CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 412

Heard at Montreal, Tuesday, June 12th, 1973

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

DISPUTE:

Claim on behalf of Clerk (Planner) J. Lemire for the payment of wages while absent from work account illness on October 6th, 1972.

JOINT STATEMENT OF ISSUE:

On October 6th, 1972, Clerk (Planner) J. Lemire, St. Luc Car Department, was absent account illness and was replaced for two hours by a lower-rated employee who was paid the higher rate on that date.

The Union contends that under the provisions of Article 18.1 Mr. Lemire should have been paid his regular day's wages less the additional amount paid the relieving Clerk.

The Company contends that in denying this claim Article 18.1 was not violated in any way.

FOR THE EMPLOYEES: FOR THE COMPANY:

(SGD.) W. T. SWAIN (SGD.) E. L. GUERTIN

GENERAL CHAIRMAN GENERAL MANAGER, Operation & Maintenance

There appeared on behalf of the Company:

R. L. O'Meara – Supervisor, Labour Relations, Montreal

D. Cardi – Labour Relations Officer; Montreal

H. Lyttle – Supervisor, Labour Relations, Toronto

M. Gelinas – General Car Foreman, Montreal

And on behalf of the Brotherhood:

W. T. Swain – General Chairman, Montreal

D. Herbatuk – Vice-General Chairman, Montreal

D. Martel – Local Chairman, Montreal

R. Welch – General Chairman, Vancouver

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AWARD OF THE ARBITRATOR

Mr. Lemire is a weekly rated clerical employee and was absent from duty due to bona fide illness on October 6, 1972. In the circumstances, it is clear that he was entitled to the benefit of Article 18 of the collective agreement, which provides as follows:

> **18.1** Weekly rated, clerical employees who are absent from duty due to bona fide illness will not have their pay reduced during the period of such illness up to a maximum of three calendar days, which is the waiting period for weekly indemnity under Article 16, provided that the Company is not put to additional expense on account thereof. In such cases, the Company may require the employee to furnish medical certificate attesting to the bona fides of the illness.

No question arises here as to any claim in respect of other day and the grievor would be entitled not to have his pay reduced in respect of the day in question, provided, as Article 18 sets out, "that the Company is not put to additional expense on account thereof".

Article 18 was incorporated in the collective agreement in 1972; a somewhat similar benefit had been provided for employees under the terms of a letter issued by the Company and which had been followed for several years. The operative terms of the letter were not identical to those of Article 18, but its general purpose was the same. Reference is made in the Company's submission in this case to certain Union proposals which would have the effect of altering the collective agreement to provide expressly for payment in cases similar to the instant case. In my view, this proposal should not be taken as an admission that the collective agreement does not now support the claims made in this case. There is no reason why a party should not seek to alter or clarify collective agreement language at the same time as it asserts a particular interpretation thereof. In any event, the matter is to be determined on the basis of the language of the agreement in effect at the material times.

The grievor as I have said, would be entitled to his regular pay in respect of October 6, provided that the Company was not put to additional expense on account of his absence. In fact, in order to have certain work performed which the grievor would have performed had he been at work, a lower-rated employee was temporarily assigned to the grievor's position, and was paid at the higher rate while occupying it. This difference between the lower rate employee's regular rate and the rate he received while doing the grievor's job constituted, it is said, an additional expense to the Company on account of the grievor's absence.

Recognizing that if the grievor were to receive his regular day's pay in respect of October 6, and if the other employee were to receive a higher rate for the time spent on the grievor's job there would indeed be an extra expense to the Company, the Union claims for the grievor, not his full regular pay for the day, but rather his regular pay reduced by the amount of the extra pay paid the other employee while on the grievor's job. In that way there would be no extra expense to the Company.

The Company argues that such a payment would not be in conformity with Article 18, which provides that employees "will not have their pay reduced" in the circumstances to which it applies. The payment claimed by the Union is in fact a somewhat lower payment than that the grievor would have received had he been at work: it would be a reduction in his pay, and accordingly, it is argued, could not be made pursuant to Article 18. The effect, of course, is that the grievor's pay, instead of being reduced slightly, is reduced by one hundred per cent, while the Company effects a saving. The purpose of Article 18, which is the maintenance of employees' pay in cases of illness, where no sickness benefit is available, where this can be done without increasing the Company's payroll cost, would be substantially achieved on the Union's argument. It is not achieved at all on the Company's, since the employee's pay is not maintained in any degree whereas the Company's payroll cost is reduced.

In my view Article 18 should be read as a whole and in the light of its apparent purpose. The general provision that pay not be reduced is subject to the overriding *proviso* that the Company not be put to additional expense. In order to give effect to the purpose of the provision and to avoid the anomalous results which would otherwise follow, the article should be read as providing for the maintenance of an employee's pay to the extent possible without additional expense to the Company. The article is absolute with respect to the limitation on the Company's costs, but there is no reason why the provision should not act as a limitation on an employee's claim for his regular pay. In the result, he is entitled to his regular pay up to the amount at which payment would represent an additional expense to the Company. Such, in my view, is the proper effect of the provisions of Article 18.

For the foregoing reasons, the grievance is allowed.

(signed) J. F. W. WEATHERILL

ARBITRATOR