CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1714

Heard at Montreal, Wednesday, 11 November 1987

Concerning

CANADIAN NATIONAL RAILWAYS

And

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim for wages on behalf of Extra Gang Labourer J. Marcotte between January 3, 1986 and January 14, 1986.

BROTHERHOOD'S STATEMENT OF ISSUE:

Extra Gang Labourer J. Marcotte was laid off from Extra Gang No. 110 effective September 3, 1985. At that time Mr. R. Manke, an Extra Gang Labourer junior to Mr. Marcotte, was working at Acheson, Alberta. The junior employee, Mr. R. Manke, had been laid off on December 31, 1985 and was recalled to work on January 3, 1986.

The Brotherhood contends that the Company violated Article 5.4 of Agreement 10.13.

The Company disagrees with the Brotherhood's contention.

FOR THE BROTHERHOOD:

(SGD) G. SCHNEIDER
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

T. D. Ferens	– Manager Labour Relations, Montreal
J. Glazer	– Counsel, Montreal
G. Blundell	– System Labour Relations Officer, Montreal
M. Vaillancourt	– Engineering Co-ordinator, Montreal
R. Gregory	– System Engineer Production, Montreal
A. Watson	– Labour Relations Trainee, Montreal

And on behalf of the Brotherhood:

M. Gottheil	– Assistant to Vice-President, Ottawa
G. Schneider	– System Federation General Chairman, Winnipeg

AWARD OF THE ARBITRATOR:

It does not appear disputed that at the time of his lay-off Mr. Marcotte was not forced to elect to exercise his seniority rights. He was, rather, allowed to take the lay-off. As a laid-off employee he was entitled to be recalled to work pursuant to the terms of Article 5.4 of the Collective Agreement which provides as follows:

> **5.4** Laid off employees shall be recalled to service in order of seniority when staff is increased or when vacancies occur.

On January 3, 1986 the grievor claimed the right to displace a junior employee, Mr. R. E. Manke, an extra-gang labourer then working at Acheson. The Company does not appear to have disputed the ultimate right of the grievor to displace Mr. Manke. Indeed, on January 10, 1986 it called him to fill that position, which he did, effective January 14, 1986. The Company, however, maintains that the grievor was not entitled to displace Mr. Manke between January 3 and January 10 because, in its view, Mr. Marcotte was then on scheduled annual vacation. The Company's position is based on the provisions of Article 25.15 of the Collective Agreement which provides as follows:

> **25.15** An employee who is laid off shall be paid for any vacation due him at the beginning of the current calendar year and not previously taken, and if not subsequently recalled to service during such year shall, **upon application be allowed pay in lieu of any vacation due him at the beginning of the following calendar year**. (emphasis added)

The material establishes that for internal administrative and recording reasons the Company classifies laid-off seasonal employees as being on vacation for whatever number of days in January of the following year coincide with their vacation entitlement. While it may be within the prerogative of the Company to administer its records in that fashion, it is clear that any "vacation" taken in that context is a fiction. There is no suggestion that the grievor elected to take vacation during that period, nor was argument addressed to the Company's right to require him to do so. The better view appears to be that, pursuant to Article 25.15, the grievor was in a position to receive accrued vacation pay in lieu of vacation, as opposed to actual vacation, at the beginning of the calendar year. In these circumstances the Company cannot claim that, in any real sense, the grievor was not entitled to wages for the period between January 3 and January 10 because he was on vacation. The monies he received for that period are clearly pay in lieu of vacation, relating entirely to work performed in the previous year. His entitlement to that pay cannot prejudice his separate right to prompt recall under Article 5.4 of the Collective Agreement.

For these reasons the grievance must be allowed. The grievor shall therefore be compensated for all monies lost in respect to the Company's failure to recall him to work from and after January 3, 1986. I remain seized of this matter in the event of any dispute between the parties respecting the quantum of compensation.

(sgd.) MICHEL G. PICHER
ARBITRATOR