CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2358

Heard at Montreal, Thursday, 15 April 1993

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

CanPar's failure to include the 100 days in the computation of service for annual vacation for employees who are off work due to bona fide illness, injury, etc.

UNION'S STATEMENT OF ISSUE:

The Union asserts the Company's failure to apply article 13.7 of the collective agreement and filed grievances on behalf of a number of employees in the province of Quebec. The Union also asserts employees off duty due to bona fide illness, injury, to attend committee meetings, called to court as a witness or for uncompensated jury duty are entitled to up to a maximum of 100 days included in the computation of service for vacation purposes.

The Union further asserts, providing an employee is off work on a bona fide illness or injury, he does not have to work any time in a calendar year to be entitled to the provisions of article 13.7.

The Union requested the Company comply with article 13.7 of the collective agreement and claimed vacation days and wages on behalf of the employees.

The Company declined the Union's request and claims, advising there was no violation of the collective agreement.

FOR THE UNION:

(SGD.) J. CRABB
EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Director of Terminal, Toronto
R. Dupuis	– Regional Manager, Quebec
C. Theriault	– Payroll Department, Montreal

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
J. Crabb	– Executive Vice-President, Toronto
J. J. Boyce	– National Vice-President, Ottawa
D. J. Bujold	– National Secretary-Treasurer, Ottawa
R. Pichette	– Local Chairman, Montreal

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the preponderant practice of the Company, since at least 1979, a period which spans several collective agreements, has been to pay employees under the terms of article 13.7 of the collective agreement only if they have performed some work during the year prior to the time for which the vacation claim is made. The Company does not contest the literal interpretation of the article advanced by the Union. It submits, however, that the Union must be estopped as the Company has repeatedly renegotiated the collective agreement on the basis of its understanding and practice, without apparent objection from the employees or the Union. In this regard Counsel for the Company notes that in some instances the application of the practice involved employees who held union office.

In the Arbitrator's view the Company's position must be sustained. I cannot agree with Counsel for the Union that no detriment would attach if, during the currency of the present agreement, the Company were required to adopt an interpretation inconsistent with the practice which, to all appearances, was fully acquiesced in by the Union over a period of many years.

It is trite to say that the parties to a collective agreement, and most especially an employer, make their bargain in anticipation of the ongoing costs and benefits such as they may be calculated at the time of the agreement's execution. Clearly, if the Union's interpretation were to be applied at this point in time, the Company would be compelled to bear costs in respect of vacation pay for employees on sick leave which would be greater than those which it could fairly have anticipated at the time the collective agreement was executed, based on the practice which was well established under previous agreements, and confirmed by the failure of the Union to raise any objection. In these circumstances I am satisfied that the silence of the Union over many years can be taken as a tacit representation that it would not enforce the strict letter of article 13.7, and that it agreed with the practice of the Company. To change the application of that article in mid-contract would, I think, clearly be prejudicial to the Company in that it would be required to bear costs for which it did not bargain and could not have planned.

As Counsel for the Company concedes, the grievance now advanced by the Union does constitute sufficient notice by the bargaining agent that the estoppel will end with the expiry of the current collective agreement. The parties will then be restored to a position, at the bargaining table, where they can resolve the future application of article 13.7 in a manner which is mutually acceptable.

April 16, 1993

(Sgd.) MICHEL G. PICHER
ARBITRATOR