IN THE MATTER OF AN ARBITRATION

BETWEEN:

The Canadian Pacific Railway Company

and

Teamsters Canada Rail Conference

(Supplemental Dispute – Annual Vacation and General Holidays)

Before:	William Kaplan Sole Arbitrator
Appearances	
For the Company:	Francine Billings Manager, Labour Relations Canadian Pacific
For the Union:	Ken Stuebing Caley Wray Barristers & Solicitors

The matters in dispute proceeded by written submissions.

Introduction

This case concerns a dispute arising out of an earlier award, one issued on March 25, 2021:

> **Introduction**
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> The issue in this case concerns the cancellation of scheduled vacation days in January 2018. It is un-contradicted that the employees in question – among the most senior in the company – were scheduled off duty on extended vacation until the evening of January 4, 2018 (their approved vacations were extended by virtue of the fact that December 25 & 26, 2017 and January 1 & 2, 2020 were General Holidays). However, these employees were contacted late in the evening on January 2, 2018 and instructed to book on at 2201 that evening; accordingly, to be available two days earlier than planned.
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> **Position of the Parties**
> In the union's submission, the employer was not entitled to unilaterally cancel these previously scheduled vacations. The vacations had been approved and the last minute cancellation was a breach of the collective agreement, long-standing and widely acknowledged past practice, and the *Canada Labour Code*. Under the collective agreement, past practice and the *Code*, vacations in the last week of the year may, and regularly were, extended by two and up to four days depending on when General Holidays fell. In this case, the two General Holidays extended the vacation to January 1 & 2, and then the vacation was further extended to January 3 & 4 because of the General Holidays on January 1 & 2.
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> The company disagreed. In management's view, vacations in the final week of the year were extended to January 1 & 2, 2018 to take into account the General Holidays of December 25 & 26, 2017. There was, therefore, no obligation to further extend vacations to January 3 &4 to take into account the General Holidays of January 1 & 2, 2018 as those dates fell outside the applicable vacation week. Put another way, the company takes the position that it is only obligated to extend the vacation period when the General Holidays fall within the scheduled vacation period. As the employees in question received their full vacation entitlement through the extension of their vacation on January 1 & 2, the company argued that the grievance should be dismissed.
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> **Decision**
> In my view, the grievance must be allowed. The employees in question had their vacations scheduled, and by virtue of the timing of the General Holidays, extended for two days. Simply put, that is the way it has to work in circumstances like this. The December General Holiday dates extended the vacation to January and the vacation was further extended by the January General Holiday dates. There is no other interpretation.
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> Management knew all of this and agreed to this in advance; why else would it otherwise have started calling the cohort on the evening of January 2nd asking them to sign on for duty? In any event, the documentary record is persuasive as is the past practice notwithstanding disputed issues surrounding the notice of estoppel during bargaining and the *Code*. What matters is that having scheduled vacations the company can only reschedule them in accordance with the provisions of the collective agreement.
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> **Remedy**
> The grievance is allowed.
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> Article 29.09 is governing. Accordingly, the remedy for each affected employee is $175 per day lost and each affected employee shall receive an additional day of vacation, or if two days were lost, two additional days of vacation, on a mutually agreed day, or dates, as the case may be.
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> An additional observation is in order: The collective agreement requires notice and consent to reschedule already scheduled vacation. Should there be a repetition of these events, i.e., no notice or consent, the

> remedy that is awarded will necessarily have to consider this in addition to the obligations under the collective agreement. It is axiomatic that scheduled vacations should only be interfered with in the most compelling circumstances.
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> At the request of the parties, I remain seized with the implementation of this award.

Further Background

This earlier case was one of a number referred to arbitration pursuant to a December 16, 2020, protocol which, among other terms and conditions, provided:

> For each case, the parties will identify one lead claim that is representative of the dispute with the intent that the outcome, either by mediated settlement or by an arbitrated decision, will enable the parties to subsequently review outstanding grievances that bear the same facts and apply the guidance from the lead claim to achieve resolution.

Vacation cancellation went beyond a single case as was evidenced by related grievances that were held in abeyance pending determination of this lead dispute. Put another way, there was really no doubt that directly in issue were a number of outstanding claims arising out of similar sets of facts. The union made a motion for enforcement of the lead case by applying it to the various outstanding cases that had been held in abeyance. The Company disagreed.

Summary: The Ongoing Dispute

There are numerous outstanding grievances raising the same issue decided in the March 25, 2021, award; namely, cancellation of scheduled vacation on short notice. The union, therefore, asserts that the affected employees are entitled to the earlier awarded relief. The Company disagrees and asserts that the cases advanced by the union are distinguishable. Also in dispute is implementation of that part of the remedy requiring rescheduling lost vacation days as mutually agreed. Here, the union states that employees who lost prime time annual vacation are entitled to relief that restores their prime time annual vacation. The Company states that lost days should not be added to existing future scheduled vacation but taken independent of any scheduled vacation and outside the month of December, pursuant to a Bulletin that it issued.

Union Position in Detail

In the union's view, the situation was straightforward: the parties entered into a protocol that provided that like circumstances would be resolved on the basis of the lead award. The lead award was issued but the Company was not paying all of the outstanding claims and was not allowing affected employees to take their vacation as mutually agreed but was, instead, insisting that the vacations be taken within more circumscribed time periods: not added to existing/future vacations; taken independent of vacation schedules/weeks; and outside the month of December. The union took the position that all affected employees must be paid forthwith and that there was nothing in the award that limited mutual agreement or allowed the Company to unilaterally circumscribe when the owed vacation days were taken. Depriving employees of prime time vacation but then limiting the remedy to non-prime time periods was, the union submitted, unresponsive to the breach and completely contrary to the terms of the award.

Company Position in Detail

The Company made a number of submissions, but this award will deal only with the one that is germane, that the additional grievances put before are distinguishable as they do not relate to the specific time period first put into issue (2017-18 holiday season). As all of those grievances have been resolved, payments made, and replacement vacation day scheduling underway, there was nothing remaining to put back before me assuming for the sake of argument that I continued to remain seized. Accordingly, the Company asked that the union motion be dismissed.

Decision

Having carefully considered the submissions of the parties, the Company's argument that the extent of my jurisdiction is confined to the 2017-18 holiday season is rejected as are the Company's efforts to relitigate decided matters (including the Company submissions about estoppel). Obviously, I am not seized in perpetuity with every grievance relating to annual vacation or general holidays. I am, however, seized with respect to the disputes that were held in abeyance pending the determination of the lead case. As has

already been observed, the purpose of the protocol was to forward one lead case and then remit that decision to the parties so that other like and outstanding cases that were held in abeyance could be resolved according to its terms. Resolving these virtually identical matters on identical terms is a completely appropriate use of time and resources; and the good labour relations sense of doing so is manifest. Why have multiple cases proceed that raise similar facts? This is obviously why the parties entered into the protocol reproduced above.

By all appearances, the grievances enumerated in the union brief (paras. 12, 13 & 37) raise the identical issue: cancellation of scheduled vacation on short notice in prime time. The only thing that appears to distinguish these grievances from the one that went to hearing is the name and geographic location of the various terminals, the specific employees, the amount of notice, the number of cancelled vacation dates and the filing dates: accordingly, nothing of either factual or legal significance. The earlier awarded result in the lead case, and as agreed by the parties, should follow with respect to these cases; cases the parties deliberately held in abeyance pending the determination of the lead award. Other than some generalized comments about the lead case being limited to a specific time and place, together with some inapplicable legal submissions, nothing in the Company's brief actually establishes that these outstanding cases are distinguishable.

Very simply, the cases listed in the union's brief relate to facts and circumstances that are on all fours with the lead case and so should be decided like the lead case. The Company is, accordingly, directed, in these like and/or similar cases, to pay the amounts owing forthwith. Moreover, there is nothing in the award that limits mutual agreement to time periods preferred by the Company as set out in its Bulletin. Obviously, everyone cannot take their vacation on the same day, but this group of grievors is entirely entitled to replace lost prime time vacation – i.e., prime time vacation cancelled with no or little notice or consent – with other prime time vacation if they wish limited only by the extent that it is operationally feasible with the Company having the onus of establishing why a particular vacation request cannot be

granted for *bona fide* and pressing reasons. A remedy that replaced prime time vacation – lost in violation of the collective agreement – with vacation that was entirely to the convenience of the Company is no real remedy whatsoever. Very simply, in analogous circumstances, employees are entitled to the penalty payment as provided for in the March 25, 2021, award and to remedial vacation days – scheduled as mutually agreed and not limited to those days of the year preferred by the Company. Bearing operational circumstances in mind, which might preclude certain employees from going on vacation at the same time with the Company showing that real hardship would result, the Company is directed to allow employees to use their remedial vacation days in conjunction with their scheduled vacation, in the summer months and December. Lost prime time should be replaced by prime time, if the affected employee wishes. Any other outcome would not be a real remedy.

Conclusion

Accordingly, and for the foregoing reasons, the union's motion is granted in accordance with the foregoing.

DATED at Toronto this 23rd day of July 2021.

"William Kaplan"

William Kaplan