CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2774

Heard in Montreal, Tuesday, 8 October 1996

concerning

VIA RAIL CANADA INC.

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Interpretation and application of article D 6 of Justice Mackenzie's award.

UNION'S STATEMENT OF ISSUE:

On December 19, 1995, the Union advised the Corporation that under the provisions of article 76 of agreement 12, the Union's position was that each employee was entitled to 8 calendar days off in each 28 day period under the terms of the Mackenzie award, article D 6 and also that it is mandatory that each employee receive one day off per week.

Also in accordance with the above, it is the Union's position that each employee receive 8 days per 28 days regardless of whether the employee bid or is forced to another assignment.

Further, it is the Union's position that the designated four week period with respect to days off is the same four week period that has been established for the purposes of pay.

The Corporation disagrees with the Union's position.

FOR THE UNION:

(SGD.) M. P. GREGOTSKI
GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

E. J. Houlihan	– Senior Officer, Labour Contracts, Montreal
J. C. Grenier	– Senior Consultant, Montreal

And on behalf of the Union:

M. P. Gregotski	– General Chairman, Fort Erie
G. E. Bird	– Vice-General Chairman, Montreal

AWARD OF THE ARBITRATOR

This dispute concerns the interpretation and application of a newly established article of the collective agreement found in paragraph D 6 of the award of Mr. Justice Mackenzie, issued on June 14, 1995. The language of the provision is as follows:

> **6.** All employees shall be allowed a minimum of eight calendar days off at their home terminal for each designated four-week period. Of the eight calendar days off, employees shall be entitled to one calendar day off in each week, and 4 calendar days off in each two-week period. In the event that an employee is not allowed 4 days off in each designated two-week period, the Corporation shall pay a one hour penalty to that employee for each third and fourth day missed,

without affecting the obligation of the Corporation to provide 8 calendar days off in the four-week period (the obligation to provide one calendar day off in each week remains mandatory).

The dispute arises because employees who transfer into temporary vacancies, whether by way of a bid, based on seniority, or when they are forced to do so in inverse order of seniority when there is a lack of volunteers, can find themselves impacted in the days off available to them. The Corporation maintains that the four week period contemplated within paragraph D 6 can be a "floating" period, for the purposes of determining whether there has been compliance with the requirement contained therein. It further submits that in any circumstance when an employee bids voluntarily to a temporary vacancy, resulting in a reduction in his or her days off, there is no violation of the provision to the extent that the move is voluntary and the employee was otherwise allowed the days off contemplated by the provision. Lastly, it submits that although the forcing of junior employees may result in those persons occasionally receiving less than the minimum number of days off contemplated in paragraph D 6, that is a general function of the seniority system under the collective agreement, and does not violate the overall spirit of paragraph D 6, bearing in mind that in other circumstances employees may enjoy more days off than the minimum provided in that paragraph.

The Arbitrator cannot sustain the position of the Corporation, having regard to the clear language of paragraph D 6. Firstly, the paragraph contemplates the existence of a clearly established four week period, by making reference to "... each **designated** four-week period." By any reasonable standard of interpretation, the reference to a designated four-week period must suggest, absent language to the contrary, a period which can be referred to by all employees and supervisors concerned, in advance, so as to allow for the planning necessary to ensure that employees do receive the minimum number of days off contemplated. In the result, the Arbitrator is satisfied that the position of the Corporation with respect to the possibility of a "floating" four week period cannot stand. It does, however, appear to the Arbitrator that there is a discretion in the employer in establishing the general objective system whereby designated four week periods are to be calculated. It can, for example, determine that the four week periods will correspond to pay periods. Alternatively, it would appear to be at liberty to commence the four week periods so as to coincide with the change of time which occurs twice yearly, in the spring and fall. Alternatively, it can unilaterally select, or agree with the Union, on some other bench mark date, so long as the four week period, and successive periods, remain clearly and firmly established.

Secondly, the Arbitrator has no difficulty with the position of the Corporation as regards the treatment of employees who voluntarily bid onto temporary vacancies. An employee who, in his or her regular assignment, is allowed the minimum days off contemplated in paragraph D 6 cannot be heard to complain if he or she knowingly bids to another temporary vacancy, the result of which would reduce the employee's days off, having regard to the assigned days off which may attach to the temporary position. In that circumstance the employee has clearly been "allowed" his or her minimum days off by the Corporation, and temporarily changed their position voluntarily. I can see no requirement upon the employer to reorganize assignments further in that circumstance, to ensure that the minimum days off carry over into a temporary assignment which is voluntarily selected.

Different considerations, however, obtain where junior employees are forced to assume temporary vacancies. In the Arbitrator's view the clear language of article D 6 does not allow the Corporation, in that circumstance, to deny to the employee who may be forced the guaranteed minimum days off provided for in paragraph D 6. Clearly, an employee forced into a circumstance where he or she is denied the minimum days off cannot be said to have been "allowed" the minimum contemplated within that paragraph. Consequently, it is incumbent upon the Corporation to so order its affairs as to be able to force employees in circumstances which respect the provisions for minimum days off. If, as the Corporation suggests, there may be practical difficulties as to the workability of such an arrangement, it should be stressed that the instant grievance does not raise issues of the kinds of manpower adjustments which might properly be available to the Corporation as a means of accommodating the rights and obligations which flow from the language of paragraph D 6. It should also be noted that the instant grievance does not, in the Arbitrator's view, address or concern specific circumstances sought to be raised in argument by the Union, such as the treatment of employees who are required to do rules training or similar activities.

This matter is referred back to the parties for implementation consistent with the interpretations contained herein.

October 11, 1996

(signed) MICHEL G. PICHER
ARBITRATOR