

The Union contends that the 4 hours overtime pay entitlement guaranteed under Articles 7.10 and 7.13 would include all paid leave.

The Union requests the Company discontinue this violation of the *Canada Labour Code*, including Section 239, and the members' rights under Agreement 11.1, including Articles 7.10 and 7.13, and that the Arbitrator order all members be made whole, including an order directing the payment of all overtime claims that were previously removed and or denied to all employees so affected until resolved.

Appendix B

IN THE MATTER OF AN ARBITRATION BETWEEN

INTERNATIONAL BROTHERHOD OF ELECTRICAL WORKERS (SYSTEM COUNCIL NO. 11)

(the **Union**)

and

CANADIAN NATIONAL RAILWAY COMPANY

(the **Company**)

THE COMPANY'S EX-PARTE STATEMENT OF ISSUE

DISPUTE:

The alleged violation of section 239 of the *Canada Labour Code* (the **Code**) with respect to the Union's claim that employees at the S&C Walker Yard Call Desk are entitled to overtime pay under the provisions of Agreement 11.1 (the **Collective Agreement**) including Articles 7.10 and 7.13 while on paid Personal Leave Days (**PLDs**) or Medical Leave Days (**MLDs**).

EX-PARTE STATEMENT OF ISSUE:

This dispute arises in the context of IBEW members holding positions at the S&C Walker Yard Call Desk and covered under the provisions of Articles 7.10 and 7.13 of the Collective Agreement. The employees at the S&C Walker Yard Call Desk working under the modified work cycle do not have a guarantee of 4 hours of overtime on paid PLDs or MLDs under the Collective Agreement or the Code. In or around July 2023, the Company came to understand that overtime pay was being claimed by and paid to certain S&C Walker Yard Call Desk employees in pay periods where MLDs were being taken. The Company ceased providing overtime pay in these circumstances on

the grounds that such payment is not owed under the Code or the Collective Agreement.

COMPANY POSITION:

The Company denies any violations of the Collective Agreement and the Code and declines the Union's grievance in its entirety. The Collective Agreement and Code are clear that overtime is to be paid for time actually worked and as required by the modified work cycle. Employees at the S&C Walker Yard Call Desk earn overtime when they work in excess of 80 hours in a two-week cycle. When an employee utilizes a PLD or MLD, the employee is not working that day, therefore, they are not capable of earning overtime on those hours.