IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY
(the "Company")

-and-

CANADIAN SIGNALS AND COMMUNICATIONS SYSTEM COUNCIL NO. 11 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
(the "Union")

RE: THE COMPANY'S METHOD OF CALCULATING EMPLOYEE'S VACATION PAY

SOLE ARBITRATOR: **Michel G. Picher**

APPEARANCES FOR THE COMPANY:

Michael Goldsmith	- Officer, Labour Relations, Calgary
Krystal Hein	- Manager, Labour Relations, Calgary
Bruce Lockerby	- Officer, Labour Relations, Calgary

APPEARANCES FOR THE UNION:

Ken Stuebing	- Counsel
Brian Strong	- System General Chairman, Saskatchewan
Lee Hopper	- Western Regional Representative, British Columbia
Yves Seguin	- Eastern Chairman, Quebec

A hearing in this matter was held in Montreal, Quebec on May 14, 2010.

AWARD

This arbitration concerns a dispute between the parties relating to the method of calculating the vacation pay of employees who receive stand-by allowance. As defined within article 7 of the collective agreement stand-by allowance is the equivalent of 7.5 hours per week at an employee's straight time rate of pay. Article 7.1 of the collective agreement provides as follows:

> **7.1** When employees are required by the Company to hold themselves available to protect the requirements of the service outside of regular working hours and on rest days, they will be paid a standby allowance in addition to their regular earnings.

The nature of the dispute is reflected in the *Ex Parte* Statements of Issue filed separately by the parties. Those statements read as follows:

> **The Union's Ex Parte Statement of Issue:**
>
> In October 2009, the Company ceased issuing vacation top-up payments governed by Article 17.14. In January 2010, the Company introduced a new method by which it would calculate employees' vacation pay. In response to this new initiative, the Brotherhood advanced a policy grievance on behalf of all S&C employees governed by Wage Agreement No. 1.
>
> The Brotherhood contends that the Company's refusal to pay these claims constitutes a breach of Wage Agreement No. 1. It is the Brotherhood's contention that the Company's new practice is contrary to Article 17, in particular Article 17.14 which unequivocally sets out the manner in which vacation pay shall be calculated.

The Brotherhood asserts that its position is supported by past practice. Accordingly, the Brotherhood further maintains that the Company is estopped from abandoning its longstanding practice in respect of vacation pay.

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

The Company's Ex Parte Statement of Issue:

In order to correct an identified error in the Company's pay system, the Company temporarily suspended the issuance of automatic vacation top-up payments governed by Article 17.14 of the Wage Agreement in October 2009. After discussion with the Union, the Company instituted a change in the method by which it would calculate employees' vacation pay in January 2010. In response to this initiative, the Brotherhood advanced a policy grievance on behalf of all S&C employees governed by Wage Agreement No. 1.

Union's Contentions:

The Brotherhood contends that the Company's refusal to pay these claims constitutes a breach of Wage Agreement No. 1. It is the Brotherhood's contention that the Company's practice eludes the guidelines and principles of Article 17.14.

The Brotherhood asserts that its position is supported by past practice and maintains that the Company is estopped from abandoning its practice in respect of vacation pay.

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

At issue in this grievance is the interpretation and application of article 17 of the collective agreement which reads, in part, as follows:

17.14 An employee will be compensated for vacation at the rate of pay that he/she would have earned had he/she not been on vacation during such period or the

> percentage of the previous year's gross earnings as follows (whichever is higher): 1 week 2%, 2 weeks 4%, 3 weeks 6%, 4 weeks 8%, 5 weeks 10% and 6 weeks 12%.
>
> **17.15** For employees paid a stand-by allowance of 7 5 hours per week, the stand-by day (sixth day) shall not be considered a working day for vacation purposes.

A formula for vacation top-up payments has been in the parties' collective agreement for a number of years. According to the Union's representations, since at least 1992 the Company's method of calculating employees' vacation entitlements for the purposes of article 17.14 has been "consistent and unchanged" The instant dispute arises because in October of 2009 the Company suspended all vacation top-up payments. The record discloses that the Company came to the opinion that it had been administering the calculation of the vacation top-up incorrectly for a number of years. That is reflected in an email issued by Company officer Glenn Mullally dated December 29, 2009. That message reads, in part, as follows.

> It has been brought to our attention that the calculation with respect to the top-up of AV as per clause 17.14 (appended below) of the IBEW Collective Agreement has been incorrectly applied. We have discovered that although the standby allowance is included in the calculation of eligible vacationable earnings, it is excluded in the total vacation amount paid. The impact of this is that employees who received AV top-up, especially those receiving 8%, 10% and 12% of eligible vacationable earnings, have been overpaid as the total vacation pay amount did not include standby allowance claimed on the same day the employee was on annual vacation. The difference between what they have been paid for vacation and their minimum vacation payout amount is far greater that what it should be.

> Actions have been taken to prevent future overpayments and a program fix is being implemented. In order to avoid overpayment, we have suspended the automatic top-up payment once vacation entitlement has been exhausted and will process payment of AV top-up's in Pay Period 2, once the year 2009 is complete. Going forward, it is our intention to make AV Top-Up payments in the same calendar year.

The Union submits that the Company's adjustment or supposed correction of an error is in fact inconsistent with the primary intention of the collective agreement as it has been understood and administered for a number of years. The change implemented by the Company commencing in October of 2009 has, the Union submits, visited a significant financial loss on the members of the bargaining unit. The following excerpt from the Union's brief clearly illustrates, without apparent dispute, the difference between the two methods of calculation and the resulting loss in vacation pay top-up to an employee:

> The Company's new formula can be considered in view of a general example involving an S&C Maintainer who is entitled to five weeks' vacation The S&C Maintainer's rate of pay is $26.779.
>
> a. Under historic practice, this employee would be compensated vacation top-up as follows:
>
> i. The rate of pay that this employee would have earned had he not been on vacation during a year is calculated at 200 hours (5 weeks x 40 hours/week) at $26.779/hour, totalling $5,355.80.
>
> ii. The employees' total gross earnings for that year, including all premiums, standby allowance, etc. are assumed to be $70,000.00
>
> iii. 10% of those gross earnings is equal to $7,000.00.
>
> iv. The employee is entitled under Article 17.14 to the difference between 10% of the gross and

the rate of pay that this employee would have earned had he not been on vacation that year: $7,000.00 - $5,355.80 = **$1,644.20.**

b. Under the Company's new, December 2009 formula, this employee would be compensated vacation top-up as follows:
    i. The rate of pay that this employee would have earned had he not been on vacation during a year is calculated at 237.5 hours (5 weeks x 40 hours/week in addition to 5 weeks x 7.5 hours of standby allowance under Article 7.5 of the Collective Agreement) at $26.779/hour, totalling $6,360.07.
    ii. The employee's total gross earnings for that year, including all premiums, standby allowance, etc. are assumed to be $70,000.00.
    iii. 10% of those gross earnings is equal to $7,000.00
    iv. The Company pays the employee the difference between 10% of the gross and the rate of pay that this employee would have earned had he not been on vacation that year combined with five weeks' standby allowance: $7,000.00 - $6,360.01 = **$639.99.**

In essence, the Union stresses that the inclusion of the employee's stand-by allowance as part of his or her "...rate of pay that this employee would have earned had he not been on vacation...", contrary to the previous practice of excluding the stand-by allowance, results in a significant loss in vacation top-up for the employee.

The Company's representative submits that it is important to understand the distinction between stand-by allowances and annual vacation payments, as those concepts operate within the collective agreement. He notes the language of article 7.1 of the collective agreement reproduced above. He submits that the intention of the collective agreement is to provide employees time off work, as vacation, while

continuing to permit them to earn compensation as though they had been working. That, he says, is done, in part, by continuing to pay stand-by allowance during an employee's vacation when he or she is entitled to it when working. He submits that before the error was corrected an employee's total compensation while on vacation did not reflect what the individual was in fact earning, bearing in mind that stand-by allowance continued to be paid during an employee's vacation. The result, in the Company's submission, was an excessive windfall payment to the employee. As can be seen from the comparative example presented by the Union, to correct what it viewed as an error the Company included stand-by allowance in the calculation of the "rate of pay" that the employee would have earned had he or she not been on vacation.

The narrow issue in this grievance is whether the Company is entitled to include stand-by allowance pay in the calculation of the "...rate of pay that he/she would have earned had he/she not been on vacation during such period...", for the purposes of the calculation of the difference as compared to the appropriate percentage of the previous year's gross earnings, a figure which admittedly does include stand-by allowance.

After careful review of the respective submissions of the parties the Arbitrator has some difficulty with the position advanced by the Company. In approaching this question I consider it important to resort to first principles, and to have some regard to the history of articles 17.14 and 17.15 within the collective agreement. It appears that the current iteration of article 17.14 was introduced into the collective agreement in 2005 when the Union was successful in negotiating an increase from the previous

maximum of six percent (6%) for six (6) weeks as provided under section 183 of the *Canada Labour Code*. I consider it important to note that earlier versions of the collective agreement appear to make it clear that stand-by allowance was not to be calculated as part of an employee's rate of pay which would have been earned had the employee worked during the vacation period. For example, the collective agreement in force for the years 2001 – 2004 contained the following statement of articles 17.14 and 17.15.

> **17.14** An employee will be compensated for vacation at the rate of pay he would have earned had he been working during the vacation period.
>
> **17.15** For employees paid a stand-by allowance of 7.5 hours per week, the stand-by pay (sixth day) shall not be considered a working day for vacation purposes.

As can be seen from the above language, in the application of article 17.14 the determination of what an employee would have earned had he or she been working during the vacation period would have excluded the stand-by day as a working day. In other words, the rate of pay an employee would have earned had the employee worked during the vacation period would have been based on a forty (40) hour week, rather than on a 47.5 hour week for each week of the vacation period. The Arbitrator is inclined to accept the Union's position that the Company's interpretation, namely that stand-by allowance can be considered part of a rate of pay for the purpose of article 17.14 of their collective agreement is fundamentally inconsistent with the provisions of article 17.15, which is immediately juxtaposed with article 17.14. The logic of the Union's position is further supported by the fact that as a general practice employee's

who are paid a stand-by allowance of 7.5 hours per week continue to be so compensated, whether or not they are on vacation.

In the result, for the reasons stated above, I am in substantial doubt as to the Company's interpretation. It is far from clear to the Arbitrator that there was, for some eleven (11) years as the Company contends, an error in the administration of article 17.14 of the collective agreement. Rather, as appears more clear from earlier versions of the collective agreement, it seems to have been generally understood that stand-by allowance was not to be included in the calculation of working days for vacation purposes and that it therefore did not enter into the calculation of the rate of pay an employee would have earned had the employee been working during the vacation period, for the purposes of article 17.14 of the collective agreement. Moreover, having close regard to the wording of the first part of article 17.14, on what basis can it be concluded that the phrase "rate of pay" would include the concept of a supplementary allowance such as the stand-by allowance The phrase "rate of pay" is generally understood to mean an employee's hourly rate of pay multiplied by the hours he or she might work in any given period. Again when reference is had to the earlier versions of the collective agreement, article 17.15 would suggest that stand-by allowance was not to be included in the calculation of the "rate of pay" an employee would have earned had the employee been working during the vacation period. In the Arbitrator's view, given the language of the article and the history of its application, both before and after 2005, the better view would appear to be that the parties agreed and understood that while stand-by allowance might enter into the calculation under article 17.14 as part of

an employee's previous year's gross earnings, it is not to be included in the calculation of his or her rate of pay which would have been earned had the employee not been on vacation.

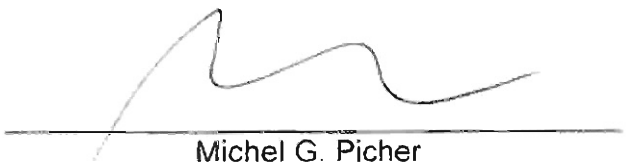
Alternatively, if I am incorrect in my interpretation of article 17.14, I would conclude that the Company must, in any event, be estopped from introducing a different interpretation and administration of article 17.14 of the collective agreement during the currency of the collective agreement under which this grievance arose. Assuming that the Company's interpretation is correct, a conclusion I expressly reject, its conduct in continuously applying the interpretation of article 17.14 through the negotiation and renegotiation of several successive collective agreements must be viewed, at a minimum, as a representation by conduct from which the Union could conclude that it would not resort to a more strict application of the provisions of the article. Consequently, even if I should accept the interpretation of the Company, which I do not, it could not implement the change it has made until such time as the parties are in the open period of bargaining for renewal of their collective agreement. While in the instant case that period of estoppel may be relatively short, it must apply nevertheless. More fundamentally, for the reasons related above, I am satisfied that the correct interpretation of the collective agreement supports the Union's position.

The Arbitrator therefore finds and declares that the Company did violate the provisions of article 17.14 of the collective agreement. I direct that employees affected

by the Company's actions be fully compensated for the balance of vacation top-up pay that is properly owing to them.

I retain jurisdiction in the event that the parties are unable to agree on the quantum of compensation, or in respect of any other aspect of the interpretation or implementation of this Award.

Dated at Ottawa, Ontario this 22nd day of May, 2010.



Michel G. Picher
Arbitrator