CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2572

Heard in Montreal, Wednesday, 11 January 1995

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

The calculation of cumulative compensated service for step rate increases.

BROTHERHOOD'S STATEMENT OF ISSUE:

The grievor, Mr. P.M. Freidt, while receiving step rate increases, went off work with a *bona fide* illness. The time off work was not counted by the Company in its calculation of CCS for the purposes of the grievor's step rate increases. Thus Mr. Freidt stayed at the 95% pay step during the 1992 season.

The Union contends that the Company's actions constitute a violation of Section 30.5, 24.9 and 26 of the collective agreement.

The Union requests that: **1)** the grievor be compensated for all lost wages and benefits for the time he received 95% rate of pay when he should have received 100% and that; **2)** the grievor be credited 100 days of CCS.

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

FOR THE BROTHERHOOD:

(SGD.) D. McCRACKEN
System Federation General Chairman

There appeared on behalf of the Company:

R. M. Andrews	– Labour Relations Officer, Vancouver
R. J. Martel	– Labour Relations Officer, Toronto
R. deMontignac	– Manager, Benefit Plans, Montreal
A. G. Mielke	– Supervisor, Engineering Maintenance, Toronto Division
D. Botting	– Roadmaster, Toronto Division

And on behalf of the Brotherhood:

D. Brown	– Senior Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. McCracken	– Federation General Chairman, Ottawa
P. Davidson	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

The facts of the instant case are not complex. In early 1991 the grievor, Mr. P. Freidt was employed as a Group I Machine Operator, and was then paid 95% of the job rate for his classification, as he was between the third and seventh months of his cumulative compensated service. The graduated payment of employees entering service is provided for in the following terms in Section 26(1)(b) of the collective agreement:

> Employees entering the service on or after March 1, 1988 will be compensated as follows:
>
> | | |
> |---|---|
> | 1st 7 months of cumulative compensated service (CCS) | – 85 % of job rate |
> | 2nd 7 months of CCS | – 90% of job rate |
> | 3rd 7 months of CCS | – 95% of job rate |
> | Thereafter | – 100 % of job rate |

The grievor suffered a work related injury which caused him to be off work, in receipt of workers' compensation benefits, for a period of several months. Upon returning to work he discovered that the Company did not credit the time of his absence for the purposes of cumulative compensated service and continued to pay him at the rate step of 95%. The Brotherhood asserts that in the circumstances he should have been credited with 100 days of cumulative compensated service as such service is defined in the Job Security Agreement, which provides, in part, as follows:

> **Definitions**
> **(g)** "Cumulative Compensated Service" means:
> …
> **(iii)** Time off duty on account of bona fide illness, injury, authorized maternity leave, to attend committee meetings, called to court as a witness, or for uncompensated jury duty not exceeding a total of 100 days in any calendar year, shall be included in the computation of Cumulative Compensated Service

The Company's position is that the concept of cumulative compensated service for the purposes of the wage provisions of the collective agreement is different from that which applies in respect of the matters dealt with in the Job Security Agreement. In support of that submission it points to the specific provision contained within the collective agreement governing vacation with pay, noting the provisions of section 24.9 which are as follows:

> **24.9** Provided an employee renders compensated working service in any calendar year, time off duty, account bona fide illness, injury, authorized pregnancy leave, to attend committee meetings, called to court as a witness or for uncompensated jury duty, not exceeding a total of 100 days in any calendar years, shall be included in the computation of service in that year for vacation purposes.

The Company submits that the collective agreement contains no definition of cumulative compensated service, and that there is no basis upon which to conclude that the parties intended the same definition as is found in the Job Security Agreement. Its representative submits that reference should be had to the position which the Company took before a conciliation commissioner several years ago, which position apparently forms the basis of an internal Company interpretation, apparently in effect since August of 1988, which provides, in part:

> **3.** The term seven months of cumulative compensated service is to be applied as 147 working days or 1,176 straight time hours, whichever is greater.

The Arbitrator cannot accept the arguments advanced by the Company in the case at hand. Firstly, the internal memorandum quoted above, issuing in August of 1988, is a unilateral document generated by the Company, and does not reflect an agreement reached with the bargaining agent. As noted, the collective agreement provides no definition of cumulative compensated service. The only document which provides a definition of that concept is the Job Security Agreement. It is of interest to note that the parties adopted the same formula as is found in the Job Security Agreement within the terms of section 24.9 to clarify the entitlement of an employee to service credit for vacation purposes.

The parties before the Arbitrator are sophisticated in the ways of collective bargaining. While it would, of course, be open to them to give varying definitions to the concept of cumulative compensated service within the various documents which govern their collective bargaining relationship, it is not unreasonable to apply a

presumption that the use of a particular term in one part of the collective bargaining documents is, absent any clear indication to the contrary, intended to have the same meaning when that term is used in another part of the documents which govern their relationship.

In the Arbitrator's view, the fact that the parties have made special provision in respect of vacation with pay within section 24 of the collective agreement, as regards the computation of cumulative compensated service is not particularly instructive to the merits of the case at hand. Vacation is generally considered an earned benefit, and it is not unreasonable to find within a provision such as section 24 guidelines to assist in the treatment of broken periods of service. For example, section 24.7 establishes the general rule that a year's service for the purposes of vacation entitlement is defined as 250 days of cumulative compensated service. Section 24.9 can be understood as an exception to the general definition of cumulative compensated service reflected in the Job Security Agreement, to the extent that an employee cannot claim a maximum of 100 days of cumulative compensated service in any year if he or she is, for example, off duty for the entire year on account of an injury and renders no compensated working service whatsoever within the calendar year. Absent the provisions of section 24.9 it could be argued that the person in that circumstance would be entitled to the minimum of 100 days' credit reflected in the definition found in the Job Security Agreement.

It is, of course, possible that the parties could have intended some other definition of cumulative compensated service for the purposes of the step rates found in section 26.1(b) of the collective agreement. It would appear to the Arbitrator, however, more than likely that the parties would have included any such definition or formula within the language of their collective agreement if they intended to differ in any substantial way from the general understanding of cumulative compensated service reflected elsewhere in the documents they have negotiated. If it was the intention of the parties that the step rate increases were to be tied to actual days worked rather than length of compensated service with the Company, it was open to them to say so in clear and unequivocal language of the kind found in the internal Company document, or in other collective agreements (*cf.* **CROA 2344**). The Company cannot point to any such language, however, and in the circumstances the Arbitrator is persuaded that the better conclusion, on the balance of probabilities, is that the parties intended a single concept of cumulative compensated service to operate within their collective agreement documents, including the basic collective agreement and the Job Security Agreement, save where the language of a particular provision gives a contrary indication, as for example section 24.9, governing vacation with pay. Absent any clear indication in the agreement, the Arbitrator cannot conclude, on the balance of probabilities, that the parties intended two or more definitions of cumulative compensated service to operate within the terms of their agreements.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the grievor be credited with 100 days of cumulative compensated service towards his step rate of 100%, and be compensated for all wages, including overtime, for which he should have been compensated at that rate.

13 January 1995

(signed) MICHEL G. PICHER
ARBITRATOR