CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 104

Heard at Montreal, Tuesday, May 14th, 1968

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

DISPUTE:

Claim of the Union that the Company violated the General Holiday provisions of the Collective Agreement when it denied holiday pay to 131 Stores Department employees for Labour Days September 5, 1966.

JOINT STATEMENT OF ISSUE:

These 131 employees went on strike along with all other railway non-operating employees on August 26, 1966 and returned to work on September 7, 1966. On their behalf the Union claimed a day's pay for the General Holiday, Labour Day, September 5, 1966, on the basis they met all of the qualifications for General Holiday payment in accordance with Clauses (a), (b) and (c) of Article 2 of the General Holiday Agreement dated December 16, 1965.

This claim was denied by the Company.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(Sgd.) M. PELOQUIN	(Sgd.) G. LAWSON
GENERAL CHAIRMAN	MANAGER OF STORES

There appeared on behalf of the Company:

J. C. Anderson	– Assistant to Vice President-Personnel, Montreal
G. Lawson	– Manager of Stores, Montreal
G. C. Thompkins	– Works Manager Angus Shops, Montreal
W. B. Crichton	– Superintendent of Stores, Montreal

And on behalf of the Brotherhood:

M. Peloquin	– General Chairman, Montreal
W. C. Y. McGregor	– International Vice President, Montreal
E F. Downard	– International President's Special Assistant, Montreal
F. W. McNeely	– Vice General Chairman, Toronto
F C. Sowery	– Vice General Chairman, Montreal
W. T. Swain	– Assistant General Chairman, Saint John
D. Herbatuk	– Assistant General Chairman, Montreal

AWARD OF THE ARBITRATOR

The applicable provisions of The General Holiday Agreement executed by the parties on December 16, 1965, are as follows:

> **1.** An employee who qualifies in accordance with Section 2 hereof, shall be granted a holiday with pay on each of the following general holidays, including a general holiday falling on an employee's rest day …
>
> **2.** In order to qualify for pay for any one of the holidays specified in Section 1 hereof, an employee
>
> **(a)** must have been in the service of the Company and available for duty for at least 30 calendar days;
>
> **(b)** must be available for duty on such holiday if it occurs on one of his work days excluding vacation days, if notified prior to completion of his shift or tour of duty immediately preceding such holiday that his services will be required;
>
> **(c)** must be entitled to Wages for at least 15 shifts or tours of duty during the 30 calendar days immediately preceding the general holiday except that in respect of regularly assigned sleeping, dining and parlour car service employees the number of tours of duty worked during the 30 calendar day period shall, for the purpose of this agreement, be the number of hours on duty during that period, exclusive of overtime, divided by eight.

As indicated in the Joint Statement of Issue, there was no dispute that the 131 employees involved went on strike, along with all other railway non-operating employees, on August 26, 1966, returning to work on September 7, 1966, the second day after the holiday in question.

The Claim of the Brotherhood was that the employees in question qualified within the terms of the subsections (a), (b) and (c) set forth and should have been paid for the holiday.

Support for this reasoning was found by the representatives of the Brotherhood in a decision by Referee J.C. Pelech. It was submitted the facts were comparable. In it the expression was used that holiday pay "is a reward".

This latter submission was questioned by the representative for the Company on the ground that Arbitrator Pelech had relied heavily on a specific understanding reached between the Express Company and the Union, which does not exist in respect to this matter. That judgement also relied upon the arbitrator's interpretation of the **Canada Labour (Standards) Code**, which was challenged by the Company. It was also submitted that this claim had not been based on the **Canada Labour Code** but solely on the General Holiday Agreement.

The submission for the Company was based on an analysis of the wording of the subsections quoted from The General Holiday Agreement, in which a conclusion was reached that its pattern established holiday pay was not contemplated by the parties as a bonus due employees, whereby an employee is paid for a holiday not worked even though he lost no wages by reason of the holiday falling on a non-working day. This, it was suggested, was in contra-relation to the "rest" theory for holiday pay indicated by the language used in the Agreement.

An example of the "bonus" or unqualified type of provision necessary to support the Brotherhood's theory was quoted. It was taken from a collective agreement in which Mine, Mill and Smelter Workers was the union involved. It read:

> All employees will receive one day's pay at their regular rates for these holidays …

In other words, that benefit was not qualified by wording such as found in the provision under consideration, namely; Clause (b) of Section 2, providing for two things, namely:

> **1.** that to qualify for a holiday with pay an employee must be available for duty on the holiday if it occurs on one of his work days if notified prior to completion of his shift or tour of duty immediately preceding such holiday that his services will be required, and
>
> **2.** that the provision of Item 1 above will not apply where an employee is on vacation at the time of the holiday.

In the latter respect Section 3 of the General Holidays Agreement provides:

3. A qualified employee whose vacation period coincides with any of the general holidays specified in Section 1 hereof shall receive an extra day's vacation with the pay to which the employee is entitled for that general holiday.

As indicated, on August 26, 1966, all of the non-operating railway Unions, including the Brotherhood of Railway, Airline and Steamship Clerks ordered a cessation of work by the employees they represented, which action resulted in a complete shut down of Canadian Pacific Railway Operations.

An emergency session of the Parliament of Canada was called that resulted in passage on September 1, 1966, of the Maintenance of Railway Operation Act. That Act required all the employees to return to work and the railway to commence operations forthwith. Accordingly, it was said that railway operations were resumed forthwith.

It was stated for the Company that the 131 Stores Department employees in question were legally expected to report for duty on their regular assignment at Angus Shops and St. Luc Stores on Friday, September 2nd, which they did not do. September 3rd and 4th were assigned rest days for these employees and September 5th was the Labour Day holiday, on which their services were not required, as it was the general practice to close the shops in question on general holidays. They were, however, required to report at their regular starting times on Tuesday, September 6th, which they did not do. Although required to return on September 2nd, they did not report until Wednesday, September 7th.

One feature of the argument for the Company was that during the period these employees were on strike they could not claim to be employees, namely, persons actually working for wages at the time of the holiday.

The representative for the Company summarised their submission in part, by the following;

1. The agreement is clearly based on the "rest" theory which contemplates that holiday pay is reimbursed for wages that would otherwise have been earned had the employee worked his regular position that day.

2. In order for the "rest" theory to apply, an employee must be a member of the work force at the time of the holiday.

3. That the collective agreement specifies clearly where the "rest" theory is to be departed from and the "bonus" theory applied, namely where the holiday falls on a rest day or during annual vacation.

4. There is no indication in the agreement that the "bonus" theory is to apply on the basis of payment of holiday pay to all employees regardless of whether they fall on working or non-working days. On the contrary, special provisions are included in the rule to provide for holiday pay to be allowed in certain non-working days, namely, rest and vacation days, which provisions would not have been required if the "bonus" theory were applicable.

A study of the applicable provisions convinces that the language in subsection (b) of Section 2 as described has in it words of governing importance to this claim, having regard to the particular circumstances prevailing. They are:

> In order to qualify for pay for any one of the holidays specified in Section 1 hereof, an employee
>
> …
>
> **(b)** must be available for duty on the holiday if it occurs on one of his work days, excluding vacation days, if notified prior to completion of his shift …

That provision underlines that two of the qualifying terms, such as described in (a) and (c) are not sufficient to produce this benefit for an employee. He must qualify in each of the requirements specified, including (b).

Therefore, an employee on strike, one who has temporarily removed himself from being subject to direction as to employment, would have to advise his employer that he was "available for duty on such holiday … if notified prior to completion of his shift …" It was not suggested that any of the employees in question had complied with this requirement.

For these reasons this claim is dismissed.

(signed) J. A. HANRAHAN
ARBITRATOR