CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 37

Heard at Montreal, Monday June 13th, 1966

Concerning

CANADIAN PACIFIC RAILWAY COMPANY (PRAIRIE REGION)

and

THE BROTHERHOOD OF RAILROAD TRAINMEN

DISPUTE:

Claims of Yard Foreman J. W. West, Moose Jaw and J. Kozak, Winnipeg, for the difference between Yard Foreman's rate claimed and Yard Helper's rate paid for vacation pay while on annual vacation, July 6 - 24 inclusive (15 working days involved), and May 16-17-18-19-20-21-24-25-26-27-28 (10 Working days and 1 Statutory Holiday involved), respectively.

JOINT STATEMENT OF ISSUE:

Article 20, Section 1 (G) of the Yard Rules provides that:

> "An employee will be compensated for vacation on the basis of the service to which he was assigned at the time of taking his vacation."

Questions and Answers 4 and 5 relating to Article 20 read as follows:

4.Q. What is the intent of the word "assigned" as used in Section 1 (g)?

A. The classification in which the last service was performed prior to taking vacation, except where employees are only intermittently employed on Yardmaster's positions. For employees who have worked regularly in both Yardmen's and Yardmasters positions, vacation pay will be pro-rated on the basis of service performed in each position at the established vacation rate for each position.

5.Q. Must an employee take his vacation as a continuous period?

A. Employees entitled to one or two weeks vacation must take such vacation in a continuous period. An employee entitled to three or four weeks vacation may, provided proper application is made between December 15th and Jaruary 31st, and there is no additional expense to the Company, take his vacation in two portions, neither of which will be less than one week.

Yard Foreman West was entitled to 20 working days vacation with pay

and was allotted a vacation period commencing on July 5th, 1965, but took 5 days of his vacation from February 1st - 5th inclusive. He was assigned as a Yard Helper at the time of going on vacation on February 1st and claimed and was paid vacation pay at Yard Helper's rate of pay. He was assigned as a Yard Foreman at the time of going on vacation on July 6th and claimed vacation pay at Yard Foreman's rate of pay which was reduced by the Company and he was paid at Yard Helper's rate of pay.

Yard Foreman Kozak was entitled to 15 working days vacation with pay and applied for his vacation in two portions. He was allotted 5 days in January and was assigned as a Yard Helper at the time of going on vacation and claimed and was paid vacation pay at Yard Helper's rate of pay. He was also allotted 10 days commencing on May 12th and was assigned as a Yard Foreman at the time of going on vacation on May 12th and claimed vacation pay at Yard Foreman's rate of pay which was reduced by the Company and he was paid at Yard Helper's rate of pay.

In both instances, claims were submitted on the basis of Article 2C, Section 1 (G) for Yard Foreman's rate of pay for the second portion of their annual vacations. Payment was declined on the grounds that when a vacation period is allowed in two portions it is still one vacation as the second portion is a continuation of the first portion, therefore the rate of compensation for the second portion should be the same as that applying to the first portion.

FOR THE EMPLOYEES	FOR THE COMPANY
(Sgd.) S. McDONALD	(Sgd.) R. C. STEELE
GENERAL CHAIRMAN	GENERAL MANAGER (PR. R)

There appeared on behalf of the Company:

P. Maltby	Supvr. Personnel & Labour Relations. C.P.R., Montreal
C.F. Parkinson	Labour Relations Assistant, C.P.R., Montreal

And on behalf of the Brotherhood:

S. McDonald	General Chairman, B.R.T., Calgary

AWARD OF THE ARBITRATOR

The representative for the Brotherhood disclosed that since January 19, 1960, an amendment to the collective agreement permitted an employee entitled to three or four weeks vacation to take it in two portions, as outlined in the answer to Question 5 appearing in the Joint Statement of Issue.

Until February, 1965, this ammendment had been implemented by the Company paying Yardman on the basis of what he was receiving according to the classification in which he was assigned at the time of starting each vacation period.

On the date mentioned the following notice was issued to yardmen on the Prairie Region:

> "Under Article 20, 1(g) an employee will be compensated for vacation on the basis of the service to which he was assigned at the time of taking his vacation. This, of course, is based on vacation being taken in a continuous period and under Clause (g) payment would be made on the basis of the service to which assigned on taking vacation. However, Question No. 5 of the Questions and Answers stipulates that the Company agreed to the splitting of vacations under certain conditions, one of which - no additional expense. Therefore, the rate applying to the vacation taken in the first half of the split applies to the second half."

Contrary to this revised view taken by the Company the representative for the Brotherhood maintained that the second portion of a vacation was not a continuance of the first portion; that to continue is to carry on without interruption.

It was stated there was no new gain sought by this application; it was only to preserve the basis for vacation pay that has always existed and to correct the inequalities now imposed by the Company.

The representative for the Company indicated that in February, 1965, the conclusion was reached that an improper interpretation had been put upon the applicable provisions. The right to return to the proper course was one well established by arbitration decisions.

The nub of the argument for the Company was that if an employee intended to divide his vacation period, if paid at the rate of a yard helper at the time he took the first portion, that was the rate that should prevail for the second portion, even if then he had been employed as a yard foreman. The higher rate for the latter classification would represent "an additional expense to the Company".

For the Company emphasis was placed on the intent of the word "assigned" as outlined in the answer to Question 4: "The classification in which the last service was performed prior to taking vacation."

Section 2 (a), it was stressed, provides in Article 20; "An employee shall be granted such vacation within a twelve month period."

The use of the word "portions" in the answer to Question 5, "An employee entitled to three or four weeks vacation may.....take his vacation in two portions" indicated portions of a whole to the representative of the Company. In other words, whether taken all at once or in two portions, it is a vacation, i.e., one vacation.

An analysis of these provisions leads to the conclusion that to attempt to assign to the language used the meaning taken after February, 1965, difficulty is encountered. In other words, there exists a lack of clarity to express the specific intent newly assigned. How can the word "vacation", standing alone be taken to mean a combination of periods or two different leaves of absence, even taken months apart. Again, how can the bare words "there is no

additional expense to the company" be assigned the meaning given them by the company. One practical purpose for their inclusion was suggested by the representative for the Brotherhood, namely, that a spare yardman might have to be paid for deadheading to a particular distant point to relieve a yardman going on vacation and that the Company would properly oppose having to assume double costs for deadheading twice to permit a yardman to take his vacation in two portions.

It is well established that past practice may be looked to in order to ascertain the correct meaning of a contract provision which is vague, ambiguous and capable of different interpretations. In other words, the conduct of the parties may be used to fix a meaning to words of uncertain meaning.

The contrary to this principle is of course true, that when a contract is clear and unambiguous the conduct of the parties cannot be used to prove that it means something different than it says. In other words, if I could find that in the past the Company had improperly interpreted a specific provision of the contract, past practice could not be relied upon to permit its continuance in the future.

I am convinced, however, for the reasons stated, that principle could have no application to the instant case; that the provision could be interpreted in different manners to support the respective contentions of both parties.

In that situation I am satisfied the interpretation placed upon the provisions under consideration for the lengthy period described represents a sound basis for fixing meaning to them.

For these reasons the claims of the grievors are allowed.

J. A. HANRAHAN
ARBITRATOR