CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3072

Heard in Montreal, Tuesday, 12 October 1999

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of employees on the Internal Shortline of the Nephton and Havelock Subdivisions.

BROTHERHOOD'S STATEMENT OF ISSUE:

On November 25, 1996, the parties entered into a Short Line Agreement for employees employed on the Nephton and Havelock Subdivisions. According to article 14.12 of the agreement, employees are to be compensated at certain percentage rates for their annual vacation, based on their compensated service.

The Union contends that the Company has violated article 14.12 of the agreement by failing to compensate employees at the agreed upon percentage rates.

The Union requests that the Company abide by the terms of the agreement and compensate all affected employees for any losses they may have incurred, including interest.

The Company denies the Union's contention and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. Freeborn	– Labour Relations Officer, Calgary
E. J. MacIsaac	– Labour Relations Officer, Calgary
R. M. Andrews	– Manager, Labour Relations, Calgary
D. T. Cooke	– Manager, Labour Relations, Calgary
S. J. Samosinski	– Director, Labour Relations, Calgary
G. D. Wilson	– Counsel, Calgary

And on behalf of the Brotherhood:

J. J. Kruk	– System Federation General Chairman, Ottawa
D. J. McCracken	– Federation General Chairman, Ottawa
D. W. Brown	– General Counsel, Ottawa
P. Davidson	– Counsel, Ottawa
G. D. Housch	– Vice-President, Ottawa

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that the Brotherhood tabled before the Company a number of provisions which it wished to include in a then proposed internal shortline agreement to govern operations on the Nephton and Havelock subdivisions. Among the Brotherhood's proposals was a top up provision for the payment of annual vacation, based on a table taken directly from the collective agreement governing running trades employees. The article in question, article 14.12, makes provision for the payment of vacation pay on the basis of a percentage of previous years' earnings, with percentages of 4, 6, 8, 10 and 12% corresponding to vacation entitlements of 2, 3, 4, 5 and 6 weeks, respectively.

The Company signed the agreement with the full provisions of article 14.12 included. It has, however, declined to pay the increments of 8, 10 and 12% for employees with vacation entitlements of 4, 5 and 6 weeks. It is common ground that the 4 and 6% top ups are payable to employees with 2 and 3 weeks' vacation entitlement, in accordance with the minimum employment standards provisions of the **Canada Labour Code**. In the Company's view, however, the additional increments of 8, 10 and 12% were included in the collective agreement by mistake. In its view those provisions would be inconsistent with article 14.5 of the collective agreement which reads as follows:

> **14.5** An employee shall be compensated for vacation at the rate of pay he would have earned had he not been on vacation during such period.

The Brotherhood submits that there has been no mistake. According to its representative, although there was no substantial discussion of the provision at the bargaining table, the five-step increment table of article 14.12 was knowingly and deliberately proposed in the written document provided to the Company by the Brotherhood, and properly became part of the agreement which the parties ultimately executed. It submits that in the circumstances the Company cannot be relieved against its own failure to detect a provision which, in hindsight, it should have objected to.

The Arbitrator is compelled to agree with the Brotherhood. The provisions of article 14.12 are, on their face, clear and unambiguous. It appears clear to the Arbitrator that the Brotherhood put forward a specific proposal in written form, that the Company raised no objection to it and that it found its way into the language of the collective agreement. It is, with respect, no answer now for the Company to plead an oversight or negligence on its own part as a basis to disavow a provision proposed in writing by the Brotherhood and incorporated into the jointly executed final document. I know of no principle of Canadian labour arbitration that would sustain the view that a party can disavow a provision of a collective agreement on the basis that it failed to read or understand it before executing the document. Nor is there any irreconcilable conflict between article 14.12 and article 14.5, especially if the former is understood as a potential top up. This is not, it may be added, a circumstance where there was a typographical or administrative error in the editing or printing of the agreement which would bring to bear principles of rectification. It is, rather, an issue of straightforward interpretation of a clear and unambiguous term of a collective agreement, in respect of which the position of the Brotherhood must prevail.

The grievance is therefore allowed. The Arbitrator directs that the Company apply fully the provisions of article 14.12 of the collective agreement and that it compensate all affected employees accordingly, with interest.

October 19, 1999

(signed) MICHEL G. PICHER
ARBITRATOR