

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 79

Heard at Montreal, Monday, October 16th, 1967

Concerning

ALGOMA CENTRAL RAILWAY

and

BROTHERHOOD OF RAILROAD TRAINMEN

DISPUTE:

Claims of Conductors G.F. Kennedy, O.E. Dent, G. Cockwill and Brakeman E. Thomas for payment of general holiday pay for Labour Day, September 5, 1966.

JOINT STATEMENT OF ISSUE:

Conductor G.F. Kennedy working assigned through freight train that normally works twenty days a month only worked twelve days, due to the strike of the Non-Operating Employees, claimed mileage earned on the last trip worked before the strike August 26, 1966.

Conductor O.E. Dent working assigned passenger train that normally works seventeen days a month, only worked thirteen days due to the strike, claimed mileage earned on the last trip before the strike.

Conductor G. Cockwill working an assigned yard job that normally works twenty-one days a month, only worked fourteen days due to the strike, claimed eight hours at yard rates.

Payment of the above three claims was denied by the Company under the terms of the General Holiday Agreement effective June 1, 1966.

Brakeman E. Thomas working on assigned through freight qualified for general holiday pay and claimed mileage earned on last trip before strike as mileage from Steelton to Hawk Junction and return to Steelton. This claim was reduced by the Company and employee was compensated 186 miles at through freight rates in accordance with the Company's understanding of General Holiday Agreement effective June 1, 1966.

FOR THE EMPLOYEES:

(SGD.) C. E. MCCLELLAND
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. A. THOMPSON
VICE-PRESIDENT – RAIL OPERATIONS

There appeared on behalf of the Company:

H. R. Wootton – Manager Rail Operations, Sault Ste. Marie
P. J. Leishman – Supervisor Personnel, Sault Ste. Marie

And on behalf of the Brotherhood:

C. E. McClelland – General Chairman, Sault Ste. Marie

AWARD OF THE ARBITRATOR

The Company's brief included copies of correspondence that had passed between the parties with respect to these claims.

A letter from Mr. C. E. McClelland, General Chairman, to Mr. J. A. Thompson, Vice-President Rail Operations, dated December 13, 1966, concisely sets forth the basis for the claims, as well as admitting with respect to the conductors involved, that they did not qualify for holiday pay not having 15 days service in the previous 30 days. It read:

Conductor G.F. Kennedy, O.E. Dent and G. Cockwell submitted claims for Statutory Holiday payment for Labour Day.

Due to the Non-Ops being on strike the latter part of August, these three conductors did not have 15 days service in the previous 30 days. However, the Company did not notify these employees that they would not be paid until after the 30 days as required in article 82 of our schedule.

Brakeman E. Thomas worked on the last train out of Steelton prior to the strike and returned to Steelton without tying up at Hawk Junction due to the time element and claimed the total miles earned as statutory pay. He was only paid mileage earned Hawk Junction to Steelton.

The representative for the Brotherhood based his submission in justification for the claims of the three conductors, purely on the provision in article 82 of the agreement. With respect to Brakeman E. Thomas the same claim was made, plus the additional factor that, qualifying for holiday pay, this employee should have been paid for a return trip Hawk Junction-Steelton return.

The portion of article 82 quoted reads:

Where there is a question regarding the time or mileage to be paid for, any portion not in dispute will be allowed, and the employee advised within thirty (30) calendar days from the date of receipt of ticket regarding the portion which is not allowed together with reason why not allowed, otherwise such claim will be paid. In cases where all time or mileage claimed on any time return is disallowed, such time return will be within thirty (30) calendar days returned to the employee through the proper Officer of the Railway otherwise such claim will be paid.

Admittedly the Company had failed to notify these employees within the thirty day period provided in article 82. This was stated in a letter from Mr. J. A. Thompson to Mr. McClelland, under date of December 28, 1966, as follows:

As regards failure to notify the three men first named within the thirty day period provided in article 82 that the claims were denied it is quite correct that we made an error in this regard. You will understand that the shutdown of our operation by strike action by the Non-Ops employees created much confusion and a great variety of claims, counter-claims, etc., the result being that the three claims referred to were lost in the shuffle ...

The basis for the submission made by the Company's representative was that section 82 was never intended to apply to a claim that was entirely without validity. In other words, admission of the fact that these men failed to comply with section 2(b) of the agreement between the parties dealing with statutory holidays, took them beyond the intended scope of article 82.

Section 2(b) referred to reads:

In order to qualify for pay on any of the holidays specified in section 1, an employee shall have completed 30 days of continuous employee relationship and in addition:

(b) shall be entitled to wages for at least 15 shifts or tours of duty during the 30 calendar days immediately preceding the general holiday.

In considering the portion of article 82 relied upon, it is important to underline that the three conductors and the brakeman did not work on the holiday in question. This brings into prominence the opening words of the provision:

Where there is a question regarding the time or mileage to be paid for ...

Nothing in that language indicates an intention that it extends to holiday pay for those not required to work. Clearly no time was involved, or mileage. What was involved was a bonus payment flowing from section 29(3) of the **Canada Labour (Standards) Code**, from which the agreement between the parties as to pay for statutory holidays was developed. It reads:

An employee whose wages are calculated on any basis other than a basis mentioned in subsection (1) or (2) (weekly, monthly or hourly) shall, for a general holiday on which he does not work, be paid at least the equivalent of the wages he would have earned at his regular rate of wages for his normal working day.

The parties have clearly provided a qualifying factor for an employee before he can receive holiday pay for a day on which he has not worked namely, "15 shifts or tours of duty during the 30 calendar days immediately preceding the general holiday." That, in my opinion, is a special provision requiring compliance before there would be any right to submit a claim that would bring section 82 into effect. Where no work has been done on the holiday and no claim that in fact the claimant had qualified as to the previous shifts or tours of duty required, section 82 has no application.

This finding would, of course, apply to the claim made on that basis for Brakeman Thomas, no work being done by him on the holiday.

With respect to the other aspect of Brakeman Thomas' claim, section 5(1)(b) of the agreement concerning pay for holidays provides:

An employee qualified under section 2 hereof and who is not required to work on a general holiday shall be paid in accordance with the following:

(b) A Conductor, Baggage man, Brakeman or Spare Board Trainman shall be paid an amount equal to his earnings, exclusive of overtime, for the last tour of duty he worked prior to the general holiday.

The one question to be determined, therefore, is whether the return trip made by this claimant comes within the term "his last tour of duty". Pertinent to that determination is the fact that the brakeman was not on turnaround service. The distance between Steelton and Hawk Junction being approximately 163 miles, article 9 of the collective agreement, in subsection (f) forbids trainmen being called for turnaround service where the distance from the terminal to the turnaround point is one hundred miles or over.

This crew operating on Train No. 11 (timetable train) ex Steelton 11:30 p.m. 25 August, terminated their run on August 26th at Hawk Junction. The strike was scheduled to commence at 12 o'clock noon E.S.T. Friday, August 26th. A bulletin issued by the Company told that all train and yard assignments were cancelled on completion of tour of duty on that day. There was no dispute that the claimant left Hawk Junction on Extra South 9.10 a.m., arriving at Steelton at 4.00 p.m. and as indicated was paid for that trip on the basis of 186 miles at through-freight rates.

I am satisfied the trip described on August 26th represented Brakeman Thomas' last tour of duty, prior to the holiday in question, within the meaning of section 5(1)(b) quoted.

For these reasons all four claims are disallowed.

(signed) J. A. HANRAHAN
ARBITRATOR