AH 713

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY

("Company")

-and-

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

SYSTEM COUNCIL NO. 11

("Union")

Re: Grievance relating to paragraph 18.2 of Agreement 11.1.

(Preliminary Objection)

ARBITRATOR: John M. Moreau QC

Appearing for The Union:

Michael Church - Counsel, Caley Wray
Lee Hooper - General Chairman-Conductors, Trainmen and Yardmen, West
Steve Martin - Senior General Chairman
Gurpal Badesha - Regional Representative

Appearing for The Company:

François Daignault -Senior Manager, Labour Relations
Susan Blackmore -Senior Manager, Labour Relations

A virtual hearing was held on August 24, 2020

PARTIES TO THE DISPUTE

The parties before the Arbitrator are the Canadian Signal and Communications System Council No, 11 of the International Brotherhood of Electrical Workers (the “Union”) and the Canadian National Railway Company (the “Company”).

The dispute referred to the Arbitrator involves employees governed by Collective Agreement 11.1 between the Union and the Company which governs the service of S&C Coordinators, S&C Technicians, S&C Testmen, S&C Leading Maintainers, S&C Leading Mechanics, S&C Maintainers, S&C Mechanics, Assistant S&C Maintainers, S&C Apprentices and S&C Helpers.

THE COMPANY’S EX PARTE STATEMENT OF ISSUE

On September 28, 2017, the Union advanced a Policy Grievance on behalf of all Signals and Communications employees covered by Agreement 11.1 alleging the Company’s failure to abide by the language of paragraph 18.2 of Article 18 of the collective agreement pertaining to the allotment of vacation.

The matter was progressed to arbitration on January 22, 2020. Arbitrator Roger Gunn adjudicated the dispute between the same parties in the case AH698. On February 3, 2020, Arbitrator Gunn ruled in favor of the Company’s preliminary objection. He indicated that the Policy Grievance CN-IBEW-2017-00039 was not arbitrable by reason of the mandatory time limit found in Article 13.20 of the Collective Agreement and ruled that the grievance was thereby considered as dropped.

On February 5, 2020, the Union advanced an identical Policy Grievance on behalf of all Signals and Communications employees covered by Agreement 11.1 alleging the Company’s failure to abide by the language of paragraph 18.2 of Article 18 of the collective agreement pertaining to the allotment of vacation.

The Union contends that the Company has failed to implement the negotiated changes as outlined in Attachment P of the Memorandum of Settlement dated March 20, 2017.

The Union requests that the Company provide additional vacation allotment to all employees.

The Company maintains that the doctrine of *res judicata* applies in this circumstance, as the aforementioned arbitration decision squarely dealt with identical collective agreement provisions dealing with the same bargaining unit.

Additionally, the Company maintains that the matter is not arbitrable as the Brotherhood has failed to abide by the mandatory provisions of the collective agreement. The grievance was not submitted within 35 calendar days from the cause of the grievance as provided for in Article 13.10 of the Collective Agreement 11.1 and thus is considered dropped by the Union in accordance with article 13.14.

In the alternative, the Company also submits that the Brotherhood's claim is without merit.

THE UNION'S EX PARTE STATEMENT OF ISSUE

On February 5, 2020, the Union advanced a Policy Grievance on behalf of all Signals and Communications employees covered by Agreement 11.1 alleging the Company's failure to abide by the language of paragraph 18.2 of Article 18 of the collective agreement pertaining to the allotment of vacation.

The Union contends that the Company has failed to implement the negotiated changes as outlined in Attachment P of the Memorandum of Settlement dated March 20, 2017. The Union requests that the Company provide additional vacation allotment to all employees.

The Company submits that the matter has been resolved by the decision of Arbitrator Roger Gunn in AH698 and that the grievance is not timely pursuant to Article 13 of Agreement 11.1. The Company submits that the grievance is without merit.

The Union contends that it has fulfilled its obligations under Article 13 of Agreement 11.1, that the decision of Arbitrator Gunn in AH698 does not resolve this dispute and that the Company's preliminary objections should be dismissed and that the case should be heard on its merits.

AWARD

BACKGROUND

As noted in the Company's ex parte statement, the Union advanced a Policy Grievance on behalf of all Signals and Communications employees covered by Agreement 11.1 alleging the Company's failure to abide by the language of paragraph 18.2 of Article 18 of the collective agreement pertaining to the allotment of vacation. Article 18.2 reads as follows:

> **18.2** An employee will be compensated for vacation at the rate of pay he would have earned had he been working during the vacation period or the percentage of the gross wages (whichever is higher) as reported on T-4 earnings as "Total Earnings Before Deductions Less Taxable Allowances and Benefits ".

VACATION ENTITLEMENT TABLE

VACATION QUALIFICATIONS CRITERIA		**VACATION ENTITLEMENT**		
Minimum Number of Years Continuous Employment Relationship at January 1st of the Current Year	**Minimum Number of Days Cumulative Compensated Service (CCS) by Next Service Anniversary Date**	**Days of CCS for One Day of Paid Vacation**	**Maximum Number of Weeks Vacation**	**Vacation Pay Factor**
Less than 3	-	25	2	4%
3	1.000	16 2/3	3	6%
9	2,500	12 ½	4	8%
19	5,000	10	5	10%
28	7,250	8 1/3	6	12%

> **Note:** At the beginning of the current calendar year, employees who will meet all the qualifications as set forth in paragraph 18.2 during the calendar year will be granted a vacation allotment scheduled as though they do meet all such qualifications at the beginning of the calendar year. Any vacation granted for which employees do not subsequently qualify will be deducted from the employees' vacation entitlement in the next calendar year.

The Union filed a policy grievance in 2014 alleging that employees who meet the qualifications set out in the above table during the course of the calendar year should be entitled to vacation time outlined for that year, even if they do not meet the qualifications at the beginning of the year.

Arbitrator Picher issued a decision on July 21, 2014 upholding the grievance indicating *"the parties intended to capture both the minimum number of years of continuous employment and the minimum number of days of cumulative compensated service".* Arbitrator Picher also found that it was not appropriate to award retroactive redress given *"…the Union's delay in bringing the grievance to arbitration and the potential for prejudice to the Company".*

Subsequent to that decision, the parties entered into the following Memorandum of Settlement which reads:

> March 10, 2017
>
> Mr. Steve J. Martin
> Senior General Chairman
> IBEW System Council No. 11
>
> Dear Mr. Martin:
>
> This has reference to our discussions regarding the application of 18.2 of Collective Agreement 11.1 with regards to determining vacation entitlement.
>
> It is understood that vacation entitlement calculations for those employees in the service of the Company prior to April 1st, 2017, will continue to be in keeping with the current Note found under the Vacation Entitlement Table of Article 18.2.
>
> Article 18.2 will be further amended to reflect that employees hired on or after April 1st 2017, will have their vacation entitlement going forward calculated based on their number of years of continuous employment relationship and days of cumulative compensated service at January 1st of the current year in keeping with the vacation qualification criteria of the vacation entitlement Table.
>
> Would you please indicated your concurrence with the foregoing by signing this letter in the space provided below.

Yours truly,	I CONCUR.
"D.S. Fisher"	"Steve J. Martin"
D.S. Fisher Senior Director Labour Relations	Steve J. Martin Senior General Chairman IBEW, System Council No. 11

The Union then filed a policy grievance on September 28, 2017 alleging that the Company was not following the terms of the agreement reached in the Memorandum of Settlement. The Company successfully argued before Arbitrator Roger Gunn on a preliminary objection that the grievance was untimely since more than two years had elapsed since the filing of the grievance at Step 1. Arbitrator Gunn determined that the grievance had been "dropped" pursuant to article 13.20 which reads:

> **13.20** Within forty-five (45) calendar days of date of receipt of a request for arbitration the parties shall endeavour to agree on the name of the arbitrator, it being understood that preference will be given to the arbitrator(s) of the Canadian Railway Office of Arbitration and Disputes Resolution. If an agreement is not reached, the party requesting arbitration may then request the Minister of Labour appoint an arbitrator and advise the other party accordingly. Such request to the Minister of Labour must be made no later than fourteen (14) calendar days following the 45-day period referred to in this paragraph. Grievances not docketed and scheduled for hearing before an Arbitrator, by either party, within two (2) years from the date of the filing of the Step 1 grievance, will be considered dropped, on a "without prejudice or precedent" basis, and both parties shall close their respective files. The parties may, buy mutual agreement in writing, waive these time limits.

SUBMISSIONS OF THE COMPANY

The Company submits that the doctrine of *res judicata* applies in this case. The Company cites Brown and Beatty, Canadian Labour Arbitration (5th) at 2:3221 for the following proposition:

> In order for there to be a conclusive bar to the second grievance, the first award must meet the following three conditions. First, it must be between the same parties, secondly, the matter in dispute must be identical in both proceedings involving the same or unaltered collective agreement; and, finally, it must have been brought for the same object or remedy.

The Company argues that the doctrine of *res judicata* applies here given that it meets the three conditions cited above: first, it involves the same article 18.2 provision of the collective agreement; second, the parties are the same; and third, both policy grievances pertain to all employees in all seniority regions and both request the same remedy for the breach of article 18.2. Arbitrator Gunn was clear that the Union missed the mandatory deadlines set out in article 13.20 and for that reason the grievance was considered as "dropped". The Company further argues that to allow the current grievance filed on February 5, 2020 would nullify the parties' objective in negotiating a strict grievance filing process. The decision of Arbitrator Gunn would otherwise have no meaning or precedential value.

In the alternative, the Company submits that the current grievance filed on February 5, 2020, was well outside the mandatory time limits (2.5 years) given that it was not submitted 35 calendar days "from the cause of the grievance" as provided in article 13.10. The Company states that it should not be accountable for the Union's failure to follow the unequivocal language of the collective agreement and relitigate an issue that has been resolved.

Finally, the Company submits that this is not a case where the arbitrator should exercise the discretion granted under article 60.1.1 of the **Canada Labour Code** and

relieve against the mandatory time limits. Any relief granted to the Union will prejudice the Company.

SUBMISSIONS OF THE UNION

The Union submits that the grievance is of a continuing nature given that it involves a repeated breach of a duty, in this case involving the payment of vacation entitlements. The time limits run from the date of the breach and are reset upon each subsequent breach. The failure to recognize vacation entitlements is properly the subject of a continuing grievance and may be advanced through the grievance process as long as each underlying entitlement is being denied.

In the alternative, the Union submits that the arbitrator should exercise his discretion under article 60.1.1 of the **Canada Labour Code** to extend the time limits which reads:

> **Power to extend time**
>
> **60 (1.1)** The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension

The Union submits that it acted promptly to file the current grievance once Arbitrator Gunn had rendered his decision. The Union further argues that in addressing whether he should grant the application to extend time limits under section 60.1.1, Arbitrator Gunn only considered whether there was a reasonable explanation for the delay. Counsel points to the decision in **CROA 3493**, where Arbitrator Picher noted that

three factors should in fact be considered in determining whether a time limits extension is appropriate: (1) the reason for the delay given by the offending party, (2) the length of the delay, and (3) the nature of the grievance.

The Union also submits that the Company will not suffer prejudice because the Company has been aware of the Union's opposition to the Company's vacation entitlement practices since 2014. The Union also notes that when a grievance is dropped, it is on a "without prejudice or precedent basis" under article 13.20 which it argues permits the filing of a grievance of a continuing nature.

ANALYSIS

With respect to the Company's submission that the grievance submitted by the Union on September 28, 2017 and a further grievance on February 5, 2020 are identical, the Company submits that the three requirements for application of the *res judicata* doctrine apply given that the same collective agreement provisions are in dispute, the same parties are involved and the subject matter of the grievances are identical.

I note the comments of Arbitrator Albertyn in *Canadian National Railway Company v. CAW* (SHP 690) (April 25, 2012) where he states the following:

> **31**. Foremost *res judicata* and issue estoppel are equitable doctrines – they are intended to prevent an injustice, the injustice of allowing a party to relitigate an issue that has been resolved between the parties. The doctrines are a protection to a party from having to fight again a battle already resolved. Equally, if a party has not had the opportunity to assert a right for adjudicative determination, the party should not be deprived of it by the application of the doctrines. The discretion to apply the doctrines is to be done within the overriding considerations of fairness, natural justice and common sense: *D'Aoust v. 1379202 Ontario Inc. (c.o.b. Automotive Edge)*, 2003 CanLII 38391 (ON SC) at 51.
>
> **32.** *Res judicata* has two aspects: it bars a party from re-litigating an issue already decided in a previous proceeding; and it prevents a party from litigating a matter which it ought to have brought up in the earlier proceeding. The doctrine, including issue estoppel, is

> intended to give the parties finality when they have resolved an issue or had that issue adjudicatively determined. Three conditions are necessary: the dispute must be between the same parties; the matter in dispute must be identical in both proceedings involving the same or an unaltered collective agreement; and the dispute, raised for the same purpose, must have been previously determined by adjudicative decision or resolved by agreement: *Essar Steel Algoma Inc. and United Steelworkers,* Local 225 (2008), 177 L.A.C. (4th) 183 (Stout); *Toronto (City) v. CUPE Local 79* (2003), 120 L.A.C. (4th) 225 (S.C.C.), 2003) 3 S.C.R. 77; *Canadian Union of Public Employees, Local 1253 v. Board of Management (King Grievance)*, [2006] N.B.L.A.A. No 15 (Bladon), at 19.
>
> **33.** Issue estoppel has the same purpose, to ensure the finality of an earlier adjudicative decision on the same subject matter between the same parties: *Danyluk v. Ainsworth Technologies Inc.*, 2001 S.C.C. 44.

In *Re: Easy Park Parking Corp of Vancouver and CUPE, Local 1004 (Owinar)* 2014 CarswellBC 4249, the arbitrator notes that the doctrine of *res judicata* remains a discretionary doctrine:

> The application of the doctrines of *res judicata*, abuse of process and the rule against collateral attack are discretionary and the outcome of a given case rests on whether it would be fair to hold a party to the decision in the earlier proceeding. In the circumstances of the present case the basic tenets of the finality doctrines exist, *but there are compelling reasons based on fundamental notions of fairness and justice that weigh in favour of exercising discretion to allow the grievance to proceed to arbitration. (emphasis added)*

Arbitrator Gunn, after reciting the details of the delays attributable to the Union in bringing the grievance of September 28, 2017 to arbitration and noting that the 2-year time limit for docketing and scheduling the hearing under article 13.20 had expired, determined that the Union had not provided reasonable grounds to extend the time limits under s. 60.1.1. Arbitrator Gunn, it should be noted, similar to the current proceedings, was dealing with the same preliminary objection of the Company regarding a procedural issue involving time limits. Arbitrator Gunn did not address any issue involving the merits of the grievance.

The purpose of the doctrine of *res judicata*, as Arbitrator Albertyn put it, is to prevent a party from *"…having to fight again a battle already resolved".* That "battle" is typically set out in the broad wording of a grievance claiming a breach of the collective agreement. Given the context of the parties' close and sophisticated relationship, I agree with the comments of Sullivan in *Easy Park Parking* that there is an overriding concern for fairness when determining whether equitable doctrines such as *res judicata* or estoppel should apply.

It is very significant in my view that this issue of the interpretation of the NOTE in article 18.2 was dealt with directly by Arbitrator Picher when the Union filed the policy grievance in 2014[1]. Arbitrator Picher succinctly summarizes the issue in dispute as follows at p. 2:

> The instant policy grievance arises out of an individual grievance originally filed by employee Serge Morin. It is common ground that on January 1, 2013 Mr. Morin had attained 27 years and 8 months of service with 7, 267 days of cumulated compensated service (CCS). The Company took the position that as Mr. Morin did not then have 28 years of continuous employment service he was not eligible as of January 1, 2013 for six weeks of vacation in that calendar year. He was granted five weeks of vacation entitlement and was recognized as being entitled to six weeks of vacation in 2014 when, according to the Company, he properly satisfied the requirements of article 18.2 to merit the additional weeks.

He went on to find at p. 4:

> In the Company's interpretation, what the Note does is to allow a prospective estimate of whether an employee will meet the CCS qualifications during the course of the calendar year, as of their subsequent service anniversary date. Essentially the Company's position is that the Note does not apply to the minimum number of years of continuous employment relationship reflected in the first column of the Vacation Entitlement Table, but is restricted to the projection of cumulative compensated service found in the second column.
>
> *The Arbitrator has substantial difficulty with that interpretation. Clearly the Note speaks to "all the qualifications set forth in paragraph 18.2". I am satisfied that by using the phrase "all the qualifications" the parties intended to capture both the minimum number of years of continuous employment and the minimum of days of cumulative compensated service. In the result, I am satisfied that the Union is correct in its interpretation that Mr. Morin*

[1] IBEW, Council No. 11 v. Canadian National Railways (July 21, 2014)

> *would have been entitled to the benefit of the Note to the extent that he would, in the year 2013, attain 28 years of continuous employment, even though he may not have done so effective January 1, 2013. To put it simply, the Note contemplates employees meeting the qualification criteria established within the Vacation Entitlement Table during the forthcoming calendar year under consideration. Those qualifications include the years of continuous employment and the days of cumulative compensated service. I can see no reason to restrict the application of the Note to CCS only, as the Company would have it.*
>
> *(emphasis added)*
>
> For the foregoing reasons I am satisfied that the interpretation of the Union is to be preferred to that of the Company, with respect to the meaning of the Note to Article 18.2 of the collective agreement. In the case of Mr. Morin, as he was clearly scheduled to meet the qualification of 28 years of continuous employment during the course of 2013, by the operation of the Note he should have been deemed to meet the qualifications at the beginning of that calendar year, and granted vacation allotment accordingly.

Having Arbitrator's Picher interpretation in hand, and consistent with his decision, the parties agreed to the Memorandum of Settlement (Attachment "P") to the collective agreement on March 17, 2017. As noted above, it reads in part:

> Article 18.2 will be further amended to reflect that employees hired on or after April 1, 2017 will have their vacation entitlement going forward based on their number of years of continuous employment relationship and days of cumulative compensated service at January 1st of the current year in keeping with the vacation qualification criteria of the vacation entitlement Table.

The Union referred to the above Memorandum of Agreement when it filed its Step 1 policy grievance on September 28, 2017. The Union's position is set out at paragraph 3 of the grievance:

> It must be noted that this dispute has previously been determined. On March 20, 2017, the IBEW and CN entered into a Memorandum of Settlement (MOS) which included an amendment coinciding with the implementation of the Note in article 18.2 This implementation was a result of an Arbitration award in August 2014. The determination and qualification of vacation allotment for existing employees would adhere to the Note. The language that summarized this revision was contained in Attachment P and endorsed by Senior Representatives of both organizations.

Although there has been a clear breach of the two-year time limit set out in article 13.20, this arbitrator has an overriding concern that the issue in dispute regarding the interpretation of article 18.2 was previously addressed by the decision of Arbitrator Picher and, more particularly, the follow-up Memorandum of Agreement dated March 17, 2017. To deny the Union the opportunity to pursue the merits of the grievance in the face of both Arbitrator's Picher decision and the Memorandum of Agreement would in my view be unjust. Although there has been a procedural failure to meet the stipulated time limits, there remains an overriding concern here for fairness given the history of this dispute, which would be denied if the doctrine of *res judicata* was applied to the grievance filed on February 5, 2020. Accordingly, it is my view that the doctrine of *res judicata* should not be applied in this case.

Turning to whether the Union has demonstrated reasonable grounds for an extension of time limits under article 60.1.1 of the **Canada Labour Code**, I note the following comments of Arbitrator Picher in **CROA 3493**, a case where the time limits extension was denied:

> Section 60. 1.1 of the **Canada Labour Code, Part I** provides as follows:
>
> > **(1.1) Power to extend time** – The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.
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> As can be seen from the foregoing the Arbitrator is compelled to undertake a two-part analysis before deciding to extend time limits in the exercise of his discretion. Firstly, consideration must be given to whether there are reasonable grounds for the extension and secondly, the Arbitrator must examine whether an extension of the time limits would unduly prejudice the opposite party, in this case the Company.
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> In the leading decision of **Re Becker Milk Company Ltd. and Teamsters Union, Local** 647 (1978), 19 L.A.C. (2d) 216 (Burkett), a board of arbitration was called upon to consider the virtually identical provisions of the **Ontario Labour Relations Act**, R.S.A. 1970, c.

> 232, s. 35(5a), the board of arbitration found that it was appropriate to consider three factors: the reason for the delay given by the offending party; the length of the delay; and the nature of the grievance.
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> Boards of arbitration have made it clear that where it is apparent that there was unexplained laxity on the part of the offending party in progressing a grievance, it may not be appropriate for a board of arbitration to exercise its discretion to relieve against the time limits. (See, e.g., Re Corporation of the City of Brantford and Canadian Union of Public Employees, Local 181 (1983), 9 L.A.C. (3rd) 289 (Samuels); Re Helen Henderson Care Centre and Service Employees' Union, Local 183 (1992), 30 L.A.C. (4th) 150 (Emrich); Re Laidlaw Transit Ltd. and Canadian Union of Public Employees, Local 2151 (2000), 93 L.A.C. (4th) 386 (Devlin).)
>
> …
>
> Nor is this a case where irreparable harm would result, given the nature of the grievance. We are not here concerned with an irretrievable loss if the grievance does not proceed for reasons of timeliness, as contrasted with a case of discharge or a wide- ranging interpretation affecting wages, for example. Moreover, it appears that the same dispute is being pursued in another bargaining unit represented by the Union. In all of the circumstances, I am not prepared to find, on the basis of the arguments submitted by the Union, that reasonable grounds for an extension have been demonstrated in this case.

Having reached the point of implementation of an arbitration award in a Memorandum of Agreement, it would be untenable in my view to deny the Union the right to pursue the grievance filed at Step 1 on February 5, 2020 to the point of an arbitrated award on the merits of this case. Although the Company is technically correct that the cause of the grievance arose some 2.5 years prior to February 5, 2020, the fact remains that the Company's challenge on procedural grounds to the grievance filed on September 28, 2017 was not dealt with until the Gunn award was issued on February 3, 2020. The Union then filed the current grievance on February 5, 2020.

The Union has satisfied the first two criteria set out in the *Becker Milk Company* decision having provided reasonable explanations for both the reason and length of delay in filing the February 5, 2020 grievance. The Union did not display any "laxity" in filing the February 5, 2020 grievance in the sense, for example, of having simply overlooked the

time period for filing. Rather, the Union was waiting for the Gunn decision on the Company's preliminary objection to the timeliness of the September 28, 2017 grievance.

The third criteria, the nature of the grievance, raises a significant issue, as noted, regarding the calculation of vacation allotment under article 18.2, one that has been the subject of both a decision by Arbitrator Picher and a Memorandum of Agreement. The issue of vacation entitlement fits squarely within the comments of Arbitrator Picher above of a *"case of discharge or wide-ranging interpretation affecting wages, for example".* This case in my view could result in an *"irretrievable loss"* if it is prevented from proceeding on its merits given, as the Union submits, that it involves a substantial and important benefit of entitlement to vacation to employees.

I also find that there is no evidence of any prejudice to the Employer's case if a time extension is granted and the case is allowed to proceed on its merits. As the Union pointed out, there have been no changes to the parties positions since the issue was first grieved in 2014.

Having reached the conclusion to extend the time limits, it is unnecessary to deal with the Company's submission concerning whether this policy grievance filed on February 5, 2020 is a continuing grievance.

CONCLUSION

The preliminary objection of the Company is dismissed. I find that reasonable grounds exist for extending the time limits on the February 5, 2020 grievance under section 60.1.1 of the **Canada Labour Code** in order to permit a hearing on the merits.

Given that the roots of this case date back to 2014, it would be in everyone's interest going forward to try and resolve the merits of this grievance, particularly in light of the Arbitrator Picher's earlier decision which was followed by the Memorandum of Agreement.

Dated at Calgary, this 14th day of September, 2020

JOHN M. MOREAU, Q.C.