

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2536

Heard in Montreal, Tuesday, 8 November 1994

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(BROTHERHOOD OF LOCOMOTIVE ENGINEERS)**

DISPUTE:

Claim for General Holiday pay for Locomotive Engineer B.A. Harmer for Labour Day, September 4, 1989.

JOINT STATEMENT OF ISSUE:

Locomotive Engineer Harmer was in unassigned service at Winnipeg. On September 3, 1989, Locomotive Engineer Harmer deadheaded from Dauphin to Symington and was paid 215 passenger miles. Locomotive Engineer Harmer was off duty at 1500 and booked 16 hours' rest which expired at 0700 on September 4, 1989, a General Holiday.

Mr. Harmer submitted a duplicate claim for 215 passenger miles for the General Holiday of September 4, 1989.

The Brotherhood contends Mr. Harmer qualified for payment of the General Holiday under article 79 of Agreement 1.2.

It is the Company's position that Mr. Harmer was not available throughout the General Holiday as required in article 79 of Agreement 1.2.

The Company denied the claim.

FOR THE BROTHERHOOD:

(SGD.) W. A. WRIGHT
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) M. E. HEALEY
for: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

J. B. Dixon	- System Labour Relations Officer, Montreal
J. T. Torchia	- Manager, Labour Relations, Montreal
V. J. Vena	- Coordinator, Transportation, Montreal
D. Gagné	- System Labour Relations Officer, Montreal
J. Krawec	- System Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

W. A. Wright	- General Chairman, Saskatoon
M. W. Simpson	- Vice-General Chairman, Saskatoon

AWARD OF THE ARBITRATOR

The issue concerns the availability of Mr. Harmer for service on the occasion of the Labour Day statutory holiday on September 4, 1989. It is common ground that he booked off duty at 15:00 on September 3 and booked sixteen hours' rest. On that basis the Brotherhood maintains that he became available to work as of 07:00 on the general holiday, and should therefore be entitled to the payment of holiday pay for that day.

The entitlement to holiday pay is governed by the terms of article 79 of the collective agreement which provides, in part, as follows:

79.1 An employee who qualifies in accordance with the provisions of paragraphs 79.2 or 79.3 hereof shall be granted a holiday with pay on each of the following general holidays:

79.3 An employee who does not commence a shift or tour of duty between 0001 hours and 2359 hours on a general holiday and who has completed 30 days of continuous employee relationship shall qualify for a holiday with pay providing:

(a) he is available for duty on holiday, unless suffering from a bona fide injury, or who is hospitalized on the holiday, or who is in receipt of or who subsequently qualifies for weekly indemnity benefits because of illness on such holiday, and is entitled to wages for at least 15 shifts or tours of duty during the 30 calendar days immediately preceding the general holiday; or

It is common ground that the grievor did not commence a shift or tour of duty on the general holiday within the meaning of the foregoing provision. The sole issue between the parties is whether he was "available for duty on the holiday" within the meaning of article 79.3(a). The issue of availability for duty is further addressed in article 79.5 of the agreement which provides, in part, as follows:

79.5 Availability for duty as required by paragraph 79.3 is defined as follows:

...

(b) Unassigned Service

An unassigned employee shall hold himself available for duty throughout a general holiday. Where an employee elects to utilize sub-paragraph 79.3(b) to qualify for holiday pay he shall also hold himself available throughout the day before and the day after a general holiday.

(c) In the application of sub-paragraphs 79.5(a) and (b) an employee who is otherwise qualified for general holiday pay and who is under rest for any portion of a qualifying day, where the rest booked does not exceed 12 hours consecutive with a shift or tour of duty, shall not lose his entitlement to general holiday pay.

The Company asserts that having booked off for sixteen hours consecutive with the end of his tour of duty on September 3, the grievor did not qualify as available for duty within the meaning of article 79.5, and could therefore not claim the benefit of article 79.3 of the agreement. The Brotherhood, on the other hand, submits that the language of article 79.5(c) was not meant to be so restrictive. It argues that the mere fact of booking rest for a period in excess of twelve hours does not necessarily disqualify a person from the standpoint of availability. According to its representatives the grievor should not, merely by reason of having booked sixteen hours' rest, be deemed unavailable. They submit that if the grievor had been called after the conclusion of twelve hours' rest, but before the expiry of the sixteen hours, and had then declined to accept a call, he could properly have been viewed as unavailable. If, on the other hand, he had accepted a call during that period, he would have been available, and would not necessarily be excluded from entitlement to holiday pay by the terms of article 79.5(c)

The Arbitrator has some difficulty with the position advanced by the Brotherhood. It is important, I think, that article 79.5 is, in its own terms, intended to be a definition of "... Availability for duty as required by paragraph 79.3". It seems clear that the purpose of sub-paragraph (c) of article 79.5 is to provide an incentive for employees to be available for work on a general holiday, coupled with a ready means to identify those employees who have brought themselves within the definition of availability provided in the terms of the collective agreement. The prospect of the Company canvassing the availability of employees during periods for which they have booked rest is not consistent with the apparent intention of the provision, nor of the expectation of the parties. The suggestion of the

Brotherhood's representatives that sub-paragraph (c) speaks only to certain defined employees not losing their entitlement, without addressing the circumstances of others who fall outside the twelve hour limitation is strained, and in the Arbitrator's view out of keeping with a provision which is expressed as intended to bring definition, and by extension clarity, to the meaning of the words "availability for duty". By article 79.5(c) the parties sought to provide a definitional line with respect to the issue of availability. Absent such a line, there would be room for substantial uncertainty as to the availability of employees whose booked rest period trenches substantially into the general holiday. Article 79.5(c) is, I think, best understood as intended to provide a "bright line" demarcation for the benefit of Company and employees alike.

The evidence in the case at hand confirms, beyond dispute, that Locomotive Engineer Harmer booked rest for sixteen hours, a period clearly exceeding twelve hours, consecutive with his tour of duty immediately prior to the general holiday. By doing so he fell outside the definition of availability provided in article 79.5(c) of the collective agreement, for the purposes of article 79.3. For these reasons the grievance must be dismissed.

11 November 1994

(signed) MICHEL G. PICHER
ARBITRATOR