

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

CASE NO. 4879

Heard in Montreal, October 19, 2023

Concerning

VIA RAIL CANADA INC.

And

UNIFOR COUNCIL

DISPUTE:

The interpretation and application of Article 8.6 of Collective Agreement No.2, and of part 3, section 197 of the *Canada Labour Code*.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The Corporation has unilaterally changed payment for service hours worked by employees on General Holidays between arrival and departure cycles in different time zones, which in some cases sees those employees receiving less hours pay than the actual service hours that they worked. The Union contends that this recent change is a departure from the time-honoured manner that employees have been paid and is in breach of Article 8.6 of the collective agreement and part 3, section 197 of the *Code*, which both state employees are to be paid for all hours worked. The Union further contends that an employee's service hours are based on their physical location, and therefore they are entitled to proper compensation for those hours.

The Union requests that the Corporation pay employees for their actual hours worked on General Holidays, and not off their home terminal clock. Furthermore, we request that employees whom have experienced a loss in pay on General Holidays be properly compensated and made whole, including J. Lillies, whom was named in the grievance for submitting an appeal.

The Corporation recognizes that employees physically work the hours in question on General Holidays, but assert that they are to be compensated based on their home terminal clock, despite this never being the practice in the past.

The Corporation disagrees with the Union's interpretation and declined the Union's grievance.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

The Corporation disagrees with the Union's position. The argument that the company unilaterally changed the payment for service hours worked on General Holidays is inaccurate. In

2017, VIA Rail introduced a crew management office and a new computer system, VIA 360, to help manage schedules of train crews. Prior to the launch, multiple meetings took place with the union, including but not limited to, home terminal time zone and its implications. Since the introduction of the new system, on a consistent basis, employees working across different time zones are compensated according to their home terminal time zone. Moreover, since 2017, three (3) rounds of bargaining occurred (in 2017, 2020 and 2021). At no point these issues were brought up by the union during bargaining rounds. The Union's arguments regarding a past practice is not substantiated by facts.

The union further alleges a breach of Art. 8.6 of the collective agreement and part. 3, section 197 of the *Code* and that "employees are to be paid for all hours worked". The argument is not founded. All hours effectively worked are paid by the Corporation. Shift hours are based on home terminal. For example, a Winnipeg-based crew departing from Vancouver (going back to Winnipeg) may start at 10AM Vancouver time. The system will nonetheless clock their starting time at 12PM (home terminal time). Since time registered for the start of the shift therefore corresponds to the time zone of arrival, the total number of hours paid for the trip reflects the number of hours effectively worked.

If the Board followed the Union's position regarding application of time zones, employees departing from Winnipeg (heading to Vancouver) would have to be paid two hours less, given the change of time zones.

For these reasons, the corporation is asking that the union's grievance be denied.

FOR THE UNION:
(SGD.) B. Kennedy
National Representative

FOR THE COMPANY:
(SGD.) K. Chapados
Specialist Director, Employee Relations

There appeared on behalf of the Company:

C. Trudeau	– Counsel, Fasken Martineau DuMoulin, Montreal
T. Drouin-Shannon	– Senior Advisor, Employee Relations, Montreal
K. Parizeau	– Employee Experience Partner, Montreal
V. Pisciueneri	– Employee Experience Partner, Montreal

And on behalf of the Union:

B. Kennedy	– National Representative, Edmonton
D. Kissack	– President, Winnipeg
L. Hazlitt	– Regional Representative, Winnipeg

AWARD OF THE ARBITRATOR

Context

1. The current dispute flows from a new crew management system and a new centralized computer system, launched by Via in 2017.
2. The issue to be decided is whether the Company had the right to base holiday pay on the home terminal of employees working on transcontinental trains.

3. There is no dispute that all employees are paid for time worked. The issue is solely with respect to when employees become entitled to holiday pay under art. 8.6 of the collective agreement and s. 197 of the Canada Labour Code and whether certain employees have not been properly paid holiday pay.

Position of the Parties

4. The Union submits that previously employees submitted time sheets based on their physical location and claimed and were paid holiday pay based on whether there was a holiday in the location in which they were physically working.

5. The Union contends that employees can lose overtime hours as compared to their colleagues based in a different home terminal.

6. It gives the following example:

Changing service hours to home terminal time zones causes employees to forfeit pay for actual hours they have worked. The following is an example in support of the Union's position and demonstrates how employees from different terminals working the same hours in the same location are paid disproportionately:

Employee Base	Shift Start/Report Local time	Home Terminal Time	Shift End/Release Local Time	Home Terminal Time	Total Hours Worked	Stat Holiday Pay	Regular Pay
Vancouver	12:00	12:00	00:00	00:00	12	12	
Winnipeg	12:00	14:00	00:00	02:00	12	10	2

*Local time is the physical time zone that the employee is working in/under

7. The Union argues that there have been instances of local managers adjusting pay to deal with the problems caused by Via 360.

8. It seeks a declaration that the Corporation has breached article 8.6 of Agreement 2 and Section 197(1) of the *Canada Labour Code*. It further seeks compensation for employees affected.

9. The Company submits that it has abided by both the collective agreement and the *Canada Labour Code*.

10. It submits that there are no inequities between employees, as the payment of the overtime premium is simply a function of train schedules and the timing of the holiday. It submits that, in the example provided by the Union, depending on schedules, sometimes the Vancouver based employee will benefit and sometimes it will be the Winnipeg based employee.

11. The Company provides the following example in response to the one provided by the Union:

21. In the example provided by the Union, the employee based in Vancouver is paid a general holiday premium as follows:

- a. Time of departure: 12:00 (noon) Vancouver time (domicile time zone);
- b. Premium period : until 23:59 on the general holiday (domicile time zone);
- c. Total premium: twelve (12) hours (between 12:00 and 23:59).

22. The employee based in Winnipeg, working on the same team, is paid as follows:

- a. Time of departure: 14:00 Winnipeg time (domicile time zone), as there is a two (2) hour time zone difference with Vancouver.
- b. Premium period : until 23:59 on the general holiday (domicile time zone);
- c. Total premium: ten (10) hours (between 14:00 and 23:59).

12. The Company submits that access to holidays is based on the home terminal of the employee.

13. It argues further that the purpose of holiday pay is to compensate employees for time away from celebrations with loved ones.

14. The Company argues that the Union has not established any national and consistent practice to adjust holiday pay other than on the basis of the home terminal.

15. Finally, it submits that the grievance was only filed in July 2021, when the system was implemented in 2017, and there was a collective agreement renewal in January 2020 and two rounds of bargaining since, with time zone issues not raised during negotiations.

Analysis and Decision

Preliminary objection

16. The Company argued that the grievance had been filed late, well after the initial implementation and after several rounds of bargaining.

17. The Union argued that the problem only became apparent over time, by both the complexity of the new pay system and the delays caused by the shutdown of Via operations due to Covid and protests.

18. I accept that it may well have taken time for the Union to fully seize the nature of the problem before filing a grievance and hence cannot sustain the objection.

Legal Framework

19. Article 8.6 of the 2020-2021 Collective Agreement reads as follows:

An employee who is required to work on a general holiday shall be paid, in addition to the pay provided in Article 8.5, at a rate equal to one and one-half times his regular rate for all hours worked between 2400 hours on the eve of the recognized general holiday and 2359 hours on the night of the recognized general holiday, both times inclusive.

20. Section 197(1) of the *Canada Labour Code* provides as follows:

Additional pay for holiday work

197

(1) An employee who is required to work on a day on which they are entitled to holiday pay shall be paid, in addition to the holiday pay for that day, wages at a rate equal to at least one and one-half times their regular rate of wages for the time that they work on that day.

Employment in continuous operation

(2) An employee employed in a continuous operation who is required to work on a day on which they are entitled to holiday pay shall

- (a) be paid in accordance with subsection (1);
- (b) be given a holiday with pay at some other time, either by adding it to their annual vacation or by granting it at a time convenient to both the employee and the employer; or
- (c) be paid holiday pay for the first day on which they do not work after that day, if a collective agreement that is binding on the employer and the employee so provides.

21. However, neither article 8.6 of the Agreement or section 197(1) of the Code define when the right to a holiday arises.

22. It is not contested by the Parties that rights to general holidays, as set out in article 8.1 of the Agreement, are based on the home terminal of the employee:

8.1 All employees, from their first day of work, are entitled to a holiday with pay on each of the following general holidays. When a general holiday falls on an employee's rest day, such holiday shall not be moved to another normal working day.

The Collective agreement defines general holiday periods based on employees' province of domicile

30. Section 8.1 of the 2020-2021 Collective agreement (**Tab 7**) provides the list of general holidays:

8.1 All employees, from their first day of work, are entitled to a holiday with pay on each of the following general holidays. When a general holiday falls on an employee's rest day, such holiday shall not be moved to another normal working day.

Occasion	Atlantic	Quebec	Ontario	West	Alberta
New Year's	✓	✓	✓	✓	✓
Day after New Year's		✓	✓	✓	
Family Day					✓
Good Friday	✓	✓	✓	✓	✓
Easter Monday	✓				
Victoria Day	✓	✓	✓	✓	✓
St. Jean Baptiste		✓			
Canada Day	✓	✓	✓	✓	✓
Civic Holiday	✓	✓	✓	✓	✓
Labour Day	✓	✓	✓	✓	✓

National Day for Truth and Reconciliation	✓	✓	✓	✓	✓
Thanksgiving	✓	✓	✓	✓	✓
Remembrance Day	✓		✓	✓	✓
Christmas	✓	✓	✓	✓	✓
Boxing Day	✓	✓	✓	✓	✓

If, in any province or part thereof, a holiday is more generally recognized than any one of the holidays specified above, the signatories hereto will substitute such holiday therefore in that province or part thereof. If such signatories fail to agree that such holiday is more generally recognized, the dispute will be submitted to arbitration for final decision.

23. Thus, whether an employee is entitled to a holiday depends on the location of his home terminal. Employees in Atlantic are entitled to a holiday on Easter Monday, unlike all other employees across the country. The same is true for employees based in Quebec for St. Jean Baptiste. Conversely, employees based in Quebec are not entitled to a holiday on Remembrance Day, unlike all other employees across the country.

24. The Parties agree the entitlement to the holiday is based on the employee's home terminal and not where they are working on the day of the holiday. In the example above, an Atlantic based employee is entitled to a holiday on Easter Monday, whether he is working in Halifax or Vancouver. As well, an employee based outside the Atlantic region would not be entitled to Easter Monday as a holiday, even if they worked on Easter Monday in the Atlantic region.

25. If entitlement to the holiday itself is dependent on the home terminal of the employee, it appears logical that the holiday pay would also be dependent on the home terminal. If there is no holiday, there is no holiday pay.

26. The holiday pay will be paid based on the holiday, and holiday timing, of the home terminal.

27. The application of this principle will give rise to apparent anomalies, when comparing rates of pay for employees on a continental train, when they are based at different home terminals. The Union example of two employees, one Winnipeg based, the other Vancouver based, heading east on a holiday common to both BC and Manitoba, will result in a greater number of holiday hours for the Vancouver employee. However, the Company example of the same two employees heading west from Winnipeg will result in the Winnipeg based employee with a greater number of holiday hours. Both examples depend on the timing of the holiday relative to the schedule of the train. Whether the Vancouver or Winnipeg based employee appears to have a relative benefit will depend on when the holiday starts and stops for that employee based on his/her home terminal.

28. The principle of holidays is to permit employees to celebrate with family and friends on festive occasions as set out in 1643749 Ontario Inc. v. Arsenault 2009 CarswellNat 5565:

One of the purposes of general holiday pay under the Code is to provide employees time off with pay on public holidays so that they may celebrate those holidays with family, friends and the general public without loss of income. ...

29. It is my view that the purpose of holidays is consistent with holiday pay being based on home terminals, which in most cases, will be near to the employee's home.

30. I do not find that the Union has established any national, consistent practice challenging the payment of holiday pay based on the home terminal.

31. It is possible that the working through of the, now not so new, Via 360 system will bring forward problems which have been hidden to date. As Arbitrator Sims noted in **AH 658**, "some of the consequential impacts may...still generate grievances".

32. In all cases, employees will be paid holiday pay when they work on that holiday, as required by the jurisdiction of the home terminal. The relative advantages or

disadvantages between colleagues, as set out above, should even out over time. It is possible that certain employees, because of their particular situation, may be disadvantaged by the application of holiday pay based on their home terminal. These situations could be addressed in either an immediate Letter of Understanding or in future bargaining.

Decision

33. I find that the Company has not infringed either article 8. 6 of the Collective Agreement or section 197 (1) of the Canada Labour Code in paying holiday pay based on the home terminal of the employee.

34. For these reasons, the grievance is dismissed. I retain jurisdiction for any questions of interpretation or application.

November 21, 2023



JAMES CAMERON
ARBITRATOR