CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1258

Heard at Montreal, Thursday, June 14, 1984

Concerning

CANADIAN NATIONAL RAILWAY COMPANY
(CN RAIL DIVISION)

and

UNITED TRANSPORTATION UNION

DISPUTE:

Claim of Conductor D. L. King and Brakeman H. F. Orr, Toronto, Ontario for 100 miles at through freight rate of pay, September 9, 1982.

JOINT STATEMENT OF ISSUE:

Conductor D. L. King and Brakeman H. F. Orr were regularly assigned to work train service, August 31st to September 9th, 1982, which included a General Holiday, Labour Day, September 6, 1982. On Friday September 9, the work train assignment did not operate.

Conductor D. L. King and Brakeman H. F. Orr claimed 100 miles at through freight rates, September 9, 1982, under the provisions of Article 14.3 of Agreement 4.16 in effect at that time.

The Company declined payment of the claim.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) R. A. BENNETT General Chairman	(SGD.) D. C. FRALEIGH Assistant Vice-President Labour Relations

There appeared on behalf of the Company:

D. W. Coughlin	- Manager Labour Relations, CNR, Montreal
J. A. Bart	- Labour Relations Officer, CNR, Montreal
J. A. Sebesta	- Coordinator Transportation - Special Projects, CNR, Montreal
W. P. Byers	- Assistant Superintendent, CNR, Sarnia

And on behalf of the Union:

R. A. Bennett	- General Chairman, UTU, Toronto
T. G. Hodges	- Vice-General Chairman, UTU, Toronto

AWARD OF THE ARBITRATOR

Because the grievors worked the Labour Day Holiday on September 6, 1982, the employer was obliged pursuant to Article 144.6(b) of the

collective agreement to give them a holiday with pay "...on the first calendar day the employee is entitled to wages following that holiday". Article 144.6(b) reads as follows:

> "An employee qualified under paragraph 144.2 and who is required to work on a general holiday shall, at the option of the Company...be paid for work performed by him on the holiday in accordance with the provisions of this Agreement, and in addition shall be given a holiday with pay at the rate specified in paragraph 144.5 on the first calendar day on which the employee is not entitled to wages following that holiday."

The grievors at all material times were regularly assigned in work train service and therefore were entitled to the work train guarantee provided in Article 14.3:

> "Regularly assigned wayfreight, work and construction trainmen who are ready for work the entire month, and who do not lay off of their own accord, will be guaranteed not less than 100 miles, or 8 hours, for each calendar working day, exclusive of overtime (this to include legal holidays). The guarantee is predicated on the men being both ready for service the entire month, and entitled to the assignment during the entire month, or for the portion of the month the assignment is in effect. If, through Act of Providence, it is impossible to perform regular service, guarantee does not apply."

The evidence disclosed that the grievors were initially scheduled to work on Thursday, September 9, 1982. For whatever the reason their scheduled work day was cancelled for that day and they thereby became entitled to the work train guarantee for September 9, 1982. The employer has conceded that prima facie the grievors were entitled to a day's pay in accordance with Article 14.3 of the collective agreement. Or, to put it differently, the grievors satisfied all the prerequisites contained in Article 14.3 for payment of the guarantee.

The employer, however, designated September 9, 1982, as the first calendar day holiday on which the grievors were not entitled to wages. Accordingly they were required to take their holiday for the missed Labour Day holiday on September 9, 1982. The trade union claims that the first calendar day for which they were not entitled to wages after the holiday was Sunday, September 12, 1982, the grievors' scheduled day of rest.

The issue in this case is whether a day for which payment is guaranteed, because work is not performed, may be treated, for purposes of Article 144.6(b) as "the first calendar day on which an employee is not entitled to wages" following a missed holiday.

In interpreting provisions like Article 14.3 in the past the CROA case appears somewhat tentative in the conclusions reached. This approach is clearly attributable to the "fuzziness" of the language

used in discerning the parties' true intentions. Quite clearly where the parties expressly mention one item that is not to be included in making up a monthly guarantee (i.e., "overtime") it is inferred that holiday is to be included in the computation. (see CROA cases #80 - #84). And by the same token where the context of the language of the collective agreement lends itself to either the inclusion or exclusion of holidays making up the monthly guarantee then the inference against the pyramiding of benefits is applied to the "inclusion" of the holiday in the computation (see CROA case #65). In this case the bracketed term "(This to include legal holiday under Article 14.3 may very well lend itself to either interpretation with respect to the inclusion or exclusion of a holiday in the determination of entitlement to payment of the guarantee. This dilemna suffices from the company's perspective to justify the application of the presumption against pyramiding.

The company, in any event submitted that September 9, 1982 was the first day following the missed Labour Day Holiday the grievors were not entitled to wages. It was argued that since wages are only paid for hours worked and not for hours not worked, the grievors' entitlement to the guarantee should be characterized as earnings. Since September 9, 1982 was not a day the grievors were required to work, its designation as the Labour Day Holiday should be viewed as appropriate.

In this regard I cannot agree with the company's submission that the payment of the guarantee does not represent the payment of wages. The purpose of Article 14.3 is to ensure a minimum monthly wage for hours worked or unworked. Payment of the same amount is guaranteed to the grievors whether or not they are required to attend work. The requirement to attend work is dependent upon the operational requirements of the employer's services. In order to retain key personnel the employer has guaranteed such employees a minimum wage irrespective of need. I find no appreciable difference with respect to the designation of the payment of a "wage" between the employee who attends work and has nothing to do and the employee who is prepared to work but is not required to attend the work premises because there is nothing to do. In each case the employee is being paid a "wage" for hours spent at the disposition of the company.

Accordingly, notwithstanding my difficulty in discerning the clear intention of the parties with respect to the application of the legal holiday with respect to a guaranteed day under Article 14.3 I am not convinced that the presumption against the pyramiding of benefits should be applied in this case. Rather, the case can be disposed of on the basis of the application of Article 144.6 (b) of the collective agreement. Because Thursday, September 9, 1982, was not the first calendar day on which the grievors were not entitled to wages following the Labour Day holiday the employer should have designated September 12, 1982, as the appropriate day as the holiday. Accordingly the grievance succeeds.

DAVID H. KATES,
ARBITRATOR.