

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4816

Heard via Video Conference and in Ottawa, Ontario, April 13, 2022
with additional written submissions provided by May 17, 2022

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The parties do not agree on the compensation granted to locomotive engineer C. Bujold for taking two personal leave days under Article 206.6 Section VII, Part III of the *Canada Labour Code*.

JOINT STATEMENT OF ISSUE:

On January 20th and 21st, 2020, Mr. Bujold took advantage of a personal leave provided for by the *Canada Labour Code*. He submitted a claim representing the loss of earnings associated with his regular assignment and the company paid him the equivalent of two basic days, which is less compensation than he claimed.

The Union contends that, according to the provisions of the *Canada Labour Code*, Mr. Bujold is entitled to the average earnings for the 20 working days preceding January 20th, 2020 and that it does not correspond to the amount paid by the Company.

The Union maintains that collective agreement 1.1 does not contain specific provisions regarding the payment for personal leave and that the minimum requirements of the *Canada Labour Code* must apply. The Union is also of the opinion that this application by the Company is discriminatory against locomotive engineers working in freight service. It appears that other employees of the Company are compensated for the wages actually lost.

For these reasons, the Union requests that Mr. Bujold be reimbursed for the loss of earnings he suffered on January 20th and 21st, 2020. Also, the Union requests that the Company

ceases its discriminatory practice, complies with the provisions of the Canada Labour Code and corrects the situation for all members who would have been negatively impacted.

The Company does not agree with the Union's contentions. The Company denies any violation of the collective agreement and believes that Mr. Bujold was appropriately compensated for the days in contention.

FOR THE UNION:

(SGD.) J.M. Hallé
General Chairperson

FOR THE COMPANY:

(SGD.) S. Roch (for) **D. Taylor**
Vice President Operations

There appeared on behalf of the Company:

T. O'Hearn Davies	– Counsel, Norton Rose Fulbright, Montreal
F. Daignault	– Director Labour Relations, Montreal
S. Roch	– Manager Labour Relations, Montreal

And on behalf of the Union:

D. Bélanger	– Counsel, MMGC, Montreal
J.M. Halle	– General Chairperson East, Montreal

AWARD OF THE ARBITRATOR

Overview

1. This grievance is about the calculation of payment for personal leave days ("PLDs"). Under article 206 of the *Canada Labour Code* ("CLC") R.S.C. 1985, c. L -2., the Grievor is entitled to a maximum of three paid PLDs per year, compensated at his "regular rate of wages" for his "regular hours of work."

2. The Grievor is a locomotive engineer in freight service. His compensation is based on a complex set of rules, set out in detail in dozens of articles within the Collective Agreement. The Grievor's earnings can vary from one shift to another, depending on the number of miles he travels and the allowances he receives (for example) based on the length of the train, the type of train, and the time spent in terminals. The number of hours the Grievor works can also vary depending on the run to which he is assigned.

3. The Grievor took two PLDs in January 2020. The parties agree he is entitled to compensation for these days, but they differ as to how that compensation should be calculated.

4. This matter was heard on April 13, 2021. At the hearing, counsel informed me that the issue of compensation for PLDs was being litigated by other parties in other venues. On April 21, 2022, counsel for the Union advised that Arbitrator Schmidt had issued an award dealing with PLDs under a different collective agreement. I invited counsel for the parties to provide additional submissions in light of this award. They provided their submissions, in writing, all of which were received by May 17, 2022.

The Issues in Dispute

5. The CLC was amended in 2019, to allow employees to take a maximum of three PLDs per year. Article 206.6(2) states:

(2) If the employee has completed three consecutive months of continuous employment with the employer, the employee is entitled to the first three days of the leave with pay at their regular rate of wages for their normal hours of work, and such pay shall for all purposes be considered to be wages. [Emphasis added.]

6. Section 17 of the *Canada Labour Standards Regulations* (C.R.C., c. 986) (“Regulations”) sets out two methods for calculating the wages owed to employees, such as the Grievor, with variable hours of work or who are paid on a basis other than time.

Article 17 states:

For the purposes of subsections 206.6(2), 206.7(2.1) and 210(2) of the Act, the regular rate of wages of an employee whose hours of work

differ from day to day or who is paid on a basis other than time shall be:

(a) the average of the employee's daily earnings, exclusive of overtime hours, for the 20 days the employee has worked immediately preceding the first day of the period of paid leave; or

(b) an amount calculated by a method agreed on under or pursuant to a collective agreement that is binding on the employer and the employee.

7. The CLC was amended to include PLDs after the Collective Agreement between the parties came into effect. Accordingly, the parties have not bargained what constitutes a "regular rate of wages" for the purposes of PLDs.

8. The Union submits that compensation for PLDs must be calculated based on paragraph 17(a) of the Regulations. According to the Union, the parties have not agreed to a method for calculating compensation for PLDs, nor does the Collective Agreement contain a default or catch-all method that applies in these circumstances.

9. The Company relies on the "basic day" rate of pay in article 3.3 of the Collective Agreement. According to the Company, unless otherwise stipulated in the Collective Agreement, article 3.3 was intended as the standard rate of pay for locomotive engineers who have a paid day off. The Company submits that paragraph 17(b) applies and that the Grievor is entitled to the basic day rate.

10. I note that the Grievor's compensation would vary considerably, depending which paragraph of article 17 is applied. The Company has paid the Grievor \$252.10 for each

PLD, based on paragraph 17(b) and the basic day rate. The Union submits that, under paragraph 17(a), the Grievor would be entitled to \$675.54 per PLD, based on his average daily earnings from the previous 20 days.

Compensation Under the Collective Agreement

11. As noted, the Grievor's compensation is based on a complex set of rules. As a locomotive engineer, he is primarily paid on a per-mile basis, at rates set out in article 1.7 of the Collective Agreement. In addition to this, he may be entitled to a range of different allowances, including at article 1.8 (train length allowance) and 1.9 (wayfreight rates).

12. Article 3.3 of the Collective Agreement refers to a "basic day" rate of pay for locomotive engineers in freight service. It states:

3.3 In all classes of service covered by paragraphs 1.7, 1.8 and 1.9 of Article 1, 100 miles or less, 8 hours or less, straight-away or turnaround, shall constitute a day's work; miles in excess of 100 will be paid for at the mileage rates provided, according to class of power and service.

13. The parties agree that article 3.3 operates as a minimum threshold: locomotive engineers receive a basic day rate as their minimum pay for any given shift. In addition, the Collective Agreement sets out a range of other circumstances where the basic day rate applies. These include:

- When a locomotive engineer's shift is cancelled with less than two hours' notice (article 22.1)
- When they book rest on arrival at the home terminal causing a loss of a trip (article 23.7)
- When they register not more than 8 hours' rest at a home terminal and not more than 6 hours' rest at other terminals and lose a tour of duty (article 29.4)

- When they lose a tour of duty for the purpose of a periodic medical examination (article 69.5)
- When they are required to relocate, they are paid a basic day's pay up to a maximum of 10 days while they seek accommodation (article 78.8(g))

14. Importantly, the basic day rate is not the exclusive method for calculating compensation for locomotive engineers who are paid for periods when they are not actively working. The Collective Agreement calculates compensation in other ways, including:

- For bereavement leave, locomotive engineers are compensated for actual time lost, exclusive of overtime (article 80);
 - For jury duty, they are compensated for actual time lost, exclusive of overtime (article 81.1)
 - For holiday pay, they are paid based on their last shift or tour of duty prior to the holiday, with a guaranteed "minimum day" (article 76.9); and
- For attendance at investigations, they are generally paid for actual time lost, with a minimum of a basic day (article 70.1).

Analysis

15. Section 17(b) of the Regulations respects the freedom to contract between parties to a collective agreement. It allows parties to agree on a method of calculation, which accounts for unique features of the workplace and maintains any balance achieved between the parties through collective bargaining. Importantly, however, section 17(b) applies only where the parties have agreed on a method for calculating the compensation.

16. As noted, the parties have not had an opportunity to bargain what constitutes a "regular rate of wages" for the purposes of PLDs. This does not necessarily preclude the application of paragraph 17(b). In the circumstances, I must consider the existing

provisions of the Collective Agreement and determine whether they contain an agreed-upon method for calculating compensation that is applicable to PLDs.

17. The principles of interpretation are not in dispute. The parties agree that the Collective Agreement must be interpreted in a way that gives meaning to their intention, having regard for the language of the agreement, the grammatical and ordinary sense of the words that are used, the broader collective agreement and the labour relations context.

18. Having considered the Collective Agreement as a whole, I am not satisfied that the parties intended article 3.3 as a standard measure for calculating any paid day off work. In my view, the basic day rate at article 3.3 of the Collective Agreement does not satisfy the criteria in paragraph 17(b). There are three reasons for this.

19. First, article 3.3 is a basic day rate, which constitutes a minimum entitlement for a day's work. The CLC states that compensation for PLDs is at a "regular rate of wages." As the Grievor's circumstances illustrate, there can be a material difference between the minimum entitlement of \$252.10 and what a locomotive engineer will regularly earn on any given day. The fact that the Regulation refers to "regular" wages suggests that it contemplates something other than a basic, minimum entitlement. Although the parties have agreed to a basic day rate, I am not satisfied that they intended this to apply as the standard or regular rate of pay.

20. Second, the basic day rate is not the exclusive or even the dominant method for calculating compensation for locomotive engineers who are paid for periods when they are not actively working. In this Collective Agreement, the basic day rate is generally applied where a locomotive engineer loses a tour of duty. It also applies where an employee is relocated and is seeking accommodation. Neither of those circumstances is analogous to paid personal days off.

21. As Arbitrator Schmidt explained in AH767, *La Conférence ferroviaire de Teamsters Canada v. Via Rail Canada Inc.*, a salary guarantee serves a different purpose from a personal leave: paras. 52 and 60. Article 17(b) applies where the parties have agreed on a method for calculating personal leave days. It is not sufficient that they have established a method for calculating other types of leaves or conditions: para. 41.

22. The case before me is factually distinct from **AH767**. Arbitrator Schmidt's award interprets a different collective agreement, with different language. Her interpretation of the specific provisions of the Via Rail collective agreement does not assist me in determining the issues in this case. However, I find guidance in her comments about the purpose of personal leaves and the fact that they are distinct from other types of paid leave. In my view, these broader principles are relevant to the application of paragraph 17(b), generally.

23. Third, in this case, where employees receive a paid leave for personal reasons, it is not at the basic day rate. This is not to suggest that PLDs should be paid out in the same way as bereavement leave or holiday pay. However, it is significant that the basic

day rate has not actually been applied to paid personal leave. In these circumstances, it would be unreasonable to infer that the parties' mutual intention was for the basic day rate to apply to PLDs.

Disposition

24. Applying the principles of interpretation and considering the Collective Agreement as a whole, I cannot conclude that the parties agreed on a method for calculating compensation for PLDs. Accordingly, compensation for PLDs must be determined based on paragraph 17(a) of the Regulation.

25. There is a further dispute between the parties as to whether they can negotiate a method of compensation under paragraph 17(b) that results in a lower rate of pay than under paragraph 17(a). I find that the parties have not agreed to a method of calculation under section 17(b). Given this finding, it is not necessary for me to determine whether, had they agreed on such a method, it could have been at a lower rate than that under paragraph 17(a).

26. For the above reasons, the grievance is allowed, and the Company is directed to compensate the Grievor for PLDs in accordance with paragraph 17(a) of the Regulation. I remain seized to deal with the interpretation and implementation of this award.

May 30, 2022



**MICHELLE FLAHERTY
ARBITRATOR**