CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2816

Heard in Montreal, Wednesday, 15 January 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Mr. E.B. Klingbyle, Track Maintainer, that he was wrongly denied compensation for the general holiday of September 7, 1992.

EX PARTE STATEMENT OF ISSUE:

On June 24, 1992, the grievor requested a leave of absence without pay for the period of June 22, 1992 to August 31, 1992. The reason the absence was requested was to allow the grievor to attend to the needs of his newborn child. The grievor returned to work on August 31, 1992. The Labour Day holiday immediately followed on September 7. The Company subsequently refused to compensate the grievor for the Labour Day holiday.

The Brotherhood contends: **1.)** That the Company, by refusing to compensate the grievor, violated article 10, and in particular article 10.4, of Agreement 10.1 entered into between the Company and the Brotherhood. **2.)** That the Company, by refusing to compensate the grievor, discriminated against the grievor on the basis of sex, notwithstanding the existence of article 1.2 of Agreement 10.1. **3.)** That various pieces of legislation, both provincial and federal, attest to the fact that current legal usage recognizes fathers as having the same rights a mothers with respect to the care and nurturing of their newborn offspring.

The Brotherhood requests that the Company be ordered to compensate the grievor for the Labour Day holiday as requested throughout the grievance procedure.

The Company denies the Brotherhood's contentions and declines its request.

FOR THE BROTHERHOOD:

(SGD.) R. A. BOWDEN
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. A. Watson	– Labour Relations Consultant, Montreal
J. C. McDonnell	– Counsel, Toronto
D. Laurendeau	– Assistant Manager, Labour Relations, Montreal
G. Search	– Assistant Manger, Labour Relations, Toronto
M. Legros	– Engineering Clerk, Montreal

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
A. Trudel	– General Chairman, Montreal

D. Brown – Sr. Counsel, Ottawa

AWARD OF THE ARBITRATOR

This grievance arises by reason of the Company's failure to pay compensation for the general holiday of Labour Day, September 7, 1992 to Track Maintainer Klingbyle. It is common ground that although the grievor was at work in the days immediately prior to the holiday, he was on a leave of absence without pay for the period from June 22 to August 31, 1992. He took that time off with permission, as parental leave following the birth of his child. He returned to work on August 31, 1992, and worked five consecutive days prior to the Labour Day weekend.

To be eligible for pay on a general holiday an employee must have earned wages on not less than twelve shifts or tours of duty during the preceding thirty days, as provided by article 10.4(c) of the collective agreement. It is clear that the grievor would not satisfy that requirement. The grievance arises, however, because of an exception provided under the provisions of article 10.4, expressed in a note to article 10.4(c) which reads as follows:

> **NOTE:** Provided that an employee is available for work on the general holiday, absences from scheduled shifts or tours of duty because of bona fide injury, hospitalization, illness for which the employee qualified for weekly sickness benefits and authorized maternity leave will be included in determining the 12 shifts or tours of duty referred to in article 10.4(c).

The Union's position is that the leave taken by the grievor must be impliedly viewed as the equivalent of authorized maternity leave for the purposes of article 10.4(c). Alternatively, it submits that if the article makes provision, as the Company contends, for maternity leave for female employees only, it is discriminatory as against the grievor, who is of the male sex, and whose leave period in relation to the care of his child is not given the same protection. Specifically, the Union asserts that the provision in question, should it apply only to females, is discriminatory, contrary to the provisions of section 7 of the **Canadian Human Rights Act**, which prohibits adverse differentiation in relation to the treatment of employees on prohibited grounds of discrimination, including an employee's sex.

The Company submits that a distinction must be drawn between maternity leave, which is leave in relation to pregnancy and the physical act of giving birth, and child care leave or parental leave, which relates more generally to time devoted to the care and custody of a child. In this regard it points to the following distinctions in the definitions found within the Company's Human Resources Manual concerning such leaves:

> **5.6.2 DEFINITIONS:**
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> **MATERNITY LEAVE:** refers to a period of up to 17 weeks leave granted to an employee who provides a certificate from a medical doctor certifying that she is pregnant. This leave may begin not earlier than 11 weeks prior to the expected date of confinement and no later than 7 weeks following the delivery. The actual start of this leave is the earlier of the agreed upon date or the date of birth of the child. In the case of a premature birth or the birth of a chronically sick child who requires hospitalization, maternity leave may be interrupted, and deferred during the weeks that the child is hospitalized, and resumed later, but to not end later than 52 weeks after the actual week of confinement.
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> **CHILD CARE LEAVE:** refers to a period of up to 24 weeks granted to an employee who has or will have the actual care and custody of a child. This leave may start, at the option of the employee:
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> - on the day the child is born;
> - on the day the child (new-born or adopted) comes into the actual care of the employee;
> - in the case of a female employee on the expiration of any maternity leave taken; or
> - in the case of a male CN parent, on the expiration of the woman's maternity leave taken under the Canada Labour Code or the laws of a province.
>
> Once started, this leave may not be interrupted.

When both parents work for companies under Federal jurisdiction their combined leaves cannot exceed 24 weeks, and must be uninterrupted.

The Company further points to provisions of the **Canada Labour Code**, Part III, Division VII, which it submits reflect the same distinction between maternity leave and parental leave. Article 206(1) of the **Code** provides as follows:

> **206. (1)** Every employee who has completed six months of continuous service with an employer is entitled to and shall be granted a leave of absence from employment as follows:
>
> **(a)** where an employee provides her employer with a certificate of a qualified medical practitioner certifying that she is pregnant, that employee is entitled to and shall be granted a leave of absence from employment of up to seventeen weeks, which leave may commence not earlier than eleven weeks prior to the estimated date of her confinement and end not later than seventeen weeks following the actual day of her confinement:
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> **(b)** subject to subsection (2), where an employee has or will have the actual care and custody of a new-born child, that employee is entitled to and shall be granted a leave of absence from employment of up to twenty-four weeks commencing, as the employee elects,
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> **(i)** in the case of a female employee,
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> **(A)** on the expiration of any leave of absence from employment taken by her under paragraph (a),
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> **(B)** on the day the child is born, or
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> **(C)** on the day the child comes into her actual care and custody, and
>
> **(ii)** in the case of a male employee.
>
> **(A)** on the expiration of any leave of absence from employment taken in respect of the child by a female employee under paragraph (a),
>
> **(B)** on the expiration of any leave of absence from employment taken in respect of the child by a female employee who is entitled to such leave on account of her pregnancy under the laws of a province,
>
> **(C)** on the day the child is born, or
>
> **(D)** on the day the child comes into his actual care and custody; and
>
> …

After careful consideration, the Arbitrator is persuaded that the grievance cannot succeed. In recent years boards of arbitration have dealt extensively with cases where it is alleged that collective agreement provisions are null and void, by reason of their discriminatory application, contrary to provincial human rights codes or the **Canadian Human Rights Act**. (*See, e.g.,* **Re Town of Ajax and Canadian Union of Public Employees, Local 54** *(1991) 23 L.A.C. (4th) 77 (Raynor);* **Re Canada Packers Inc. and United Food and Commercial Workers, Local 114P** *(1992), 28 L.A.C. (4th) 193 (Solomatenko);* **Re Canadian Airlines International Ltd. and Canadian Union of Public Employees, Airline Division** *(1993), 32 L.A.C. (4th) 398 (Springate);* **Re Riverside Hospital (Board of Governors) and Canadian Union of Public Employees, Local 79** *(1993), 39 L.A.C. (4th) 63 (Stewart);* **Re Windsor Western Hospital Centre and OPSEU, Local 143** *(an unreported award of a board of arbitration chaired by Arbitrator Douglas C. Stanley, dated October 24, 1994);* **Re Versa Services Ltd. and Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Union, Local 647** *(1994), 39 L.A.C. (4th) 196 (R.M. Brown);* **Re Corporation of City of Barrie and Canadian Union of Public Employees, Local 2380** *(1994), 40 L.A.C. (4th) 168 (M.G. Picher);* **Re Metropolitan Toronto Reference Library Board and Canadian Union of Public Employees, Local 1582** *(1995), 46 L.A.C. (4th) 155 (Burkett);* **Re Metropolitan General Hospital and Ontario Nurses Association** *(1995), 48 L.A.C. (4th) 291 (Kennedy).*); *and* **Re Stelco Inc., Hilton Works and United Steelworks of America, Local 1005**, *(an unreported award of Arbitrator O.V. Gray, dated February 13, 1995);*

The Arbitrator cannot accept the suggestion made by Counsel for the Union that the collective agreement would necessarily be discriminatory against females if it did not provide for an exception to the 12 shifts or tours being worked for women on maternity leave. While it is obviously not necessary to resolve that issue, which does not arise in the grievance before me, boards of arbitration have drawn a distinction between rights of employment status, such as the accumulation of seniority and protection against automatic discharge, which are protected by human rights legislation and earned benefits, such as wages and entitlements based on time worked, which are not so protected. That analysis is perhaps best reflected in the **Versa Services Ltd.** case, cited above, and followed in a number of recent cases. It is, in other words, at least arguable that a failure of a collective agreement to provide for holiday pay credit for employees on maternity leave would not, of itself, be in violation of the **Canadian Human Rights Act**.

The issue more narrowly addressed in the grievance, however, is whether the extending of that protection to females who are on maternity leave is, of itself, discriminatory as against males who avail themselves of the right to parental leave and do not have the same benefit.

In the Arbitrator's view the point of departure for resolving this issue must be the language of the collective agreement. It appears to me that the purpose of the note to article 10.4 is manifest. It specifically allows the crediting of qualifying shifts or tours of duty for the purposes of holiday pay for individuals who, for a number of reasons, suffer some form of physical incapacity. The categories specified include injury, hospitalization, illness and maternity leave. Even if the Arbitrator cannot give extensive weight to the definition of maternity leave found within the Company's own policies, to the extent that they may not be part of the collective agreement, it appears clear that the reference to maternity leave found within article 10.4(c) is, on an *ejusdem generis* analysis, intended to recognize the specific circumstance of the female employee who must be absent from work because of the physical demands of the birthing process, which are seen as analogous to a physical injury or illness. That circumstance is, I think, fairly to be distinguished from a parental leave, taken either by a male or female, for the purpose of caring for a new-born or newly adopted child. The birthing process is not one which can be experienced or borne by a male employee. It is therefore important, I think, to appreciate the distinction between maternity leave, which can only be accorded to a female employee involved in the physical activity of pregnancy and birth, from parental leave which is purely for the purpose of child care, whether it is taken by a male or a female employee.

Apart from the intention reflected in the language of the collective agreement, the provisions of the **Canadian Human Rights Act** give further support to the position of the Company. Section 15(f) of the **Act** provides as follows:

> **15** It is not a discriminatory practice if
>
> …
>
> **(f)** an employer grants a female employee special leave or benefits in connection with pregnancy or child-birth or grants employees special leave or benefits to assist them in the care of their children.

It appears clear to the Arbitrator that by the language of the note to article 10.4(c) of the collective agreement the employer, by agreement with the Union, has seen fit to grant a special benefit to female employees in connection with pregnancy or child-birth, squarely within the contemplation of section 15(f) of the **Canadian Human Rights Act**. By the language of the **Act** itself, such a benefit is not a discriminatory practice. With the greatest respect to the contrary argument of Counsel for the Union, the Arbitrator cannot see how the second half of the article, dealing more broadly with parental leave, can be said to derogate from the specific protections allowed by the first part, which is concerned with female employees who are accorded "special leave or benefits in connection with pregnancy or child-birth". The Brotherhood's argument fails to give any recognition to the difference between maternity leave, a concession to female employees who, in the late stages of pregnancy, and in the period immediately following the rigours of child-birth, suffer a degree of physical vulnerability, not to say stress or debilitation, not experienced by fathers who avail themselves of parental leave, which is granted for a different purpose.

It is also significant, I think, that under this collective agreement, following maternity leave, a female employee who opts for parental leave, as did Track Maintainer Klingbyle, would plainly not be entitled to holiday pay in the same circumstance. In the Arbitrator's view in considering whether male employees in the position of the grievor have been discriminated against on the basis of sex, the appropriate comparative group is female employees who are granted parental leave, as distinct from females on maternity leave. Plainly there is no differentiation of treatment, and no discrimination visited upon male employees in that regard.

For the foregoing reasons the Arbitrator is satisfied that the Union has failed to establish that the concept of "authorized maternity leave" found within article 10.4(c) of the collective agreement must impliedly include parental leave, such as was taken by the grievor. Secondly, when regard is had to the purpose of the provision, and to the specific exception provided for in section 15(f) of the **Canadian Human Rights Act**, it cannot be found that the article is discriminatory or contrary to the **Act**.

For the foregoing reasons the grievance must be dismissed.

January 23, 1997

(signed) MICHEL G. PICHER
ARBITRATOR