CANADIAN RAILWAY OFFlCE OF ARBITRATION

CASE NO. 520

Heard at Montreal, Wednesday, September lOth,1975

Concerning

CANADIAN PACIFIC LlMlTED (CP RAlL)
(Passenger Services)

and

UNlTED TRANSPORTATlON UNlON (T)

DISPUTE..

Concernlng the interpretation and application of Section 5 of Article 16-A, General Holidays, of the Current Collective Agreement.

JOlNT STATEMFNT OF lSSUE..

The Union contends that on an overtime assignment on which the total hours worked, reduced by the number of hours worked on a General Holiday and paid for at time and one-half, amount to less than 320 hours in an 8-week averaging period, any hours worked on a General Holiday cannot be used to make up the 320 hour guarantee for the 8-week averaging period and the resulting number of hours less than 320 must be paid at the straight time rate as a constructive allowance to make up the 320 hour guarantee for the 8-week averaging period.

The Union further contends that on an assignment on which the total hours worked, including those worked on a General Holiday, is less than 320, any hours worked by a Dining Car Service Employee on a General Holiday and paid for at a rate of time and one-half cannot be used to make up the 320 hour guarantee for the 8-week averaging period but must be paid in addition thereto at a rate of time and one-half.

The Company contends that all hours worked by a Dining Car Service Employee on a General Holiday and paid for at time and one-half can be used to make up the 320 hour guarantee for an 8-week averaging period. The Company further contends that on an assignment on which the total hours Worked including those worked on a General Holiday and paid for at time and one-half, is less than 320, only the penalty payment, i.e., the half-time payment is to be paid in additlon to the guarantee of 320 hours for an 8-week averaging period.

The Union alleges that the Company, in applying its method of payment, is violating the provisions of Section 5 of Article 16-A, General Holidays.

FOR THE EMPLOYEES:	FOR THE COMPANY..
(SGD.) J. R. BROWNE	(SGD.) F. G. WISE
GENERAL CHAlRMAN	MANAGER,

There appeared on behalf of the Company..

F. G. Wise	Manager, Passenger Operations, CP Rail, Montreal
J. Ramage	Special Representative, CP Rall, Montreal

And on behalf of the Brotherhood:

J. R. Browne	General Chairman, U.T.U.(T) - Coquitlam, B.C.
A. Butler	General Chairman (S.C.C.), U.T.U.(T) - Montreal

AWARD OF THE ARBITRATOR

Article 16-A deals generally with holidays and holiday pay. By Article 16-A (1), holidays with pay are granted on certain listed days, and it is provided that where a holiday falls on an employee's layover day, the holiday shall be moved to the normal working day immediately following the layover day. Article 16-A (2) deals with certain qualifications which must be met by employees in order to be entitled to holiday pay, and Article 16-A (3) deals with the situation when an employee's vacation period coincides with a general holiday Article 16-A (4) deals wlth holiday pay. It is as follows:

"(4) (1) (a) An assigned employee qualified under Section (2) hereof and who is not required to work on a general holiday shall be paid eight hours' pay at the straight time rate of his regular assignment.

(b) An unassigned or spare employee qualified under Section (2) hereof and who is not required to work on a general holiday shall be paid eight hours' pay at the straight time rate applicable to the position in which such employee worked his last tour of duty prior to the general holiday.

(2) An employee who is required to work on a general holiday shall be paid, in addition to the pay provided in Section (4) (1) hereof, at a rate equal to one and one-half times his regular rate of wages for the actual hours worked by him on that holiday.''

This grievance relates to the effect of those provisions on the calculation of the guaranteed hours provided for in Article 2 of the collective agreement. Article 2 (b) provides for a guarantee of 320 hours for each eight-week period, and Article 2 (c) provides for payment at the rate of time and one-half for hours worked "in excess of 320 straight time hours'' in any averaging period. It is expressly provided in Article 2 (g) that the premium or minimum payment made to an employee called from layover for terminal service or for road service "will be separate and apart from his guarantee". Again, by Article 5 (a) it is provided that the payment made to an employee who is in overnight service, has gone on rest and is called for service early, is to be "separate and apart from his guarantee''. ln this case, it is the Union's contention that hours worked on a general holiday cannot be used to make up the 320-hour guarantee for the averaging period. The Company contends that such hours should be

considered as part of the guaranteed hours, and that the straight-time portion of the payment therefore should be considered as covered by the guarantee, but that only the "penalty" portion of the rate paid for work on a holiday should be considered as "separate and apart" from the guarantee.

The case turns on the interpretation of Article 16-A (5), which is as follows:

> "(5) Holiday pay allowed under Section (4) (1) (a) and the penalty payment under Section (4) (2) shall be paid in addition to the guarantee.''

lt is agreed that the holiday pay, to which each qualified employee is entitled whether he works on the holiday or not, is payable separate and apart from the guarantee. The employee receives eight hours' pay under Article 16-A (4) (1) (a), but this is not credited against his guarantee. Where an employee does work on a holiday, he receives not only his holiday pay under Article 16-A (4) (1) (a), but also payment for actual hours worked at a premium rate, pursuant to Article 16-A (4) (2). The issue is whether this latter payment, or any part of it, should be credited against his guarantee. This is a question to which Article 16-A (5) addresses itself expressly, but not clearly: while it is clear that the holiday pay as such is not related to the guarantee, it is not immediately clear what is meant by "the penalty payment" in respect of work performed on a holiday. It is the Union's position that the phrase "the penalty payment under Section 4 (2)" refers to the payment, at the rate of time and one-half, made for actual hours worked on a holiday. The Company's contention is that "the penalty payment" is the amount which an employee is paid above and beyond his regular straight-time rate for work performed on a holiday. That extra amount, it is argued, is not covered by the guarantee, but the straight time earnings is, and the hours worked count toward the calculation of the guaranteed hours, and the "overtime threshold" of the averaging period.

The Company relies on the express mention, in Article 2 (g) and Article 5 (a) that the payments there provided for are to be separate and apart from the guarantee. lt is true that the language of Article 16-A (5) is not identical.. it provides that certain payments are to be "in addition to the guarantee". As far as holiday pay itself is concerned it is, as I have said, clear that the effect of this provision is that such payment is indeed "separate and apart" from the guarantee. Thus Article 16-A (5) has, to some degree at least, the same effect as Article 2 (g) and 5 (a). ln the Union's view, it has this effect as well with respect to the whole payment made pursuant to Article 16-A (4) (2) as with respect to holiday pay.

ln my view, where the phrase "penalty payment" is used in Article 16-A (5), it refers descriptively to the payment made pursuant to Article 16-A (4) (2) to employees who work on a general holiday. Article 16-A (4) (2) provides for payment for actual hours worked "at a rate equal to one and one-half times his regular rate of wages". Multiplication of the time worked the rate thus described gives a particular amount, required to be paid under Article 16-A (4) (2). It is this amount, in my view, which is referred to in Article 16-A (5) as "the penalty payment under Section (4) (2)". Article 16-A (5)

does not refer, as it perhaps might have, to "the penalty portion of the payment under Section (4) (2)". If it did read that way, the Company's position would be correct. As it is, it seems to me that the Company's position requires the insertion into the agreement of words that are not there.

lt is true that in Article 2 (g) it is provided that "this payment" will be separate and apart from the guarantee. That is a natural way of referring to the payment described in the immediately preceding sentences of that Article. Different language is naturally used in Article 16-A (5), even although its effect is to achieve an analogous result. Article 5 (a) refers to "penalty payments under this Clause (a)". lt is acknowledged, however that the whole payment made in respect of time worked in advance of scheduled reporting time in the circumstances there involved is "separate and apart" from the guarantee. Clearly, then, the parties have, at least in that instance, us the phrase "penalty payment" to refer to the entire payment in respect of certain time worked, and not just to that portion of the payment representing a rate in excess of the straight-time rate.

There is, in my view, a general analogy, although it is not precise, to be drawn between the cases dealt with in Article 2 (g) and 5 (a) when employees work during periods of what would otherwise be free or rest time and that dealt with in Article 16-A, where employees work on holidays. This is so even though the actual enjoyment of the holiday is deferred. The day itself remains a holiday for the rest of the world, although these employees must work. There is, then, a rationale in terms of the overall scheme of these collective agreement provisions, which supports the Union's contention.

Although little was made of it in the argument at the hearing of this matter, it is significant to note the provisions of Article 2 (i) of the collective agreement, which is as follows:

> "(i) Hours paid for at time and one-half under any provision of this Agreement shall not be counted in computing the hours for which the overtime rate is to be paid under Clause (c)."

Under Article 16-A (2), the hours there referred to are paid for at time and one-half. Therefore, they are not to be counted in computing the hours for which the overtime rate is to be paid. This is consistent with the position that the payment made pursuant to Article 16-A (2), there described as a "penalty payment" is to be, in its entirety, paid in addition to the guarantee. Since the guarantee is paid in respect of a lengthy period of time and since the "constructive hours" that may be credited for the purpose of making up the guarantee do not refer to precise periods of time, I do not think it can properly be said that the effect of this interpretation Is to "pyramid overtime'' or to provide for double payments. It is rather a question of what it is, precisely, that is guaranteed. ln any event, even if the result should be described that way it is the result which, in my view, flows from the collective agreement.

For the foregoing reasons, it is my conclusion that the Union's contention, as set out in the joint statement, is correct.

J. F. W. WEATHERHILL
ARBITRATOR