# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 320

Heard at Montreal, Tuesday, November 9th, 1971

Concerning

## CANADIAN PACIFIC EXPRESS COMPANY

and

## BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

**DISPUTE:**

Claim of the Union that the Company violated the General Holiday provisions of the Collective Agreement when it denied employee T. Robitaille holiday pay for Labour Day, September 7, 1970.

**JOINT STATEMENT OF ISSUE:**

This employee was on leave of absence without wages from September 2nd to 11th, 1970, inclusive. The Union contends this employee was entitled to a day's wages for the General Holiday, Labour Day, September 7th, 1970, on the basis that she met the required qualifications for General Holiday payment.

Article 35 of the Agreement reads.

> (a) An employee who qualifies in accordance with Section 2 of this Article, shall be granted a holiday with pay on each of the following General Holidays, including a General Holiday falling on an employee's rest day ...
>
> (b) In order to qualify for pay for any one of the holidays specified in Section 1 of this Article, an employee
>
> > 1. must have been in the service of the Company and available for duty for at least 30 calendar days;
> >
> > 2. must be available for duty on such holiday if it occurs on one of his work days excluding vacation days, if notified prior to completion of his last shift or tour of duty preceding such holiday that his services will be required (this Clause (b) does not apply in respect of an employee who is laid off or suffering from a bona fide injury),
> >
> > 3. must be entitled to wages for at least 12 shifts or tours of duty during the 30 calendar days immediately preceding the General Holiday ...

This claim was denied by the Company.

| FOR THE EMPLOYEES: | FOR THE COMPANY: |
|---|---|
| **(SGD.) L. M. PETERSON** | **(SGD.) J. T. HARFORD** |
| **GENERAL CHAIRMAN** | **DIRECTOR, PERSONNEL** |

There appeared on behalf of the Company:

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| F. E. Adlam | – Industrial Relations Representative, Toronto |
| W. E. Massender | – Regional Manager, Preston |
| D. R. Smith | – Regional Manager, Montreal |

And on behalf of the Brotherhood:

L. M. Peterson – General Chairman, Toronto
G. Moore – Vice-General Chairman, Toronto
F. Sowery – Vice-General Chairman, Montreal

## AWARD OF THE ARBITRATOR

On September 1, 1970, the grievor, who works in Montreal, was granted an indeterminate leave of absence, commencing September 2, due to serious injuries sustained by her sister in an accident in Quebec City. On September 3, the grievor's sister died, and the grievor was granted an extension of leave of absence. On September 11, she returned to work. Labour Day was on September 7, and the grievor claims payment for the holiday.

Eligibility for holiday pay is set out in the provisions of article 35, reproduced in the Joint Statement of Issue. It is common ground that the grievor met the requirements of subsections (1) and (3) of article 35(b), that is, she had been in the service of the company and available for duty for at least thirty calendar days, and she had been entitled to wages for at least twelve shifts or tours of duty during the thirty calendar days immediately preceding the holiday. It was the company's contention, however, that the grievor could not have met the requirements of subsection (2) of article 35(b) "inasmuch as the holiday occurred during the period she was on leave of absence from work and not while a member of the work force actually working for wages at that time." This objection, it will be seen, does not refer to the criterion set forth in article 35(b)(2) as one of the qualifications for holiday pay. No one who is actually on holiday is "working for wages at the time." Some collective agreements impose as requirements the attendance of the employee at work on the days before and after a holiday as "qualifying days". The purpose of such provision is served in the present agreement by article 35(b)(3), requiring that the employee work a certain amount during the thirty days before the holiday. This requirement was met by the grievor. She did not, of course, work on the day before or after the holiday, and she was not a part of the "work force" (if that phrase be taken to refer to the employees actually at work) on those days. Nor was she, of course, part of the "work force" (if there was one) on the holiday itself. But being a member of the "work force" is not a requirement that must be met in order to qualify for holiday pay. There must, it would seem, be an employment relationship subsisting at least until and including the day of the holiday, but clearly, on the facts, and for the purposes of article 35, that relationship continued. The scheme of article 35 is obviously to provide the benefit of a holiday with pay even to employees who may not have worked on every day during the period preceding the holiday.

By article 35(b)(2) an employee "must be available for duty" on a holiday if it occurs on one of the employee's work days, and it seems that September 7 would have been a work day for the grievor. The grievor was then on leave of absence, and the company takes the position she was not available for duty on that day. This requirement of availability, however, is one which arises if the employee is notified in accordance with the subsection that his services will be required. No such notice was given, or sought to be given to the grievor, and it seems that employees generally were not asked to work on that day. Where an employee who is notified to work in accordance with article 35(b)(2) fails to report, then he has forfeited his right to holiday pay. It is not open to the company, however, to rely on its notions of what might have happened if notice had been given. If this were so, an employee who took his family on a picnic on labour day – especially if he left the night before – would thus have disentitled himself to holiday pay. The situation is very different from that in **Case No. 104**, where employees being on strike, had removed themselves from being subject to direction as to employment.

Many arbitration cases have emphasized that holidays are earned benefits. In the agreement here, article 35 sets out the conditions by reference to which it can be determined whether or not an employee has earned the benefit of a particular holiday with pay. Having regard to these provisions, and to the facts of the case, it is my conclusion that the grievor was entitled to be paid for Labour Day, 1970. She had been in the service and available for work for thirty days, she was not notified to be available for duty on the holiday, she had been entitled to wages for at least twelve shifts or tours of duty during the thirty days preceding the holiday.

For the foregoing reasons the grievance is allowed.

**(signed) J. F. W. WEATHERILL**
**ARBITRATOR**