CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2677

Heard in Montreal, Tuesday, 12 December 1995

concerning

VIA RAIL CANADA INC.

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Interpretation and application of the contract dated June 14, 1995, issued by Justice Mackenzie with regard to annual vacation.

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.

The Corporation, during the hearing in Vancouver which concluded with Justice Mackenzie issuing a national contract on June 14, 1995, stated that the hourly system of pay which they wanted implemented was completely different from the mileage system employees were working under. During this time, the Union sought for the first time to have assigned days off for road service employees.

Justice Mackenzie, in his award, gave every employee 8 days per month off. Previous to this award, it was not uncommon for road employees to have only 3, 4 or even no days off per month.

During the meeting with the Corporation in September 1995, the Union stated that employees on annual vacation should not have their days off used to offset their entitlement for annual vacation.

The Corporation disagrees with the Union.

FOR THE UNION:

(SGD.) M. MATHEWSON
FOR: GENERAL CHAIRPERSON

There appeared on behalf of the Corporation:

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

And on behalf of the Union:

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

PRELIMINARY AWARD OF THE ARBITRATOR

The instant dispute concerns a disagreement between the parties as to the meaning and interpretation of the annual vacation provisions of the award of the Mediation-Arbitration Commission chaired by Mr. Justice Mackenzie issued on June 14, 1995. The parties are disagreed as to whether an employee's regular days off in a week are to be included as part of his or her vacation days. The dispute plainly involves the interpretation of article 69 of the collective agreement in tandem with article D.6 of the collective agreement language mandated by Mr. Justice Mackenzie's Commission, which provides 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).

It appears that the foregoing provision introduces, for the first time, the concept of a regular minimum of eight calendar days off for employees in a designated four-week period. The issue to be resolved is how that provision is to be interpreted in light of the pre-existing provisions of article 69 of the collective agreement which govern annual vacation.

For the reasons related in **CROA 2676**, the Arbitrator is satisfied that, *prima facie*, the dispute between the parties plainly relates to the interpretation and meaning of the collective agreement. It is not, in my opinion, a matter of disagreement relating to the incorporation of the Mackenzie award into the collective agreement. For these reasons the preliminary objection raised by the Corporation as to the arbitrability of this grievance must be dismissed. However, as related in **CROA 2676**, I reserve the right to make any other finding that may appear appropriate in the light of any further information disclosed in the hearing on the merits.

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

December 15, 1995

(signed) MICHEL G. PICHER
ARBITRATOR

On Tuesday, 10 September 1996, there appeared on behalf of the Corporation:

L. Béchamp	– Counsel, Montreal
E. Houlihan	– Senior Officer, Labour Contracts, Montreal
F. Hebert	– Manager, Control Centre, Montreal

And on behalf of the Union:

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

AWARD OF THE ARBITRATOR

The instant dispute turns on the application of article D paragraph 6 of the award of Mr. Justice Mackenzie dated June 14, 1995 which establishes certain terms and conditions of the collective agreement. That 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).

It is common ground that under the collective agreement, in accordance with article 69, annual vacation is earned on the basis of days worked, or days available for work by employees, having regard to their seniority. On that basis employees can obtain a maximum entitlement of from two to six weeks of annual vacation, depending upon their total months of compensated service. It is also common ground that there is nothing in the Mackenzie award which materially changes the vacation provisions of the collective agreement, subject of course to the elements of the instant dispute.

The Union submits that an employee's entitlement to days off under the terms of paragraph 6 of article D of the Mackenzie award must be construed as being in addition to vacation days, where days which would otherwise be days off to an employee under the terms of that paragraph fall within his or her annual vacation period. The Corporation takes the approach that if an employee is entitled, for example, to two weeks' vacation based on the application of article 69 of the collective agreement, the entitlement of the employee is to two consecutive seven-day periods, for a total of fourteen days, and that days which might otherwise have been days off for an employee under article D.6 are not to be counted in addition. The Union, on the other hand, submits that the entitlement of employees to regular days off should continue to be counted separately, even during a vacation period. By its reckoning, an employee who has earned two weeks' vacation should be entitled to additional days, being normal days off, which would, in the usual course, fall within that period.

The Arbitrator appreciates the logic which underlies the Union's submission. In many work settings it is not uncommon for the vacation entitlement of employees to be calculated so that normal days off, for example, Saturday and Sunday, are not counted in the reckoning of an employee's total entitlement to vacation. However, in resolving issues of this kind close regard must be had to the work setting, to the terms of the collective agreement and the specific context in which the issue arises.

It should also be appreciated that in the Canadian system of industrial relations, in general parlance, "two weeks" vacation means two five-day periods, in addition to an employee's two consecutive days off in each of the two periods. Therefore, to the extent that employees under the instant agreement receive two weeks' vacation calculated as fourteen calendar days, they are not prejudiced by the Corporation's interpretation, as compared with persons in most work settings. The Corporation also points the Arbitrator, persuasively, to the fact that under the collective agreement, prior to the Mackenzie award, yard employees were scheduled on the basis of having two days off in a given work week. In the application of article 69 of the collective agreement to the calculation of their vacation period, however, the approach now taken by the Corporation with respect to road service employees was always followed. In other words, normal or scheduled days off were never added to the vacation entitlement of yard service employees for the purposes of their entitlement to annual vacation, as determined under article 69 of the collective agreement.

The Arbitrator must agree with the Corporation that the argument now advanced by the Union, with respect to the formula which should apply to road service employees becomes dubious from two standpoints. Firstly, to accept the interpretation of the Union would plainly result in the disparate treatment of two groups of employees, yard service and road service, in the application of the same provision of the collective agreement, namely article 69. Secondly, the application which would prevail for road service employees would be at odds with the very interpretation of article 69 which has been applied, without objection by the Union, for a considerable period of time in respect of yard service employees who have long enjoyed regular days off, of the kind now accorded to road service employees by Mr. Justice Mackenzie under paragraph D.6 of his award. It is trite to say that an arbitrator should strive to avoid inconsistent interpretations or applications of a single provision of a collective agreement. A corollary, I think, is that a board of interest arbitration, such as that of Mr. Justice Mackenzie, should not, absent clear language to the contrary, be taken to have intended to fashion conflicting or inconsistent results with respect to the application of a single provision of a collective agreement.

Nor, for the reasons touched upon above, are the road employees, whose vacation is allotted in seven-day weeks, less advantaged than persons in other work settings where five working days are generally deemed to constitute a week's vacation. For these reasons, I am compelled to prefer the interpretation now advanced by the Corporation. In my view the interest arbitrator must be taken to have understood the provisions of the collective agreement before him, including the application of the concept of regular days off for employees, including yard employees, in the computation of annual vacation under article 69 of the collective agreement. I should not presume

that by establishing regular days off for road service employees he would have intended any different operation of article 69 in respect of the calculation of their annual vacation entitlement than for yard employees.

For the foregoing reasons the Arbitrator must reject the grievance of the Union, and sustain the interpretation of the annual vacation provisions of the collective agreement advanced by the Corporation.

September 14, 1996

(signed) MICHEL G. PICHER
ARBITRATOR