CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 832

Heard at Montreal, Tuesday, May 12, 1981

Concerning

CANADIAN PACIFIC LIMITED

and

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

DISPUTE:

Claim by the Union that Mr. R.S. McManus be paid at time and one half for all hours worked from October 14 to 28, 1980, inclusive.

JOINT STATEMENT OF ISSUE:

Mr. McManus was scheduled to take annual vacation from October 14 to 28, 1980, inclusive, and the Company requested that he reschedule and he readily agreed.

The Union claimed he should have been paid at time and one half for time worked during his original vacation dates, in accordance with Article 14.19.

The Company denied the Union's claim.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) W. T. SWAIN	(SGD.) J. P. KELSALL
GENERAL CHAIRMAN	GENERAL MANAGER, OPERATION & MAINTENANCE

There appeared on behalf of the Company:

D. Cardi	– Labour Relations Officer, Montreal
J. Cuin	– Supervisor Labour Relations, Montreal
F. Romeo	– Assistant Supervisor Labour Relations, Toronto

And on behalf of the Brotherhood:

W. T. Swain	– General Chairman, Montreal
D. Herbatuk	– Vice-General Chairman, Montreal
G. Gonzales	– Local Chairman, Toronto
J. Manchip	– Local Chairman, Montreal

AWARD OF THE ARBITRATOR

It may be noted that the claim in this case is advanced by the Union on behalf of the grievor and not by the grievor personally. It is not suggested that there is anything improper in this, as of course the Union has a legitimate interest in ensuring that the provisions of the Collective Agreement are correctly applied. I note the point only to make it clear that the grievor, who was personally content with the arrangements made, cannot be said in any way to have acted inequitably, or to have sought to take advantage of the Company. In the summer of 1980 the grievor had arranged to take a portion of his annual vacation. Because of some personal plans, he requested that his scheduled July vacation dates be advanced by one week. The Company was able to, and did accommodate this request.

The rest of the grievor's annual vacation had been scheduled for a period in October 1980. At that time the Company experienced some temporary difficulties in maintaining a sufficient staffing level, due to absenteeism combined with vacations. It therefore approached the grievor to determine if he would delay taking the balance of his vacation for a couple of weeks. The grievor readily agreed to such rescheduling.

It is the Union's contention that the grievor should have been paid at time and one-half for time worked during his original vacation period (October 14 to 28, 1980). That claim is based on Article 14.19 of the Collective Agreement, which is as follows:

> **14.19** An employee who is entitled to vacation shall take same at the time scheduled. If, however, it becomes necessary for the Company to reschedule an employee's scheduled vacation dates, he shall be given at least 15 working days' advance notice of such rescheduling and will be paid at the rate of time and one-half his regular rate of wages for all work performed during the scheduled vacation period. The rescheduled vacation with pay to which he is entitled will be granted at a mutually agreed upon later date. This Clause 14.19 does not apply where rescheduling is a result of an employee exercising his seniority to a position covered by another vacation schedule.

Although it is provided that an employee "shall" take his vacation at the time scheduled, it is clear that there are cases where he need not or may not do so, it being expressly contemplated in Article 14.19 that an employee's scheduled vacation dates may be rescheduled. And, at least where fifteen days' advance notice is given, the employee would have to accept such rescheduling. No question as to that arises here, however, where the question is simply one of the rate of pay which an employee is to receive when he works during a period of time for which his vacation has been scheduled, because of rescheduling at the requirement of the Company. The exceptional situation referred to in the last sentence of Article 14.19 does not apply in the instant case.

More particularly, the question in the instant case is this: was this a case where "it became necessary for the Company to change the employee's scheduled vacation dates"? If it was, then regardless of the merits of mutual accommodation, and regardless of the grievor's willingness to change his vacation dates, the Collective Agreement requires that the grievor be paid at time and one-half for the period in question. It if was not such a case, then the grievor was correctly paid at straight time.

The Company's contention is that it was not "necessary for the Company to reschedule an employee's scheduled vacation dates" in this case. The Company argues that that situation would arise only where the Company unilaterally reschedules an employee's vacation dates. Here, the rescheduling was not "unilateral", it is argued, because the grievor readily agreed to the change. The change was, as the grievor himself stated "mutually agreed upon", although of course it was not agreed to by the parties to the Collective Agreement. While it might appear fair enough to do so, it is not apt to compare the accommodation of the grievor's request in July with the grievor's accommodation of the Company's request in October. In October, the Company did in fact have certain staffing difficulties, and it did approach the grievor, so that the change in scheduling was one arranged at the instance of the Company.

It may, perhaps, have been "necessary" for the Company to take some action with respect to its staffing problem in October. That it sought the cooperation of an employee, however, is not to say that it was "necessary" for it to reschedule that particular employee's vacation dates. There is nothing to suggest that had the grievor made certain plans for his vacation or had some other reason for not wishing to change his vacation, the Company would have insisted on his working in October. Indeed, from the material before me, it would seem that the Company did not have sufficient time in which to give the grievor notice of any "required" change in his vacation dates.

Article 14.19, in its material provisions, provides for payment at time and one-half where it has become "necessary" for the Company to reschedule "an employee's" vacation dates. The situation referred to is one where the Company itself takes the action of rescheduling the vacation of a particular employee, and requires him to be at work when he would otherwise have been on vacation. Where the Company takes such a step, of course, it could then scarcely be heard to argue that it had not really been "necessary". In the instant case, however, although as I have noted it may have been "necessary" for the Company to do something, this was not a case in which it had become necessary for the Company to change the grievor's scheduled vacation dates in the sense contemplated by Article 14.19. While there is, as the Union pointed out, a certain risk of intimidation where supervision approaches an employee seeking his cooperation, there is, I think, a corresponding and at least as serious a risk of "de-humanization" of relations if inquiries of this sort cannot be made. Of course, if the grievor's consent in this case had been coerced, then I would certainly have held that it was no consent, and that he should have been paid at time and one-half. Such was not, however the situation in the instant case.

For the foregoing reasons, the grievance is dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR