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IN THE MATTER OF AN ARBITRATION

BETWEEN

BOMBARDIER TRANSPORTATION – NORTH AMERICA
WILLOWBROOK MAINTENANCE FACILITY (TORONTO)
("the Company" / "the Employer")

- AND -

THE AMALGAMATED TRANSIT UNION, LOCAL 1587
("the Union")

CONCERNING A UNION POLICY GRIEVANCE REGARDING VACATION ENTITLEMENT

Christopher Albertyn - Sole Arbitrator

APPEARANCES

For the Union:

Simon Blackstone, Counsel
Peter Brown, Grievance Officer
Darren Hager, Union Representative

For the Company:

John West, Counsel
April Brown, Human Resources Manager

Hearing held in TORONTO on November 14, 2007.
Award issued on November 21, 2007.

AWARD

1. This award concerns a Union policy grievance. The Union claims that the Employer is applying the vacation provision of the collective agreement, Article 25, incorrectly.

2. The dispute concerns whether certain employees can take additional vacation days when they achieve a continuous service milestone after the start of the vacation year.

3. In particular, the Union says that employees, who reach 5, 10 or 15 years of continuous service after the start of the vacation year (i.e. after May 1), are entitled to take the additional days that accrue at these service milestones.

4. The collective agreement is for the period January 1, 2005 to December 31, 2009. The relevant portions of Article 25 are found in Article 25.1 and Article 25.5:

> **25.0 VACATION**
>
> **25.1** The vacation year shall be the twelve (12) months period from May 1 to April 30. Vacation shall be granted to regular employees based

on the length of continuous service completed before May 1st of the vacation year as follows:

VACATION YEAR	VACATION ENTITLEMENT	VACATION PAYMENT
Less than one (1) year	One (1) day for each completed month of service to a maximum of ten (10) working days.	0.4% of previous years earnings for each day
One (1) year – less than two (2) years	2 weeks	4% of previous years earnings
Five (5) years – less than ten (10) years	3 weeks	6% of previous years earnings
Ten (10) years – less than fifteen (15) years	4 weeks	8% of previous years earnings
Fifteen (15) years of service	5 weeks	10% of previous years earnings

In addition to the above, employees employed before January 1, 2005 will be entitled to vacation based on the following schedule:

VACATION YEAR	VACATION ENTITLEMENT	VACATION PAYMENT
Two (2) years – less than three (3) years	11 days	0.4% of previous years earnings for each day
Three (3) years – less than four (4) years	12 days	0.4% of previous years earnings for each day
Four (4) years – less than five (5) years	13 days	0.4% of previous years earnings for each day

....

25.5 All employees shall take vacation in periods of not less than one (1) week blocks. Fractional week entitlement may be taken as single vacation days subject to all provisions of Article 25.

An employee, with two or more years of continuous service, will, on the anniversary date of his/her hire, be entitled to take the additional vacation days corresponding to the years of service in the above schedule.

> It is understood that any employee's request for vacation to be taken prior to April 30th of each year may be granted, provided that an employee who leaves the employment of the Company repays any such vacation absence.
>
> All vacation must be taken before the end of the vacation year.

5. The other provisions of Article 25 do not affect the outcome of this matter. Articles 25.2 to 25.4 concern the process of scheduling vacation. Article 25.6 concerns vacation for those seriously ill or injured.

6. Both parties claim there is no ambiguity in the language, and that the provisions of Article 25 are clear on their face. In the alternative, the Union says, if there is ambiguity, I should look at Article 25 of the previous collective agreement (January 1, 2002 to December 31, 2004), which the Union claims is a useful guide to what the parties intend in Article 25. The Employer disputes the relevance of the previous Article 25 and objected to my having any regard to it, but says, if I consider it, I will find support for its interpretation of the current provision.

7. The difference between the parties hones down to this: the Union claims

that the phrase, "in the above schedule", in the second subparagraph of Article 25.5, refers to both grids in Article 25.1; the Company claims it refers only to the second grid. The Union contends that the 2nd grid is subsumed within the 1st grid, it is a sub-category of employees covered by the 1st grid and, together, both grids constitute "the above schedule".

8. The implication of the difference is that, on the Company's construction, only those grandfathered employees (employed before January 1, 2005) receive the extra days in the 2nd grid if they reach their second, third or fourth years of service within the vacation year (May to April). So, on the Company's interpretation, these employees with 2, but not 3, years of continuous service get an extra day above the 2 weeks of annual vacation; those with 3, but not 4, years of continuous service get another day; and those with 4, not 5, get a total of 3 extra days.

9. The Union agrees that the grandfathered employees get the extra days, as the Company contends, but it claims that those within the first grid also get the extra days. So, if an employee reaches their 5th, 10th or 15th year of continuous service within the vacation year, they are entitled to take the extra days of the new threshold (a week) within the vacation year.

10. I look only at the language of the collective agreement. I apply its plain and ordinary meaning. Doing so, I find that the language of Article 25.1 and Article 25.5 is clear and unambiguous.

11. At the hearing I admitted the previous collective agreement as an exhibit. I did so in order that, if I found ambiguity in the language of the current Article 25, I could have regard to the provision of the previous collective agreement. Given my finding that there is no ambiguity, I cannot rely in any manner on what is contained in the previous Article 25.

12. The key sentence in Article 25.5 is the following: "An employee, with two or more years of continuous service, will, on the anniversary date of his/her hire, be entitled to take the additional vacation days corresponding to the years of service in the above schedule."

13. There is much that favours the Company's interpretation of the sentence over the Union's. In no particular order, the following considerations count for the Company's view.

14. Firstly, the sentence refers to the entitlement to take additional vacation days, not weeks. Admittedly, a week is just an accumulation of 5 working days, but the absence of an express reference to the additional vacation week suggests that the additional week of vacation was not included, and only the additional days in the 2nd grid were.

15. Secondly, regarding the key feature of the sentence in Article 25.5, most contested by the parties, is the reference to "the above schedule". The 2nd grid is expressly referred to as "the following schedule". There is no similar reference to the 1st grid. Furthermore, there is no other reference to the word, "schedule", in the collective agreement.

16. Thirdly, Article 25.5 refers to "the additional vacation days". The phrase, "in addition to the above", appears in between the 1st and 2nd grids in Article 25.1. The additional days are additional to the basic entitlement contained in the 1st grid. This strongly suggests that the additional days are those referred to in the 2nd grid only.

17. Fourthly, there is a logical inconsistency in the Union's construction of the provisions. Both parties agree that the grandfathering will cease by 2010, when

those employed prior to January 1, 2005 will have reached 5 years continuous service. By then there will no longer be an entitlement to the extra days for any employees with 2 but less than 3 years service, or for those with 3 but less than 4 years service or those with 4 but less than 5 years service. But, on the Union's construction, there would continue to be the entitlement of an extra week for those reaching their 5th, 10th and 15th year in the course of the vacation year. The additional days contemplated in the 2nd grid would no longer apply, but the additional week arising from the 1st grid would. I find it anomalous that the parties would so have limited the addition of one, two and three extra days by grandfathering the entitlement to these days, yet allow the indefinite continuation of the additional week, despite it being contrary to the preamble to the 1st grid. As the Employer argues, I find it most unlikely that the parties intended, in Article 25.5, to interfere with the basic vacation entitlement set out in Article 25.1 (in the 1st grid and the preamble to it) beyond what is contained in the 2nd grid, which they have limited in such a way that, by 2010, it will no longer have any effect.

18. Lastly, there is a practical difficulty to the Union's construction. If the Union were correct, an employee entering their 6th, 11th or 16th year of continuous service during the vacation year, would be entitled to an additional week of vacation that would not have been scheduled. It would need to be taken before the

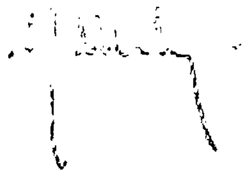
end of the vacation year. So, such employee, hired towards the end of April, would have to take their vacation before April 30. The Union says that as long as the vacation started in the vacation year the employee could have their extra vacation week run into the following vacation year. Despite this, there is the practical problem of squeezing in the vacation week, which arises only to a small extent on the Employer's construction.

19. The effect of the 1st grid in Article 25.1 is to move to a system where all vacation accrues by May 1 of each year, and is taken by April 30 of the next year. The grandfathering of the additional days in the 2nd grid means that by 2010 there will be no additional days for any employees. The 1st grid will then describe the vacation entitlement and accrual.

20. I accept Employer counsel's key argument: the threshold language in Article 25.1 says that employees can take their vacation based on the length of their continuous service completed by May 1 each year. On the Union's interpretation this threshold would be significantly depleted. It would mean that all employees reaching their 5th, 10th or 15th year, would be entitled to an extra week's leave, despite not having completed those years of service before the vacation year. I find this contrary to the intention expressed in Article 25.

21. In light of these conclusions, I find that the Employer's interpretation of the Article 25 expresses the language of the provision. I therefore deny the grievance.

DATED at TORONTO on November 21, 2007.



Christopher J. Albertyn

Arbitrator