

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 1123

Heard at Montreal, Wednesday, July 6, 1983

Concerning

### CANADIAN NATIONAL RAILWAY COMPANY

and

### UNITED TRANSPORTATION UNION

#### **DISPUTE:**

Claim of Conductor W. J. Swindall, London, Ontario, for General Holiday Pay May 18, 1981.

#### **JOINT STATEMENT OF ISSUE:**

Conductor W. J. Swindall was in unassigned service at London. On May 14, 1981 at 0645 hours he booked off on leave and booked okay for duty at 0150 hours on May 18, 1981, a General Holiday.

A number of trains were cancelled on the General Holiday May 18, 1981 on the Great Lakes Region. The Union contends that Conductor Swindall was available on the General Holiday and since all assignments at London which would be manned by unassigned crews were cancelled on May 18<sup>th</sup>, he was covered by the provisions of former article 144.2 (new article 77.2) of Agreement 4.16 and therefore not required to be available for duty on the General Holiday.

It is the Company's position that unassigned crews are entitled to man all extra trains and therefore Conductor Swindall would be required to protect the unassigned service if the need arose.

The Company has declined payment.

#### **FOR THE UNION:**

**(SGD.) R. A. BENNETT**  
GENERAL CHAIRMAN

#### **FOR THE COMPANY:**

**(SGD.) D. C. FRALEIGH**  
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

H. J. Koberinski	– Manager, Labour Relations, Montreal
M. Delgreco	– Senior Manager, Labour Relations, Montreal
W. A. McLeish	– Manager, Labour Relations, Toronto
J. R. Church	– Superintendent, Western Ontario Division, London
J. A. Sebesta	– Co-ordinator Transportation – Special Projects, Montreal
J. A. Alessandro	– Labour Relations Officer, Toronto

And on behalf of the Union:

T. G. Hodges	– Secretary, General Committee, Toronto
R. A. Bennett	– General Chairman, Toronto
M. J. Hone	– Vice-General Chairman, Toronto

## AWARD OF THE ARBITRATOR

Article 77.2 of the collective agreement is as follows:

77.2 In order to qualify for pay on any of the holidays specified in paragraph 77.1, employees shall have completed 30 days of continuous employee relationship and, in addition:

- (a) shall commence a shift or tour of duty on the general holiday; or
- (b) shall be entitled to wages for at least 12 shifts or tours of duty during the 30 calendar days immediately preceding the general holiday; and
- (c) unless cancelled:
  - (1) shall be available for duty on such holiday if it occurs on one of their work days, excluding vacation days;
  - (2) shall not book in excess of 12 hours rest consecutive with their last shift or tour of duty occurring either on the day before the general holiday or on the general holiday;
  - (3) shall be entitled to wages for at least 12 shifts or tours of duty as described in sub-paragraph (b) of this paragraph and are laid off or suffering from a bona fide injury or who is hospitalized on the holiday, or who is in receipt of or who subsequently qualified for weekly indemnity benefits because of illness on such holiday;
- (d) In the application of sub-paragraph (b) of this paragraph, a regular assigned employee who has been cancelled on an assigned working day will count such day(s) as qualifying day(s) in the calculation of the required number of shifts or tours of duty during the 30 calendar days immediately preceding the general holiday;
- (e) employees except if on the spare board, who are unavailable when called or book off for their assignments which commence on the day before a general holiday and thereby make themselves unavailable for a return movement on the general holiday will not be considered as available under sub-paragraph (c) of this paragraph. This sub-paragraph (e) shall not apply to an employee covered by the provisions of items (2). and (3) of sub-paragraph (c) of this paragraph.

It would appear that the grievor came within the provisions of the opening paragraph of article 77.2, and of Clause (b) thereof. The issue is whether or not he also came within Clause (c) (1), (Clauses (c) (2) and (c) (3) not being material in this case). Having booked fit for duty at 0150 hours on the holiday, the grievor was "available for duty" for most, although not all, of the day. All assignments which would be manned by unassigned crews (and the grievor was in unassigned service), were cancelled on that day.

It is the Company's position that the grievor was not entitled to holiday pay for the day in question (a general holiday), because he was not "available" within the meaning of article 77.2 (c) (1) on that day; that is, he was not available throughout the whole of the day.

The grievor himself, as the Company argues, was not "cancelled", but with respect that would not appear to be an apt use of the term in the circumstances. It does appear that any run which he might have taken was cancelled. Certainly, he was required to be available to protect service if any were required. Whether or not such service was in fact required, the grievor would still have to be "available", in order to be entitled to holiday pay.

The grievor was available, so it appears, for over twenty-two hours of the day. While article 77.2 (c) (1), read by itself, might be read as requiring availability for the whole twenty-four hours of the calendar day of the holiday, a reading of article 77.2 as a whole suggests that such an interpretation is too restrictive. It is to be remembered that the article provides for holiday pay for those who have already earned the holiday by virtue of entitlement to wages in accordance with article 77.2 (a) or (b). Article 77.2 (c) (2) restricts the amount of rest (consecutive with a preceding shift or tour of duty) which may be booked, and which might impinge on the holiday – where the rest booked is in excess of twelve hours. That contemplates, I think, that there might properly be circumstances where an employee could book rest (not more than twelve hours) which could limit his availability for part of the general holiday.

While being available "on the holiday" might in some contexts be read as referring to availability "at all times" on the holiday, it might also, in some other context, be read as referring to availability "at some time" during the holiday. Taken in isolation, either interpretation might be thought valid. In the context of article 77.2, neither such interpretation is valid, in my view. What is required, I think, is "substantial availability". Had the grievor, for

example, booked fit for duty at 2100 hours that day, I would consider that he was not "available for duty" on the holiday within the contemplation of article 77.2 (c) (1). As it is, however, he was available for duty for the bulk of the day, and in my view came within the terms of that article. Accordingly, he was entitled to pay for the holiday.

For the foregoing reasons, the grievance is allowed.

**(signed) J. F. W. WEATHERILL**  
ARBITRATOR