

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

CASE NO. 5195

Heard in Edmonton, July 8, 2025

Concerning

ONTARIO NORTHLAND TRANSPORTATION COMMISSION

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union's position that the Company has violated Article 28.6 as it applies to the employees' right to accrue statutory holidays.

JOINT STATEMENT OF ISSUE:

During the 2019/2020 round of bargaining, the Company put the Union on notice that it would no longer allow the accrual of non-worked statutory holidays. In essence, only Motor Coach Operators who have worked on a statutory holiday would be permitted to accrue the day as outlined under Article 28.6.

During the same round of bargaining, the Union maintained the position, as stated to the Company, that the language and application of Article 28.5 and 28.6 were clear, and that the Company was attempting to ignore the obligation of negotiating changes to that language by serving an illegitimate notice of past practice. The Union put the Company on notice that if they violated the true intent of Article 28.6, it would take the issue to task.

Subsequent to the ratification of the January 1, 2020 to December 31, 2024 Collective Agreement, the Company commenced the denial of all employees working under the agreement from accruing statutory holidays that occurred on their non-working days.

Union Position:

The Union contends that the practice of denying the accrual of statutory holidays for non-worked days is a violation of Article 28 of the Collective Agreement.

The Union contends that the General Holiday articles, more specifically, Articles 28.2, 28.5, and 28.6 flow together. Article 28.2 identifies how a Motor Coach Operator qualifies for pay on a general holiday. Once a Motor Coach Operator qualifies for pay, Article 28.5 identifies what that general holiday pay amount will be, and Article 28.6 identifies how the MTC Operator chooses to be paid for the general holiday pay amount.

The Union contends that the language of Article 28.5 and 28.6 is clear, without any grey area that could lead to any misinterpretation.

The Union requests that the Arbitrator direct the Company to cease and desist from this practice and make all affected employees whole.

Company Position:

The Company disagrees with the Union's claim.

Article 28.5(a) sets out the holiday pay for an employee who is not required to work on a General Holiday. It states as follows:

28.5 (a) An employee qualified under Article 28.2 and who is not required to work on a General Holiday shall be paid in accordance with the following:

- (i) An assigned employee **will be paid** the wages **they would have earned** at their normal rate of pay for their normal hours of work, exclusive of overtime.
- (ii) A spare board or extra employee will be paid 420 kilometers at their operator's rate of pay.

Article 28.6 is the provision that allows an employee to accrue holiday pay to be taken as a future paid holiday. The relevant language states as follows:

28.6 General Holiday pay **earned** on a general holiday may be paid at the employee's discretion as follows:

...

- 2. Accrued for later payment which may be taken as a day off with pay in conjunction with the employee's annual vacation art 29 note #3 seniority district limitations to apply or may be taken as a day off with pay, subject to the requirements of service and at no additional cost to the company. Employees must make their requests in writing to the proper officer of the company for approval prior to taking time off. [emphasis added]

The Company submits that highlighted portions of the two provisions must be given meaning. Article 28.5 makes it clear that an employee who does not work on a General Holiday does not "earn" holiday pay. As such, the Company's position is that Article 28.6 does not apply to those employees who did not work on the General Holiday.

Furthermore, the Company states that it is a "continuous operation" as that term is defined in the *Canada Labour Code*. The Company's position with respect to the interpretation of Article 28 of the Collective Agreement is consistent with the provisions of Division V of the *Canada Labour Code* relating to General Holidays.

For the Union:
(SGD.) M. Kernaghan
 General Chairperson

For the Company:
(SGD.) K. Darbyson
 Manager Labour & Employee Relations

There appeared on behalf of the Company:

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| M. Van Ginkel | – Counsel, Fillion, Toronto |
| K. Darbyson | – Manager, Labour & Employee Relations, North Bay |
| K. Mantha | – Labour & Employee Relations Specialist, North Bay |
| H. D'Angelo | – Human Resources Business Partner, North Bay |
| K. Grube | – Director of Motor Coach Operations, North Bay |
| E. Segriff | – Senior Manager Motor Coach Operations, North Bay |
| C. Carpenter | – Manager, Operations Support and Control, North Bay |

And on behalf of the Union:

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| R. Church | – Counsel, Caley Wray, Toronto |
| M. Kernaghan | – General Chairperson, LE-C, Trenton |
| P. Boucher | – National President, TCRC, Ottawa |
| C. Wright | – Vice General Chairperson, LE-C, Barrie |

AWARD OF THE ARBITRATOR

Background, Issue & Summary

- [1] This is a contract interpretation Grievance.
- [2] The parties are in disagreement regarding the interpretation of Article 28 of Agreement 11.1 (the “Agreement”), relating to General Holidays. Specifically, the parties disagree on the interpretation of Articles 28.5 and 28.6 and the application of Article 28.6.
- [3] The issue in this dispute is whether Article 28.6 is applicable to employees who are not required to work on the General Holiday.
- [4] For the following reasons, the mutual objective intention of the parties is that Article 28.6 is applicable only to employees who are required to work on the General Holiday as those who have “*earned*” on that Holiday; and not to employees who have not.
- [5] The Company has therefore not breached the Agreement in its interpretation.
- [6] The Grievance is dismissed.

Collective Agreement Provisions

- [7] It is not disputed the language of Article 28 has existed in the Agreement for several years. The relevant wording from the Agreement in force at the time of this Grievance (which arose after the 2019/2020 bargaining, and which Agreement expired in December 31, 2024) has been reproduced, below:

ARTICLE 28 - GENERAL HOLIDAYS

28.1 An employee who qualifies in accordance with Article 28.2 shall be granted a holiday with pay on the following general holidays:

- New Year's Day
- Family Day
- Civic Holiday (in August)
- Labour Day
- Good Friday
- Thanksgiving Day
- Victoria Day

- Remembrance Day
- Canada Day
- Christmas Day
- Boxing Day

28.2 In order to qualify for pay on any one of the holidays specified in Article 28.1, an employee shall

- (a) commence an assignment on the general holiday; or
- (b) Unless cancelled, shall be available for duty on such holiday if it occurs on one of their work days excluding vacation days

This Clause (b) shall not apply in respect of an employee who is 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 qualifies for weekly indemnity benefits because of illness on such holiday.

28.3 A qualified employee whose vacation period coincides with a General Holiday specified in Article 28.1 shall be paid the amount specified for his classification in Article 28.5(a).

28.4 An employee who does not qualify under Article 28.2 with respect to pay for a General Holiday and who is required by the company to work on that day shall be paid in accordance with the provisions of the wage agreement.

28.5(a) An employee qualified under Article 28.2 and who is not required to work on a General Holiday shall be paid in accordance with the following:

- (i) An assigned employee will be paid the wages they would have earned at his/her normal rate of pay for his/her normal hours of work, exclusive of overtime.
- (ii) A spareboard or extra employee will be paid 420 kilometers at their operator's rate of pay.

(b) An employee qualified under Article 28.2 and who is required to work on a General Holiday shall be paid, in addition to the pay provided in Article 28.5(a) at a rate equal to one and one-half times his/her regular rate of wages for the assignment(s) worked by him/her on that holiday. When more than one assignment is worked by an employee on a General Holiday, the provisions of this Clause shall apply to the first assignment only.

28.6 General Holiday pay earned on a general holiday may be paid at the employee's discretion as follows:

1. In the applicable pay period in which the general holiday(s) occur.
2. Accrued for later payment which may be taken as a day off with pay in conjunction with the employee's annual vacation art 29 note #3 seniority district limitations to apply or may be taken as a day off with pay, subject to the requirements of service and at no additional cost to the company. Employees must make his or her requests in writing to the proper officer of the company for approval prior to taking time off.
3. May be paid out at a later date (with no time off, and no effect on guarantee), at the employee's request. However, accrued general holiday pay must be used in the year accumulated and those not used prior to December 15th will be paid out at the rate earned.

...

Facts

- [8] The facts underlying this Grievance are straightforward.
- [9] While it is not disputed that in the past the Company has allowed all employees to accrue a future holiday day when a General Holiday occurred – whether or not the Holiday had been worked by that employee – the Company desired to change this practice. It is not disputed that in 2019, during bargaining, the Company provided to the Union what is referred to in the jurisprudence as an “*estoppel notice*” that it would be relying on a strict interpretation of the Agreement moving forward and would not permit employees who did not work a General Holiday to accrue a future paid holiday day.
- [10] The Union disagreed with the Company's interpretation of its rights under the Agreement and made its position clear.
- [11] Articles 28.5 and 28.6 were not modified during that bargaining round.
- [12] After the Agreement was ratified, the Company began applying Article 28 consistent with this estoppel notice. The Union felt the Company had breached the Agreement in doing so and that it was trying to achieve through this Notice

what it was not able to achieve in bargaining. The Union therefore filed this Grievance on January 21, 2021, alleging the Company was breaching the Agreement.

- [13] The Grievance proceeded through the steps of the Grievance process and this issue has now been brought to this Office for resolution.

Arguments

- [14] The Union argued that it was not necessary to actively work an assignment to accrue a future holiday day. It argued that entitlement under Article 28.6 was owed to all employees, regardless of whether they worked the General Holiday or not.
- [15] The Union noted that once the basic eligibility criteria in Article 28.2 was met, the *amount* of the holiday pay was determined under Article 28.5, and that a third step then applied to all employees, expressed in Article 28.6. It argued that Article explained *how* all employees could be paid for that holiday. It argued that General Holiday pay was “*earned*” for the purposes of that section by employees, whether or not the Holiday was worked by that employee.
- [16] It further argued the Company’s intention was not “*more reasonable*” as argued by the Company. It argued the Company’s interpretation to limit those options to those who had worked on the General Holiday would in fact lead to an absurd result. It argued if this were correct, no General Holiday pay could be paid out under the various options noted in Article 28.6 if it did not also apply to employees described in Article 28.5(a).
- [17] The Union also pointed out that in Article 28.3, the parties specifically agreed that employees on vacation did not have the right to accrue a further holiday day, demonstrating the parties drew that specific distinction when appropriate. It argued the same would have been done, have the parties intended to limit the application of Article 28.6 to only employees described in Article 28.5(b). It also argued that the past practice followed by the Company was a relevant piece of extrinsic evidence that was to be considered in the interpretation of Article 28; and that practice supported its interpretation.

- [18] The Union pointed out it made its position clear to the Company in bargaining that it considered the Company's position altered Article 28.6. It argued that if the Company wanted a change to the language of Article 28.6 - given the practice already conformed to the Agreement - it was incumbent on the Company to bargain that change, which it did not do during that round.
- [19] The Company disagreed with the Union's interpretation. It argued the language was clear and unambiguous and supported its interpretation. The Company maintained the plain meaning of Article 28 is that employees who do not work the holiday are not entitled to bank it towards a future day off.
- [20] The Company maintained that the threshold of receiving General Holiday pay which was "*earned*" was only met by employees "*who are required to actually work on the general holiday*", (at para. 19, Company submissions), which are employees as described in Article 28.5(b). The Company argued that it was only when that General Holiday pay was "*earned*" through that active work on the Holiday that the employee had the three options listed in Article 28.6 available to him/her/them, one of which is the accrual of a holiday day.
- [21] The Company urged that the term "*earned*" as used in Article 28.6 must be given meaning and was distinct from the term "*would have earned*" which was used in Article 28.5(a), which applied to employees who did not work the General Holiday. It argued that there was a distinction between what "*would have been earned*" and what was "*earned*", and that this distinction must be presumed to have been intended by the parties and each word/phrase must be given meaning. It argued that to accrue such a day, General Holiday pay must be "*earned on a general holiday*" which required that employee to work that holiday.
- [22] The Company also argued that its approach was consistent with the *Canada Labour Code* provisions for Companies who are in "*continuous operation*", which included its operations. It urged its interpretation was "*more reasonable*" and should also be preferred on that basis.

Analysis and Decision

- [23] This is a Grievance involving a contract interpretation dispute. Precedents are of limited value, other than setting out the principles which apply.
- [24] The objective of contract interpretation is to discern the mutual and objective intentions of the parties. That is accomplished through the application of what is termed the “*modern principle*” of contract interpretation, along with several presumptions which Arbitrators apply to determine intent.
- [25] This “*modern principle*” was summarized by this Office recently in **CROA 4884**. As noted in that Award, the principle was first adopted by the Supreme Court of Canada in 1998 and more recently discussed again by that Court in *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53, which is the leading decision on that principle.
- [26] There are also presumptions which support the modern principle of interpretation including that parties are presumed to use words deliberately and that different words or phrases are presumed to have intended different meanings.
- [27] How this modern principle applies specifically to the interpretation of collective bargaining agreements was recently discussed by the Alberta Court of Appeal in *AUPE v. AHS* 2020 ABCA 4. That Court stated:

Arbitrators apply general principles of contract interpretation, albeit to a specialized type of contract, the collective agreement. As such, they must discern the intention of the parties from the written words. But the words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement and the intention of the parties... In some ways, labour arbitrators have already been following Sattva’s directive to consider evidence of the surrounding circumstances of a contract. It is well established in labour law that labour arbitrators should consider evidence of the origin and purpose of the collective agreement, the nature of the relationship created by it and the industry in which the parties are operating, when it considers the general context within which collective agreements are negotiated....it has been recognized that arbitrators should be aware of the labour relations context, and the elements of policy and statutory goals within which the collective agreement is formed...(at paras. 37, 38; emphasis added).

- [28] That Court also provided specific and clear direction against the use of “*subjective intentions*” to determine the mutual objective intent of the parties. The Court clarified what is meant by that term:

The phrase “subjective intention” is often mentioned, but few cases explain its meaning. At the very least, it refers to a contract party giving direct evidence at a trial or an arbitration to the effect: ‘I think that the phrase means X’ or “at the time we entered into the contract, I thought the provisions meant Y” That type of evidence is always inadmissible to help interpret a contract. The concept “subjective intention” also includes indirect evidence about what a party thought the contract meant; for example, a party testifying that he or she proposed language in a draft agreement to resolve a specific problem – which it would resolve only if the language had a certain meaning (at para. 31; emphasis added).

- [29] If a collective agreement is *not* ambiguous, then evidence which is “extrinsic” to the contract – such as evidence of past practice - is not appropriately considered under the modern principle of interpretation: see *Sattva, AUPE v. AHS* and *Shewchuk v. Blackmont Capital* 2016 ONCA 912.
- [30] The Union bears the burden for establishing its allegation that the Company is acting in breach of its collective agreement obligations.
- [31] In this case, it is unnecessary to consider what the *Canada Labour Code* provides, given that this dispute can be resolved by review of the terms of the Agreement, which are not ambiguous.
- [32] As this contract is not ambiguous, the past practice of the parties is not appropriately considered to determine the parties’ mutual objective intentions. However, even if that were not the case, whether the Union believed the parties “*shared a view of the meaning*” which it felt was correct (as was argued in its Reply), is also irrelevant and inadmissible, as it is evidence of the parties’ subjective intentions: *AUPE v. AHS*.
- [33] In *AUPE v. AHS*, the Arbitrator determined what each party “*thought*” a disputed phrase meant, and then applied a meaning determined from where those views overlapped. This would be the “shared meaning” referred to by the Union. His reasoning was ultimately overturned by the Court of Appeal as not appropriately

applying the modern principle of interpretation and instead relying on the parties' "*subjective intentions*", which was inappropriate.

- [34] Turning specifically to the words used by the parties, Article 28.1 provides that employees are granted a "*holiday with pay*" for certain holidays. Article 28.2 addresses a threshold question whether or not pay for that Holiday is even owed.
- [35] Once pay *is* owed, the Agreement then contemplates two different situations: one where the day is worked; and one where the day is not worked. Those two different situations are outlined in Article 28.5(a) and (b).
- [36] Determining what is meant by the word "*earned*" is a first question. Giving primacy to the words the parties chose, it can be determined from the Agreement itself that the parties have themselves established that to "*earn*" requires active work.
- [37] The Agreement provides for different possibilities for receiving pay for that Holiday, depending on whether an employee has worked the General Holiday; or not. Article 28.5(a)(i) and (ii) refers to employees who are "*not*" required to work on a General Holiday. It provides those employees shall be paid the "*wages he/she would have earned at his/her normal hours of work, exclusive of overtime*" (emphasis added).
- [38] That is a complete Article for the entitlement of those employees. They are entitled to be paid the wages that Article sets out.
- [39] There is no gap left as argued by the Union as to what their entitlement is. The Article provides that those employees are entitled to be paid what they "would have earned" **had they worked** their normal hours of work. The underlined phrasing in Article 28.5(a) is significant.
- [40] Under the modern principle of interpretation, there is a presumption that when different words or phrases are used, a different result is intended. A second principle is related and also relevant, which is that parties are not presumed to use words that are superfluous.
- [41] The term "*earned*" is then used – on its own and without a similar modification - in Article 28.6. For ease of reference, that Article states: "General Holiday pay

earned on a general holiday may be paid at the employee's discretion as follows...

- [42] Meaning *must* therefore be given to the distinction between “*would have earned*” and “*earned*”. While the Union relied on dictionary definitions, such definitions are only applicable if the Agreement itself does not demonstrate a meaning.
- [43] In this case, the phrasing used by the parties itself demonstrates that to “*earn*” pay, an individual must physically work. Otherwise, there would be no reason to use the phrasing “*would have earned*” in Article 28.5(a) and “*earned*” in Article 28.6. There are two categories of pay for a General Holiday: pay that is “*earned*” and pay that “*would have been earned*” had it been worked.
- [44] If employees as described in Article 28.5(a) “*would have earned*” payment had they worked; they cannot also be considered to have “*earned*” that payment when they do not. While they are *entitled* to that Holiday pay, they have not “*earned*” it in the same manner as those described in Article 28.5(b).
- [45] If the Union's interpretation were preferred, the modifying words used by the parties in Article 28.5(a) to describe employees who do not work the General Holiday as those who “would have earned” ... would have an identical meaning to the word “*earned*”.
- [46] The term “*earned*” in Article 28.6, which is *used without the modifying words of “would have earned”*- can only apply to the other category of employee, who is an individual who is required to work on the General Holiday, as described in Article 28.5(b).
- [47] If the parties intended the same meaning to apply to the two different types of employees referred to in Article 28.5, it is a presumption they would have used the same word and not included any modifiers such as “*would have*”.
- [48] Article 28.6 allows for *that employee* – who has “earned” that pay – by working - to have *choices* for how they will use the Holiday which they did not enjoy because they worked it. According to that Article, that holiday can be taken at an employee's discretion in one of three ways: The holiday can a) be paid; b) It can

be accrued “for later payment which may be taken as a day off with pay in conjunction with the employee’s annual vacation...” (emphasis added); or c) It can be paid out at a later date.

- [49] This conclusion is not challenged by Article 28.3. That Article simply applies the specifics of this finding to a specific type of group – those employees on vacation. That is a third type of employee group that is distinct from the other two groups mentioned in Article 28.5.
- [50] Limiting Article 28.6 to those who have worked - who have “*earned*” that right by “*working*” that holiday as argued by the Company - does not lead to an absurdity, as argued by the Union.
- [51] First, it is not unusual or absurd to provide greater benefits to employees in how they *use* the holiday when they have not been able to enjoy it when it actually occurred, because they were required to be working. Second, Article 28.5(a) *already* offers a complete code for employees who do not work the Holiday. Their entitlement is not left in question: they are entitled to be paid a certain wage amount. There is no gap left in the Agreement for those employees, if the Company’s interpretation is preferred, as argued by the Union.
- [52] The Union has argued that the Company is asking this Arbitrator to ignore wording in the Agreement. However, it is the Union who is doing so in this case. If the Union were correct, “*would have earned*” and “*earned*” would be interpreted as having the same meaning; under the Union’s argument, the terms “*would have*” are superfluous. That interpretation would require that this Arbitrator strike out the words “*would have*” as modifying “*earned*” in Article 28.5(a). This Arbitrator has no jurisdiction to make that change, which must be bargained.
- [53] The Union pointed out the Company has carried out the contract by initially allowing all employees to have this option of accruing a future holiday.
- [54] There are at least two responses to this Argument. First, the limitation of the use an Arbitrator can make of evidence of past practice in interpreting the Agreement has already been noted. Second, while the Company may well have been

estopped from making any changes to that practice *mid-contract*, that is not what occurred in this case. In this case, the Company provided its estoppel notice *during* bargaining, as it was required to do, to change its practice and revert to the terms which were bargained.

[55] At law, the *effect* of that notice was to bring any past practice which existed between the parties to an end, given that notice was provided at a point which allowed the Union to bargain a different result.

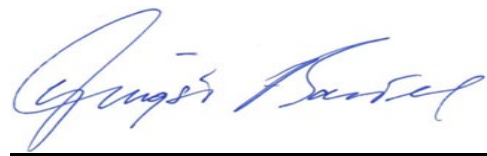
[56] The Company is therefore entitled at that point to revert back to the mutual objective intention bargained by the parties, once it satisfies its notice obligation and the Union is provided an opportunity to bargain a different result.

[57] In summary, the Company's interpretation represents the mutual objective intention of the parties.

[58] The Grievance is dismissed.

I retain jurisdiction to address any issues arising from the implementation of this Award; and to correct any errors and to address any omissions, to give this Award its intended effect.

September 5, 2025



CHERYL YINGST BARTEL
ARBITRATOR