# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 2676

Heard in Montreal, Tuesday, 12 December 1995

concerning

## VIA RAIL CANADA INC.

and

## UNITED TRANSPORTATION UNION

## EX PARTE

### DISPUTE:

Interpretation and application of the Maintenance of Earnings provisions of the contract dated June 14, 1995, issued by Justice MacKenzie.

### EX PARTE STATEMENT OF ISSUE

On September 11, 12 and 13 the Union met with representatives from VIA Rail concerning the interpretation and application of the national contract issued by Justice MacKenzie in accordance with the back to work legislation ordered by the Canadian government.

At this time, the Corporation stated to the Union that it was changing the long established provisions of maintenance of earnings in the following areas regarding the MacKenzie award and other maintenance of earnings from previously negotiated contracts.

i) Monetary penalties for unavailability
ii) Establishing of blocks
iii) Penalties for booking rest
iv) Calculation of M.O.E. for certain employees.

The Union contends that the Corporation by its interpretation and application has violated the collective agreement.

The Corporation disagrees with the Union.

### FOR THE UNION:

### (SGD.) M. MATHEWSON
**FOR: GENERAL CHAIRPERSONS, EASTERN LINES**

There appeared on behalf of the Corporation:

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| K. Taylor | – Senior Advisor and Negotiator, Labour Relations, Montreal |
| J. Ouellet | – Senior Labour Relations Officer, Montreal |

And on behalf of the Union:

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|---|---|
| H. Caley | – Counsel, Toronto |
| M. P. Gregotski | – General Chairman, Fort Erie |
| G. F. Binsfeld | – Secretary/Treasurer, GCA, Fort Erie |
| R. Skilton | – Local Chairperson, Toronto |

# PRELIMINARY AWARD OF THE ARBITRATOR

The record discloses that on September 11, 12 and 13, 1995 the Corporation and the Union met, as part of the process of incorporating the amendments to the collective agreement resulting from the interest arbitration award of Justice K. MacKenzie, handed down on June 14, 1995. During the course of their discussions the parties discovered that they had a disagreement as to the interpretation of the collective agreement provisions handed down by Mr. Justice MacKenzie, as they relate to the maintenance of earnings provisions of the collective agreement.

It appears that similar disputes of interpretation arose in the discussions concerning the application of other collective agreement language handed down by Mr. Justice MacKenzie, including annual vacation, basic day and bilingualism. These disputes are dealt with in **CROA 2677, 2678** and **2679**, respectively. The interpretations which the Corporation announced to the Union have in fact been put into place, giving rise to the policy grievance which is now before the Arbitrator. The sole issue to be determined is whether these grievances are in fact arbitrable.

The Corporation submits that the grievances are not arbitrable, as they fall within the residual jurisdiction retained by Mr. Justice MacKenzie in the following terms of his award:

> This award contains the amendments to Collective Agreement Nos. 11 and 12 between Via Rail and the United Transportation Union, which collective agreements were extended by the operation of the Maintenance of Railway Act, 1995.
>
> These amendments shall be incorporated into Collective Agreements Nos. 11 and 12 as shall all other matters agreed upon by the parties. If the parties experience any difficulties with respect to such incorporation, they may submit the matter to Justice Kenneth C. MacKenzie, who shall determine the matter by way of written submissions in a summary manner.

The Corporation argues that the disputes of interpretation which gave rise to the four policy grievances arose during the course of the parties' discussion with respect to incorporating the MacKenzie award into collective agreement no. 12. Its representative submits that the dispute between the parties would fall within the phrase "any difficulties with respect to such incorporation" and as such are matters to be referred back to Mr. Justice MacKenzie for his determination.

Counsel for the Union submits that the four grievances in question bear no relation to a dispute as to incorporation, but rather are purely disputes with respect to the interpretation and application of the terms of the collective agreement mandated in the MacKenzie award, when those terms are read together with the balance of the collective agreement. This, Counsel submits, is the everyday stuff of grievance arbitration, dealing with disputed interpretations of the established terms of a collective agreement. That, Counsel submits, is a different matter from the issue of incorporation, which is the limited jurisdiction which Mr. Justice MacKenzie retained to himself. On that basis, the Union submits that the appropriate forum for the resolution of the parties' disputes as to the meaning of the collective agreement provisions is this Office.

The jurisdiction of this Office is described in paragraph 4 of the memorandum establishing the Canadian Railway Office of Arbitration. It reads as follows:

> **4.** The jurisdiction of the Arbitrator shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of;
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> > **(A)** disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and
> >
> > **(B)** other disputes that, under a provision of a valid and subsisting collective agreement between such railway and bargaining agent, are required to be referred to the Canadian Railway Office of Arbitration for final and binding settlement by arbitration;
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> but such jurisdiction shall be conditioned always upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this Agreement.

It is common ground that Mr. Justice MacKenzie was named chair of several Mediation-Arbitration Commissions established under Part III of the **Maintenance of Railway Operations Act, 1995**, enacted by Parliament for the resolution of certain collective bargaining disputes within the railway industry. The general jurisdiction and task of the Mediation Commission is described as follows in the terms of section 55 of the statute:

> **55. (1)** Within seventy days after its establishment or such longer period as the Minister may allow, each Commission shall
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> **(a)** for the purpose of concluding a new collective agreement between the employer and the union representing the bargaining unit in respect of which the Commission was established,
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> **(i)** endeavour to mediate all the matters referred to it and to bring about an agreement between the employer and the union on those matters, and
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> **(ii)** if the Commission is unable to do so in respect of any such matter, hear the employer and the union on the matter, arbitrate the matter and render a decision;
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> **(b)** fix a date for the termination of the new collective agreement established by this Part between the employer and the union, which date may not be earlier than December 31, 1997; and
>
> **(c)** report to the Minister on the resolution of all such matters.
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> **(2)** Each Commission shall ensure that any agreement or decision referred to in paragraph (1)(a) is in appropriate contractual language so as to allow its incorporation into the appropriate collective agreement or, where necessary, draft a new agreement between the employer and the union that contains all agreements and decisions referred to in that paragraph.

As can be seen from the foregoing, the mandate of the Mediation-Arbitration Commission was to produce appropriate collective agreement language to be incorporated into the collective agreement. Further, section 59(1) of the **Act** contemplates the incorporation by statute of the terms of any arbitrated decision rendered by the Commission:

> **59. (1)** As of the day that a Commission reports to the Minister pursuant to paragraph 55(1)(c), each collective agreement between the employer and a union shall be deemed to be amended by the incorporation therein of
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> **(a)** any agreement resolving the matters in dispute between the employer and the union arrived at before, or pursuant to, mediation by the Commission; and
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> **(b)** any decision of the Commission in respect of any maters arbitrated by it.

The report of the MacKenzie Mediation-Arbitration Commission was tabled in evidence. It is clear that the Commissioners complied with their statutory mandate and rendered a decision in language truly intended to be inserted, without alteration, into the body of the collective agreement. In the overview report of the VIA Rail mediation-arbitrations, concerning some five bargaining units, at p. 22 Mr. Justice MacKenzie made the following observation:

> The reports of each of the 5 separate Commissions follow. The format is the text of amendments to the existing collective agreements required to give effect to the resolution of matters in issue. Where no amendment is presented on any issue, that issue is resolved in favour of the status quo.

The maintenance of earnings provision which is the subject of the instant grievance is found at article T of the VIA-UTU award. It is, essentially, a reproduction of the same language governing maintenance of earnings which existed previously, apparently with a minor adjustment in the definition of the term “basic weekly pay” being based on the twenty-six full pay periods preceding June 15, 1995.

The Union identifies four items in dispute arising from the Corporation’s purported interpretation of the maintenance of earnings provision flowing from the fact that the MacKenzie award departs from the mileage system of remuneration. It would appear that the Corporation asserts that an employee unavailable for work loses maintenance of earnings on the basis of 1/28th of his basic pay, based on a four week formula. The Union submits

that the employee should lose only the amount of earnings the employee would have earned had he or she been available for work. Secondly, the Corporation has established blocks of positions which include conductor-only positions, which would force the employee to a higher position as a condition of maintaining his or her maintenance of earnings. The Union maintains that that is out of keeping with the basic provisions of the parties' collective agreement governing maintenance of earnings. This, it submits, involves an interpretation of both the VIA transfer agreement of 1987 and the provisions of article T of the MacKenzie award.

Thirdly, the Union disputes the Corporation's assertion that spareboard employees can book no more than ten hours' rest before their maintenance of earnings can be affected, whereas the Union maintains that the threshold is fourteen hours' rest. Finally, the parties are in dispute over the method of the calculation of maintenance of earnings. The Union maintains that all of these issues are matter of the interpretation of the collective agreement, and do not bear on the separate question of incorporating the language of the MacKenzie award into the collective agreement.

It is important, I think, for this Office to give proper deference to the retention of jurisdiction specifically reserved by Mr. Justice MacKenzie. By the same token, it is important to reflect on the nature of that reservation of jurisdiction. Clearly, as is evident from the material reviewed above, the Chair of the Mediation-Arbitration Commission did not purport to retain jurisdiction to resolve disputes concerning the interpretation, implementation or application of the collective agreement terms contained in his award. Or, to express it differently, in the language of the memorandum establishing this Office, he did not retain jurisdiction, as arguably he could not, to resolve "disputes respecting the meaning or alleged violation ..." of the collective agreement language which he fashioned, whether by amendment or by confirmation of the *status quo*.

What then is to be made of the notion of the residual jurisdiction to resolve disputes about "incorporation" of the MacKenzie award into the collective agreement? In the Arbitrator's view it is not necessary, or indeed appropriate, to make an exhaustive determination of that matter. It would seem to me, however, at a minimum that the ability to resolve disputes as to incorporation could arise where the parties might be disagreed as to whether certain redundant language or provisions should be removed from the body of the collective agreement. For example, should the old collective agreement make provision for the points from which mileage is to be calculated for the purposes of an employee's remuneration, such arguably redundant articles might be subject to removal from the text of the collective agreement. If the parties were disagreed on such removal, however, the retention of jurisdiction by Mr. Justice MacKenzie would allow for an orderly method of resolving that dispute, and rationalizing the form and content of the collective agreement.

What appears in the dispute at hand, however, is an entirely different order of disagreement. There is no dispute as to the language of the provisions of the collective agreement governing maintenance of earnings. What is in dispute, as noted above, are several issues relating to the formula for the reduction of maintenance of earnings, an employee's bidding obligation to protect his or her maintenance of earnings, the meaning of the collective agreement as it relates to the number of hours' rest a spareboard employee can book before his or her maintenance of earnings are affected and the calculation of the maintenance of earnings itself. In the Arbitrator's respectful opinion, these disputes are plainly matters bearing on the meaning of the collective agreement as it must be interpreted in the wake of the award rendered by the Mediation-Arbitration Commission chaired by Mr. Justice MacKenzie. They are, as counsel for the Union submits, disputes as to the meaning and interpretation of the collective agreement. As such they are, *prima facie*, matters which would and should come to this Office for resolution under the terms of the memorandum establishing the Canadian Railway Office of Arbitration.

Can these disputes be fairly be said to be matters relating to the issue of incorporating the MacKenzie award into the collective agreement? Based on what is presently before me, I think not. Put at its highest, the Corporation's argument would appear to be that these disputes as to the meaning and interpretation of the MacKenzie award arose during the course of the parties' discussions of the incorporation process, and as such they should go back to Mr. Justice MacKenzie for clarification and resolution. With the greatest respect, I can find nothing in the text of the MacKenzie award, nor am I aware of anything in principle, which would justify that view of the nature of the parties' dispute. Disputes as to the meaning of an interest arbitration award governing terms and conditions of employment in the railway industry have long been the subject of adjudication in this Office. From the contracting out provisions first drafted in an award of Mr. Justice Emmett Hall dated December 9, 1974, to the more recent interest award of Arbitrator Dalton Larson dated February 3, 1988, this Office has dealt on a regular basis with disputes of interpretation relating to the meaning of collective agreement provisions drafted by interest arbitrators. It is important

to appreciate that that is the context in which Parliament enacted the **Maintenance of Railway Operations Act**, 1995, and in which the Commission chaired by Mr. Justice MacKenzie handed down its decision.

In the result, I am satisfied that the issues raised in this case, with respect to the interpretation and application of the provisions of the collective agreement concerning maintenance of earnings are not, *prima facie*, "difficulties with respect to ... incorporation". They appear, quite clearly, to be disputes between the Union and the Corporation with respect to the meaning of the collective agreement provisions found both in the MacKenzie award and the *status quo* provisions which that award has left undisturbed. In the result, I find that the dispute is, *prima facie*, arbitrable. However, out of an abundance of caution, after the benefit of a fuller explanation of these disputes on their merits, should it appear that all or part of them do truly constitute an issue of "incorporation", I reserve the right to defer such matters, in whole or in part, to the attention of Mr. Justice MacKenzie.

The General Secretary is directed to list this matter for hearing on its merits.

15 December 1995

**(signed) MICHEL G. PICHER**
**ARBITRATOR**

On Thursday, 13 June 1996, there appeared on behalf of the Corporation:

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| L. Bechamp | – Counsel, Montreal |
| B. Woods | – Director, Labour Relations, Montreal |
| J. G. Grenier | – Officer, Special Projects (ret'd) |
| E. J. Houlihan | – Senior Officer, Labour Relations, Montreal |
| F. Hébert | – Manager, Operation Control Centre, Montreal |

And on behalf of the Union:

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| H. Caley | – Counsel, Toronto |
| M. P. Gregotski | – General Chairman, Fort Erie |
| R. LeBel | – General Chairman, Quebec |
| J. W. Armstrong | – General Chairman, Edmonton |
| G. Bird | – Vice-General Chairman, Montreal |

On Tuesday, 9 July 1996, there appeared as a witness called by the Arbitrator:

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| D. W. Coughlin | – Director, Labour Relations, CNR, Montreal |

There appeared on behalf of the Corporation:

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|---|---|
| L. Bechamp | – Counsel, Montreal |
| B. Woods | – Director, Labour Relations, Montreal |
| J. G. Grenier | – Officer, Special Projects (ret'd) |
| E. J. Houlihan | – Senior Officer, Labour Relations, Montreal |
| F. Hébert | – Manager, Operation Control Centre, Montreal |

And on behalf of the Union:

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| H. Caley | – Counsel, Toronto |
| M. P. Gregotski | – General Chairman, Fort Erie |
| R. LeBel | – General Chairman, Quebec |
| J. W. Armstrong | – General Chairman, Edmonton |
| G. Bird | – Vice-General Chairman, Montreal |

## AWARD OF THE ARBITRATOR

The first issue to be resolved in this dispute concerns the manner in which the incumbency of an employee is reduced when he or she is unavailable for work. The Corporation has introduced a new system of incumbency reduction which, it maintains, is appropriate to the new hourly rated method of payment. The Corporation's approach involves establishing a specific hourly rate for an employee with maintenance of earnings, and reducing that rate, initially by 1/28th, and more recently by 1/20th for each day an employee is unavailable.

The Union objects, stressing that the system newly introduced by the Corporation is contrary to the past practice, and to the intention of the award of Mr. Justice MacKenzie.

The maintenance of earnings provision which is the source of this dispute appears as article T of the award of the Commission chaired by Mr. Justice MacKenzie. It provides, in part, as follows:

> **ARTICLE T**
> **MAINTENANCE OF EARNINGS**
>
> The following conditions shall apply to an employee who is adversely affected by the implementation of the Hours of Service system of pay provisions, changes in crew consists or otherwise as set out in this Award.
>
> **1.** The basic weekly pay of such employee shall be maintained by payment to him of the difference between his actual earnings in a four-week period and four times his basic weekly pay. Such difference shall be known as the employee's incumbency. In the event such employee's actual earnings in a four-week period exceeds four times his basic weekly pay, no incumbency shall be payable. An incumbency for the purpose of maintaining the employee's earnings shall be payable provided:
>
> ...
>
> **(b)** He is available for service during the entire four-week period. If not available for service during the entire four-week period, his incumbency for that period will be reduced by the amount of the earnings he would otherwise have earned; and ...

As can be seen from the foregoing, an employee's incumbency is defined as the difference between his or her actual earnings in a four-week period and four times the employee's basic weekly pay. That definition involves no change in the traditional formula for computing an employee's incumbency for the purpose of maintenance of earnings. The Arbitrator cannot see how, as the Corporation would suggest, the above language would allow of the conversion of an employee's incumbency into an effective hourly rate. Very simply, for reasons which he must best appreciate, Mr. Justice MacKenzie retained the "weekly pay" method of computing and determining an employee's incumbency. It is, therefore, the incumbency based on the weekly earnings calculation which is to be reduced by the amount of the earnings an employee would otherwise have earned, but for his or her unavailability, as contemplated in sub-paragraph (b). In the result, the Arbitrator is persuaded that the position of the Union with respect to computing the reduction of an employee's incumbency, in the same manner as was done under the mileage rated system, is correct.

While the Arbitrator can appreciate the concerns expressed by the Corporation, to the extent that the new hourly rated system of pay involves rewards to employees for availability for work, rather than for actual work performed, as was the case in the previous mileage rated system, and that hypothetically there could be abuse of the maintenance of earnings system by employees who consistently make themselves unavailable for work, the Corporation does have the protection of the ability to establish reasonable policies with respect to the frequency of availability to be expected from employees who wish to enjoy the status of continuing employment with the Corporation. Indeed, it can enforce reasonable policies by appropriate methods of discipline. In the result, therefore, the interpretation of the Union need not occasion abuse or undue expense, so long as management fulfills its obligation to manage.

The Arbitrator therefore finds, with respect to the first issue, that the interpretation of the Union with the respect to the formula to be applied for the reduction of an employees incumbency for non-availability is correct, and that the formula introduced by the Corporation is contrary to the intention of the award of Mr. Justice MacKenzie.

The second issue concerns the establishing of blocks by the Corporation for the purposes of bidding assignments to protect an individual's maintenance of earnings. It is common ground that a block system existed under the old mileage rated method of payment. While the details are not before the Arbitrator, it does not appear disputed that certain mileage distances were established as benchmarks to which an employee would be required to work as a means of protecting his or her maintenance of earnings. The blocks established under the mileage rated system were five in number, relating to the classifications of conductor, assistant conductor, spareboard, yard foreman and yard helper. Under that system a person holding the classification of conductor, with maintenance of earnings, would have to exercise his or her seniority to any "block one" assignment before being eligible to bid for a "block two" assignment, failing which the employee would be monetarily penalized for failing to hold the highest position available.

The Corporation has now purported to establish a six block system for the bidding of jobs and the protection of maintenance of earnings. It is as follows:

Block 1 – Conductor Only
Block 2 – Conductor with an Assistant
Block 3 – Assistant Conductor on Trains that collect held away payment
Block 4 – Assistant Conductor no held away payment and spareboard
Block 5 – Foreman
Block 6 – Helper

The following provisions of article T of the report of the MacKenzie Commission bear on the resolution of this issue:

**ARTICLE T**
**MAINTENANCE OF EARNINGS**

The following conditions shall apply to an employee who is adversely affected by the implementation of the Hours of Service system of pay provisions, changes in crew consists or otherwise as set out in this Award.

**1.** The basic weekly pay of such employee shall be maintained by payment to him of the difference between his actual earnings in a four-week period and four times his basic weekly pay. Such difference shall be known as the employee's incumbency. In the event such employee's actual earnings in a four-week period exceeds four times his basic weekly pay, no incumbency shall be payable. An incumbency for the purpose of maintaining the employee's earnings shall be payable provided:

**(a)** In the exercise of seniority, he first accepts the position with the highest earnings at his home terminal to which his seniority and qualifications entitle him. An employee who fails to accept the position with the highest earnings for which he is senior and qualified, will be considered as occupying such position and his incumbency shall be reduced correspondingly.

...

**2.** An employee entitled to maintenance of earnings who voluntarily exercises his seniority beyond his home terminal on his seniority territory rather than occupy a position at his home terminal, shall be entitled to maintenance of earnings. Such an employee will be treated in the following manner:

If the position he occupies at his new station has lower earnings than a position he could have occupied at either his original station or his new station, he shall be considered as occupying the position with the highest earnings, in either case, and his incumbency will be reduced correspondingly.

...

**4.** The payment of an incumbency, calculated as above, will continue to be made:

...

**(b)** until the employee fails to exercise seniority to a position, including a known temporary vacancy of ninety days or more, with higher earnings than the earnings of the position which he is holding and for which he is senior and qualified at the station where he is employed; or

...

**5.** In the application of Clause 4(b) above, an employee who fails to exercise seniority to a position with higher earnings, for which he is senior and qualified, will be considered as occupying such position and his incumbency shall be reduced correspondingly.

In the case of a known temporary vacancy of ninety days or more, his incumbency will be reduced only for the duration of that temporary vacancy.

> **NOTE:** The words "position with the highest earnings at his home terminal to which his seniority and qualifications entitle him" and "higher earnings of the position which he is holding" as used in this Article do not include a position on which the earnings are higher than the earnings on the position from which he was displaced.

The Union argues, based largely on the Note to paragraph 5 of article T, that an employee is not under an obligation to take a position which is higher than the position upon which he or she obtained the incumbency. For example, a person who obtained an incumbency as a brakeperson need not take a position of conductor to maintain his or her incumbency. This, it submits, has been the long standing practice at Canadian National Railways, and was also the practice with the Corporation until November 3, 1995 when the Employer purported to establish the new block system. The Union submits that under the new system a person who obtained an incumbency as a conductor would not, by virtue of the Note to paragraph 5, be required to take a position of Conductor Only to maintain his or her incumbency. Such a person, the Union submits, cannot be penalized by refusing to take such a position.

In the Arbitrator's view the position of the Union is well founded. While it may be understandable that the Corporation would seek to force employees who have the benefit of incumbencies into the highest paid available positions for which they are qualified, its position would effectively disregard the meaning and intention of the Note appended to paragraph 5 of article T of the terms of the MacKenzie Award. As is evident from the wording of these provisions, it is paragraph 5 which specifically deals with the reduction of incumbency for failing to protect work for which the employee is qualified, in accordance with paragraph 4(b), and it is clear that that provision is not to require an employee to protect work which is higher rated than the position occupied by the employee upon which the incumbency was established. In the result, therefore, the Arbitrator accepts the interpretation of the Union. For the purposes of clarity, and by way of example, an employee whose incumbency is based on prior service as an assistant conductor with no held away payment is not compelled, under the terms of article T, to take an available position as assistant conductor on trains that collect held away payment as a condition of maintaining his or her incumbency. Similarly, a person whose incumbency is based on service as a conductor is not compelled, to protect that incumbency, to take an available position in conductor only service. Obviously, however, if such a person declined to protect a "block two" position of conductor with an assistant, and opted instead to take an assistant conductor position, he or she would be subject to a reduction of incumbency.

I turn to consider the third issue, which relates to employees on a spareboard booking rest. It is common ground that prior to the MacKenzie Award, as a general rule, spareboard employees were entitled to book fourteen hours' rest at their home terminal without thereby suffering any reduction of their incumbency. There is, however, no specific language of article T of the collective agreement provided by Mr. Justice MacKenzie which speaks to that issue.

The Corporation has determined that a spareboard employee who books rest for more than ten hours at his or her home terminal will suffer a reduction in the maintenance of earnings for the unavailability in excess of ten hours. The Corporation bases its approach to this issue on the analogous provisions of paragraphs 12, 13 and 15 of Article D of the contract language handed down by Mr. Justice MacKenzie. Those provisions are as follows:

> **ARTICLE D – HOURS OF SERVICE AND OVERTIME**
>
> **12** Assigned employees who book rest at their home terminal, which results in their missing their assignment, will have their guarantee reduced by the hours of the assignment missed, unless the relieving employee was required to report for duty within ten hours from the time the regularly assigned employee booked rest.
>
> **13** Employees who book rest at an away from home terminal will have their guarantee reduced by all the hours of the tour of duty missed, unless the train was delayed by two or more hours which results in the regular layover now being less than six hours.
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> ...
>
> **15** Spare board employees who are not available for a call as a result of booking rest for more than ten hours at the home terminal, will have their guarantees reduced 1/28th of the 4-week guarantee and will retain their position on the spare board.

The Union submits that the foregoing provisions, and in particular paragraph 15, relate to the guarantee of an employee, a matter which is different from the maintenance of earnings which is the subject of this dispute. It submits that the decision of Mr. Justice MacKenzie in relation to the reduction of guarantee has no bearing on maintenance of earnings. It argues that the Corporation should, in the circumstances, be bound to continue to apply the fourteen hour formula in respect of booking rest which previously obtained.

The Arbitrator has some difficulty with the position argued by the Union. First and foremost, it is clear that there is simply no language in the document provided by Mr. Justice MacKenzie governing the reduction of maintenance of earnings for booking rest in excess of any given number of hours. It is evident, however, that neither party wishes the Arbitrator to conclude that there is a hiatus in the language of the agreement handed down by Mr. Justice MacKenzie which gives no guidance whatsoever. As the case was argued, the parties do not appear to dispute this Arbitrator's jurisdiction to choose as between the ten hour formula advanced by the Corporation and the fourteen hour formula which the Union says should remain in place.

Firstly, upon a review of the language of the document as handed down by Mr. Justice MacKenzie, I cannot find any evidence that he intended to retain the fourteen hour rest formula which was specifically negotiated into prior agreements governing maintenance of earnings. That formula is greatly conspicuous by its absence from the text of his award. In the circumstance, as a matter of law, it would appear that there is considerable basis for the Corporation's position that a different formula can and should be applied, and that it is not unreasonable, in the circumstances, to make reference to the analogous provisions of articles such as article D(15), which seem to reflect a general understanding that negative consequences can be visited upon an employee for unavailability beyond the ten hour limit when booking rest. In the circumstances, on balance, I am satisfied that the position of the Corporation best reflects the general intention of the award of Mr. Justice MacKenzie. I therefore find and declare that the Corporation is correct in its interpretation of the maintenance of earnings provisions in compensation to spareboard employees who book rest in excess of ten hours.

July 18, 1996

**(signed) MICHEL G. PICHER**
**ARBITRATOR**