CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2098

Heard at Montreal, Wednesday, 9 January 1991

Concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Whether the twenty (20) day vacation entitlement of Mr. R. Milner should extend over a period of four (4) or five (5) calendar weeks.

JOINT STATEMENT OF ISSUE:

The grievor was assigned to a regular part-time position as a Counter Sales Agent. His hours of work were 11:30 to 18:00 on Mondays and Tuesdays, in Amherst, N.S. and from 11:00 to 19:00 on Saturdays and Sundays in Sackville, N.B. His rest days were Wednesday, Thursday and Friday. Although the grievor worked twenty-five (25) hours per week, he was paid for forty (40) hours, due to the Maintenance of Earnings protection of Article E of the Special Agreement.

The Brotherhood contends that the Corporation violated Article 9.12 of Collective Agreement No. 1 when it assigned Mr. Milner's vacation entitlement of twenty (20) days over a period of four (4) calendar weeks. The Brotherhood further contends that by virtue of Article 9.12, vacation days are exclusive of rest days. Consequently, the grievor's vacation should be consumed over a period of five (5) calendar weeks.

The Corporation maintains that to accept the Brotherhood's position would result in Mr. Milner being doubly compensated, clearly not the intent of Article E of the Special Agreement or of Article 9 of the Collective Agreement.

FOR THE BROTHERHOOD:	FOR THE CORPORATION:
(SGD.) T. McGRATH	(SGD.) C. C. MUGGERIDGE
NATIONAL VICE-PRESIDENT	DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

M. St-Jules	– Senior Negotiator & Advisor, Labour Relations, Montreal
C. Pollock	– Senior Officer, Labour Relations, Montreal
D. Fisher	– Senior Officer, Labour Relations, Montreal
R. Wesley	– Senior Negotiator & Advisor (Trainee), Labour Relations, Montreal
J. R. Kish	– Personnel & Labour Relations Officer, Customer Services, Montreal

And on behalf of the Brotherhood:

G. Murray	– Regional Vice-President, Moncton

AWARD OF THE ARBITRATOR

The facts disclose that prior to the reduction in the Corporation's operations effective January 15, 1990, the grievor was regularly employed on a five-day work week, with two rest days. Following negotiations between the parties he acquired a bulletined position involving twenty-five hours of work spread over four days: Saturday, Sunday, Monday and Tuesday. The bulletin described Wednesday, Thursday and Friday as rest days. In fact, however, the grievor remained paid for forty hours' or five days' work as a result of the application of his maintenance of earnings protection provided under the parties' Special Agreement. In the result, therefore, he was paid as though he worked five days in each week, with two unpaid rest days.

It is common ground that the grievor was entitled to twenty days' vacation for 1990. The Corporation allotted his vacation over a period of four calendar weeks. The Brotherhood protests that method of scheduling the grievor's vacation, and submits that the Corporation could not, in effect, require him to take vacation on days which the bulletin described as rest days. In the result it submits that his vacation entitlement should have been spread over a period of five calendar weeks. In the Corporation's view that would have resulted in the grievor receiving an additional week of vacation with pay which it maintains is not contemplated under the Collective Agreement. By way of emphasis, its representative argues that if the grievor had in fact been reduced to two working days per week, with the balance of his week's pay being provided on the basis of maintenance of earnings, he could in fact claim six weeks of paid vacation, an outcome which the Corporation maintains was neither contemplated nor intended by the parties.

The position of the Brotherhood is admittedly advanced on the basis of a literal application of the terms of the Collective Agreement, and in particular Article 9.12 which reads as follows:

> **9.12** Vacation days shall be exclusive of the assigned rest days and the legal holidays specified in Article 6 and 8 respectively.

The Brotherhood's representative argues that the Corporation was without the ability to schedule any vacation days for Mr. Milner which would fall on his assigned rest days. As he had three assigned rest days in each week, he submits that the Corporation's obligation was to schedule five consecutive weeks of paid vacation, with four paid working days off in each of those weeks.

In the Arbitrator's view the Brotherhood's position cannot be sustained on an overall reading of the Collective Agreement taken together with the terms of the Special Agreement. The purpose, among other things, of the Special Agreement is to provide to employees with the required seniority, maintenance of earnings protection in the event of a reduction in the availability of work opportunities as contemplated in the agreement. In the case of the grievor the effect of that arrangement is to ensure that, even though he was assigned to a position involving twenty-five hours of work over four working days, he would nevertheless be compensated as though he were working for forty hours, over a five-day period. The maintenance of earnings protection was conceived as the means of sheltering the grievor against the impact of the reduction of job opportunities which became effective January 15, 1990. In the Arbitrator's view it was the general intention of the parties that he be made whole against any adverse effects of the reduction in services by that means, and nothing more.

In these circumstances can Mr. Milner invoke the further benefit of a five week paid vacation, as opposed to the four weeks vacation he would otherwise have had? I think not. Firstly, the instant Collective Agreement does not contemplate employees having three consecutive scheduled rest days as a general rule, save in the exceptional circumstances of an agreement to the contrary under Article 4.11. Article 6.1 of the Collective Agreement establishes the normal rule, which is that employees are to be assigned two rest days in each seven day period. It is therefore questionable whether the Corporation was entitled, as it purported to do, to establish unilaterally three assigned rest days for the bulletined position obtained by Mr. Milner. In the resolution of this grievance it is substance, and not form, which must prevail. Moreover, in the Arbitrator's view if the Brotherhood's position should succeed the grievor would effectively be compensated twice for the application of the same maintenance of earnings benefit. That would amount to a pyramiding of benefits, a result which should only be viewed as intended by the parties where it is supported by clear and unequivocal language.

I think that the better view of what has transpired here, in substance, is that Mr. Milner has, as the Corporation's spokesperson suggests, effectively been put in the same position as if he had been assigned four working days, a further paid day without assigned work and two assigned rest days, in keeping with the intention of the maintenance

of earnings provisions of the Special Agreement. I can see no basis on which to conclude that the parties would have contemplated or intended that he should be entitled, merely by the questionable formulation of the job bulletin, to the further benefit of an additional week's vacation with pay. In my view, to so conclude would be to disregard the presumption against pyramiding generally applied by Arbitrators in circumstances of this kind. As noted above, there is no language in the instant agreement which would support the conclusion that the parties would have intended that result.

For the foregoing reasons the grievance must be dismissed.

January 11, 1991 **(Sgd.) MICHEL G. PICHER**
ARBITRATOR