CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2645

Heard in Montreal, Thursday, 15 June 1995

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

EX PARTE

DISPUTE:

Vacation allotment – number of employees allowed to be on annual vacation at one time.

COUNCIL'S STATEMENT OF ISSUE:

On January 9, 1995, the Company issued a bulletin to the terminal of Hornepayne indicating a restriction as to the number of employees allowed to be on annual vacation at any one time.

On further inquiry, the Union was advised that the same restrictions would apply to the remaining terminals within CN's Great Lakes Region.

The Union appealed the decision of the Company maintaining that there was a commitment made by the Company which allowed a maximum of 10% of employees to be on vacation at one time.

The Company has declined the Union's appeal.

FOR THE COUNCIL:

(SGD.) M. P. GREGOTSKI
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

J. P. Krawec	– System Labour Relations Officer, Montreal
J. B. Dixon	– Manager. Labour Relations, Montreal
B. Kalin	– System Transportation Officer, Montreal
J. W. Sauvé	– Manager, Crew Management Centre, Toronto

And on behalf of the Council:

R. Beatty	– Vice-General Chairman, Hornepayne

AWARD OF THE ARBITRATOR

It is common ground that on January 9, 1995 the Company advised the employees at Hornepayne, by way of a bulletin, that restrictions would be imposed in respect of the number of employees to be on annual vacation at any given time. It should be noted that employees are required to make their election as to the scheduling of their vacation on or before January 15th of any year. Vacation bids filed after that time need not be accorded in seniority order, and may be declined and rescheduled at the discretion of the Company.

The Council relies on a letter issued on January 12, 1967 by the Company's Vice-President of Personnel and Labour Relations. That letter reads, in part, as follows:

> The ability of the Company to hire suitable employees as brakemen or yardmen for temporary periods is becoming an increasingly vexing problem. Some of the need for temporary employees is occasioned by efforts to provide vacation relief although other causes are also involved.
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> ...
>
> The problem has come to a head on the Sixth Seniority District and it will do likewise on the Ninth Seniority District at an early date. Other Districts will follow eventually sooner or later. Under these conditions, the railway cannot give carte-blanche to any number of employees to take their vacation at the same time if such arrangement would drain the Company of the necessary numbers of employees required to carry out its operations.
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> It is obvious that some limiting figure has to be determined for the guidance of local management which must not be exceeded at certain times of the year. On some Areas this may be during the summer and in other Areas during fall and winter months. We are pleased to say that Local Chairman, where requested to do so, have shown cooperation and understanding in the need for placing some limit on the number of employees in any group who may be permitted to be on vacation in any given month.
>
> **Therefore, commencing with the year 1967 on Areas where local management judges that its ability to carry on its operations would be impaired unless some vacation limitation is imposed, the maximum number of employees in any one group will be permitted to go on vacation at any one time shall not exceed 10 per cent. Initially, this limitation would be applied only at a minimum number of locations but, as time goes on, increasingly use of the limitation will undoubtedly have to be made.** (emphasis added)

The Council takes the position that the Company and the Council have both treated the above letter as an undertaking by the Company that it would, as a normal rule, schedule not less than ten percent of the employees in a given location for vacation at one time. It submits that the practice of the Company became entrenched over time, also extending to the operations of VIA Rail when it was first established, following terms of the same collective agreement. The grievance arises because the Company's vacation scheduling for 1995 at some locations, including Hornepayne, is in the eight percent to nine percent range, a level which the Council claims violates the Company's undertaking. The Council submits that the Company is estopped from changing its practice in January 1995, when the terms of the collective agreement were in place, apparently by reason of the statutory freeze under the **Canada Labour Code**. It is common ground that the ability of the parties to resort to strike and lock-out in respect of the renegotiation of their collective agreement did not arise until February 6, 1995.

Upon a review of the material the Arbitrator is satisfied that the case advanced by the Council has merit. At first blush it would appear that the letter of January 12, 1967 did not hold out a guarantee of a minimum of ten percent of employees, but rather was intended to suggest that ten percent would be the maximum allowed. This would implicitly suggest that the Company could schedule fewer employees than the ten per cent for vacation at one time, should it be necessary to do so. However, the record discloses that, for whatever reasons, the parties came to mutually acknowledge the ten percent formula as the equivalent of a guarantee, at least in those terminals where the numbers of employees would allow of its application. It does not appear disputed that in some locations where employees are present in small numbers, for example six or seven, it is, of course, mathematically impossible to apply the ten per cent formula.

Further, a letter from the Company's Vice-President for the St. Lawrence Region, dated April 19, 1982 confirms the view that the ten per cent figure is to be construed as a minimum guarantee of employees entitled to be on

vacation at any one time. In a letter to the Union's General Chairman, Vice-President Y.H. Masse states, in part, "You will recall that this ten per cent figure was given as a commitment by the then Vice-President, Personnel & Labour Relations, in a letter dated January 12, 1967, and addressed to the running trades' General Chairmen." It does not appear disputed that the Union and VIA Rail negotiated a reduction of the ten per cent figure to a quantum of five per cent, as reflected in a memorandum dated December 4, 1992. While that evidence does not bear directly on the contractual obligations of the parties to the instant collective agreement, it is, I am satisfied, further support for the Council's claim that the ten per cent figure first advanced in 1967 by the Company became treated as and understood to be a minimum which should apply generally.

In the result, the Arbitrator is satisfied that the principle of estoppel does apply in the case at hand. It appears that over time the parties departed from the strict wording of the 1967 letter, and developed an understanding that it would be taken as a commitment to allow not less than ten percent of employees at a terminal such as Hornepayne to be scheduled for vacation at any one time. The Company changed its position, and effectively reverted to the strict wording of the original document, without prior notice, on January 9, 1995. It did so at a time when the Council was unable to protect itself, at least for the balance of the period for which the terms of the collective agreement were statutorily frozen. When boards of arbitration state that an estoppel lasts to the end of a collective agreement, they generally intend to include the statutory extension of the agreement or "freeze" of its terms, as a party is not normally in a position to defend itself until the freeze has expired and it can bargain meaningfully with resort to the sanctions of strike and lockout (cf. **CROA 1612, 2142**, and see, generally, Brown & Beatty, **Canadian Labour Arbitration**, 3rd ed., 2:2210 and **Canada Labour Code** R.S.C. 1985 c. L-2 s.67 (4) and (5)). The Council's ability to bargain meaningfully in respect of this issue did not mature until some time later, in March of 1995. At that time, the vacation bids were closed, and vacation allotments were effectively assigned. In these circumstances I am satisfied that the conditions of an estoppel, being an undertaking on the part of one party not to enforce the strict terms of the collective agreement, and an injurious reliance on the part of the other, with prejudicial impact should the estoppel not apply, are made out.

In the circumstances of the instant case, the issue of remedy is somewhat more difficult. It does not appear disputed that some employees have already taken vacation under a schedule which this award finds to have been established in contravention of the parties' collective agreement. The Arbitrator has some difficulty with the suggestion of the Council that employees in that circumstance should be provided with yet another vacation period, with pay. Bearing in mind that half the calendar year has expired, it would be best for the parties to consider together the most appropriate measure of adjusting the situation. In the circumstances, therefore, for the time being the Arbitrator limits the Council's remedy to a declaration, and remits the matter to the parties for further discussion as to the appropriate remedy. Should they be unable to agree in respect of what is appropriate, the matter may be further spoken to.

For the foregoing reasons the grievance is allowed. The Arbitrator finds and declares that the Company violated the collective agreement between the parties by departing from the practice of treating the ten per cent figure in the letter of January 12, 1967 as a minimum figure, for the purposes of the collective agreement which was statutorily frozen at the time of the events in question. As regards any subsequent collective agreement, however, the Council was clearly on proper notice by the Company, at least from March of 1995, that the Company would return to the strict terms of the letter. No claim can therefore be made as regards any subsequent collective agreement, absent the negotiation of specific language to support it. Subject to the foregoing comments, the matter is remitted to the parties.

20 June 1995

(signed) MICHEL G. PICHER
ARBITRATOR