

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 543

Heard at Montreal, Tuesday, April 13, 1976

Concerning

QUEBEC NORTH SHORE AND LABRADOR RAILWAY

and

UNITED TRANSPORTATION UNION (T)

DISPUTE:

Eligibility to Vacation Bonus.

JOINT STATEMENT OF ISSUE:

The Union claims that when employees receive pay in lieu of scheduled vacation time when laid off, they are entitled to vacation bonus according to paragraph 29.07 of the collective agreement.

The Railway maintains that to be eligible to the vacation bonus employees must effectively be on vacation time (i.e., granted days off from work schedule) which is not the situation of laid off employees who may be recalled according to Article XXXVII.

The Union filed a grievance and the Railway denied same.

FOR THE EMPLOYEES:

(Sgd.) L. LAVOIE
GENERAL CHAIRMAN

FOR THE RAILWAY:

(Sgd.) F. LEBLANC
SUPERVISOR – LABOUR RELATIONS

There appeared on behalf of the Company:

J. Bazin	– Counsel
R. C. Martin	– Superintendent Employee Compensation, Sept-Îles
R. Morris	– Trainmaster, Sept-Îles
M. Gauthier	– Labour Relations Assistant, Sept-Îles
A. Belliveau	– Labour Relations Assistant, Sept-Îles
M. Goulet	– Lawyer, Sept-Îles

And on behalf of the Brotherhood:

R. Cleary	– Counsel
L. Lavoie	– General Chairman, Sept-Îles

AWARD OF THE ARBITRATOR

The employees affected by this grievance were laid off during November and December, 1975. They had, by the time of their layoff, accumulated rights to vacations with pay, proportionate to their service and earnings, in accordance with Articles 29.01 and 29.03 of the collective agreement. As is stated in the Company's brief, a number of the trainmen who were laid off "... accepted or requested earned vacation pay in lieu of scheduled vacation time at the time of such lay-off". The Union denies that employees requested such treatment, but in any event they did accept payment of the amounts to which they were then entitled by way of vacation pay.

It would appear that there was not, at the time of the layoff, a vacation schedule established pursuant to Article 29.04. That article, according to the Company (and this is not denied by the Union) is not applicable in the present case, as it was not implemented before December 1975. This does not appear, then, to be a case in which the employer changed a posted vacation schedule. Instead, it paid out certain amounts which represented accumulated vacation pay to employees who, in its submission, were not on vacation. This was not necessarily improper in itself; and it may, have been regarded as a benefit by the employees who were laid off. If they are to be regarded as being in fact on layoff at that time, then they would still retain an entitlement to vacation, as well as to any balance of vacation pay remaining. It is noteworthy that under Article 29.05, "Trainmen shall be required to be off the vacation time earned".

Article 29.07 provides as follows:

29.07 An annual vacation bonus of fifty-five dollars (\$55.00) per week or seven dollars and eighty-six cents (\$7.86) for each day of annual vacation granted will be paid for vacation days taken from October 1 to December 14 and January 16 to May 31.

The joint statement of issue refers to "pay in lieu of scheduled vacation time". Such payment, however, seems to me inconsistent with Article 29.05. In my view, an employee cannot give up his vacation period in return for payment; it is not necessary, however, to characterize what happened in this case in those terms. In the instant case, what is required is simply to consider the material circumstances, and to decide whether, while the employees concerned were away from work at this time, they were laid off, or on vacation. If they were in fact laid off (and there is nothing in the material before me to suggest that they should be treated as having been terminated), then the payment of vacation pay was merely a gratuitous payment, having no effect on their right, and indeed requirement, to take a vacation at some later time, and to receive any balance of vacation pay due. If, on the other hand, the employees concerned were in fact on vacation at the material times, then to the extent that these times fall within the periods referred to in Article 29.07, the employees are entitled to the vacation bonus provided for in the article.

It is my view that in the circumstances of this particular case, the employees in question were in fact on vacation at the material times. In some cases, the status of being on vacation may have changed to one of being on layoff once vacation rights were exhausted, but to the extent that these employees were entitled to vacations with pay, they were in fact on vacation at the material times. The mere fact of payment of vacation pay is not determinative of the matter. As noted above such a payment might be made in some cases to employees on layoff. When it is remembered that employees are required to be off during their vacation time and that they are entitled to vacations with pay the idea that an employee might go on vacation at a time when he would otherwise be subject to layoff becomes quite understandable. One of the principal incidents of a layoff (apart from their being no work and thus, in most cases, no pay) is the right of an employer to call the laid-off employees back to work. An employee on vacation is not, generally speaking, subject to any such obligation. It appears to have been the Company's position in responding to this grievance that the employees were subject to recall pursuant to Article 37. In fact, however, the Company did not require employees to accept recall, even though, in many cases, recall notices were issued. Such notices expressly postponed the employee's date of reporting for work, because of his vacation. In the particular circumstances of this case, this appears to me to be a decisive consideration.

As the Company stated in one of its replies to the grievance, "The purpose of vacation bonus is to provide additional compensation to employees taking scheduled vacation during the less desirable periods of the year". In this case, while some question may have arisen as to the propriety of the company's treating the employees as on vacation, no such question need be determined in this case. It may be that the circumstances of some particular cases will require a different conclusion, but for the purposes of a general award it is sufficient to say that the employees who accepted vacation pay and were not required to return to work were on vacation, and entitled to the vacation bonus.

Subject to such variation as may be necessary on the facts of any particular case, the grievance is, for the foregoing reasons, allowed.

(Sgd.) J. F. W. WEATHERILL
ARBITRATOR