CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2381

Heard at Montreal, Wednesday, 14 July 1993

concerning

VIA RAIL CANADA INC.

and

UNITED TRANSPORTATION UNION

DISPUTE:

The interpretation and application of the General Holiday provision contained in the Collective Agreement.

JOINT STATEMENT OF ISSUE

In January 1992, VIA Rail and the United Transportation Union negotiated a Memorandum of Settlement which provided for revisions to the collective agreement. The memorandum was ratified by the Union's members in the spring of 1992.

The memorandum contained a provision which stated the agreed upon changes were to take effect on the first of the month following ratification with the exception of wages which were retroactive to January 1, 1992.

Prior to the new changes, an employee who qualified was granted a holiday with pay on December 25, 26 and January 1 and 2 (Christmas/New Year period).

Two of the changes negotiated in 1992 were the substitution of December 24 for December 26 and December 31st for January 2 as general holidays. Subsequently, the General Holidays to be recognized for the Christmas/New Year period were December 24, 25, 31 and January 1.

By notice dated December 18, 1992, VIA informed its employees of the following:

> To: Conductors, Assistant Conductors, Yardmen and Yardmasters
>
> The General Holiday provisions have been changed in your respective agreements.
>
> December 24 has been substituted for December 26, and December 31 has been substituted for January 2.
>
> However, December 31, 1992 will not be considered a general holiday for 1992 as there have already been 11 holidays for this year. Starting on 1993, December 31 will be a General Holiday.

The Union contends that this notice was a violation of the Collective Agreement in that the general Holiday provisions were negotiated and became effective the first of the month following ratification, and therefore December 31st of 1992 became a General Holiday. The Union requests that employees be compensated for this day.

It is the Corporation's position that employees are entitled to 11 general holidays, and the inclusion of December 31, 1992 would allow them 12 days since they already benefited from January 2, 1992. The Corporation contends that it was not the intent during national negotiations to provide for an additional general holiday, and has declined the Union's request.

FOR THE UNION: **FOR THE CORPORATION:**

(SGD.) M. P. GREGOTSKI **(SGD.) C. C. MUGGERIDGE**
GENERAL CHAIRMAN **DEPARTMENT DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Corporation:

K. W. Taylor	- Senior Negotiator & Advisor, Labour Relations, Montreal
D. A. Watson	- Senior Labour Relations Officer, Montreal
P. Thivierge	- Senior Negotiator & Advisor, Labour Relations (ret'd), Montreal

There appeared on behalf of the Union:

M. P. Gregotski	- General Chairperson, Fort Erie
G. Binsfeld	- Secretary/Treasurer, GCA, Fort Erie
G. Bird	- Vice-General Chairperson, Montreal
L. H. Olson	- National Vice-President, Edmonton

AWARD OF THE ARBITRATOR

This grievance concerns the application of article 68.1 of the collective agreement. It is brought as a policy grievance on behalf of the employees of the 17th Seniority District (Road).

The facts material to the grievance are not in dispute. Under the collective agreement which preceded the current agreement employees were entitled to December 26 and January 2 as general holidays. Under the old agreement employees who qualified enjoyed holidays with pay on December 25 and 26 as well as on January 1 and 2 in the Christmas/New Year's period.

The old collective agreement expired on December 31, 1991. It was, however, continued in effect beyond that date by the operation of the freeze provisions of the **Canada Labour Code**. On January 19, 1992, the parties executed a Memorandum of Agreement resolving all issues in dispute. The Corporation was advised of ratification of the terms of the Memorandum of Agreement by the Union on March 10, 1992, and the terms of the current collective agreement became effective April 1, 1992, for a period commencing January 1, 1992, and lasting until December 31, 1993.

During the course of bargaining the Corporation proposed to substitute December 24 for December 26 and December 31 for January 2 as general holidays. This was accepted by the Union, and the terms of article 68.1 of the collective agreement were amended accordingly. In the result, article 68.1(a) provides for eleven general holidays, including December 24 and December 31. There is some variance in the holidays from province to province: for example, St. Jean Baptiste day is a holiday in Quebec only, while the first Monday in August is a holiday in some provinces, but not others. Article 68.1(b) contemplates the circumstance of an employee who transfers from one province to another and provides, in part, as follows:

> **68.1(b)** A qualified employee who transfers from one province to another will be entitled to no more/no less than the total number of General Holidays applicable to any one province in any calendar year.

It is common ground that January 2, 1992 was treated as a general holiday for the purposes of the employees who are the subject of this grievance. The Corporation takes the position that, because the employees were given a holiday on January 2, 1992, they were not entitled to a general holiday on December 31, 1992. The position advanced by the employer is that the understanding of the parties is that employees are to be entitled to eleven general holidays in any given calendar year. It submits that the addition of December 31, 1992 as a general holiday, in accordance with the Union's claim, would create a windfall not intended by the terms of the collective agreement.

While there is a certain logic to the position advanced by the Corporation, the Arbitrator has difficulty finding it to be ultimately compelling. As a general rule, absent any other indication with respect to retroactivity within the terms of a collective agreement, such a document must be taken to speak prospectively from the date it becomes effective. The language of the current collective agreement clearly provides that any employee who qualifies is to be granted a holiday with pay on certain named general holidays, including New Year's Eve, December 31. The language of article 68.1 makes no reference to any particular calendar year, and is obviously intended to apply for

the currency of the collective agreement. The qualifying provisions of article 68.2 are not pertinent to the resolution of this grievance. Typical of such provisions, they require that an employee have completed thirty days of continuous employee relationship, in addition to working on certain qualifying days, as a condition precedent to being entitled to the benefits of any general holiday.

It is, of course, true that by the Union's interpretation of article 68.1 some employees would have the benefit of twelve general holidays in the calendar year 1992. That, however, is not the consequence of the operation of the current collective agreement. Rather, it is the cumulative result of the sequential or tandem application of the predecessor collective agreement, which provided for January 2 as a general holiday, and the subsequent and current agreement, which became effective April 1, 1992 and provides for December 31 as a general holiday. The Arbitrator must accept the submission of the Union that it would have been open to the parties to articulate a bridging provision, similar to article 68.1(b), limiting the overall entitlement of employees to eleven general holidays in calendar 1992. This, however, the parties did not do. Nor was there any discussion of any such limitation during the course of bargaining. It does not appear disputed that the parties did not address the issue of overlapping general holidays by reason of the change in their collective agreement at any time prior to the execution of the Memorandum of Agreement, or indeed before the Corporation's notice of December 18, 1992.

The position of the Corporation is predicated on a view of the collective agreement operating on a calendar year basis, commencing with January 1 and ending with December 31. It argues that employees should be entitled to no more that eleven general holidays within any such period. However, if the twelve months are differently defined, as for example from April 1, 1992 to March 31, 1993, by the application of the Union's interpretation employees would receive no more than eleven general holidays within a twelve month period.

It would appear that there are two perspectives from which the disputed interpretation should be considered. Firstly, from the standpoint of a plain reading of the collective agreement, as the Union contends, there is nothing which would limit the entitlement of an employee to a general holiday on December 31 during the currency of the collective agreement. On a literal and straight-forward reading of the collective agreement, therefore, the Union's position is the more persuasive. This is particularly so as there is no provision within the language of the collective agreement for bridging the change between the old and the new agreement.

Secondly, from a purposive point of view, the Union's position is also compelling. At the bargaining table, it appears that the parties agreed that the New Year's Eve holiday should be substituted for the general holiday which otherwise would have fallen two days later, on January 2. There is nothing in the documentation before the Arbitrator, or indeed in common sense, to suggest that the parties in fact contemplated moving the general holiday of January 2, 1992 (which had already been taken) some twelve months to December 31, 1992. Such a counter-intuitive outcome would, I think, require clear and unequivocal language to support it. On the contrary, the scheme of general holidays provided for in article 68.1(a) contemplates that an employee is to receive a paid holiday on both New Year's day and New Year's eve where previously he or she enjoyed the paid holiday on New year's day and January 2. Moreover, as the Union argues, on what basis could the December 31 general holiday be denied to an employee who, for example, was newly hired in February of 1992 and who satisfied all of the qualifying conditions of article 68.2 of the collective agreement? I can see none, nor can I see any basis in the language of the agreement to justify the differential treatment of employees in the application of article 68.1 so as to give any lesser benefit to other employees. For all of the foregoing reasons the Arbitrator accepts the application and interpretation of article 68.1(a) advanced by the Union.

Some dispute arose with respect to the scope of the remedy available to employees who are the subject of this grievance. The Corporation's representative suggested that compensation might be limited to those employees who filed timely time claims in respect of the general holiday in question. With that submission the Arbitrator also has difficulty. The matter comes before me as a policy grievance. Policy grievances are common as a means of vindicating the rights of all employees commonly affected by the violation of a collective agreement, and indeed are a common mechanism in grievances relating to a general claim for a holiday with pay. In such circumstances it has been acknowledged that the employees who are the subject of a policy grievance for holiday pay are entitled to individual compensation should the claim succeed (*see, e.g.,* ***Belleville General Hospital****, 1981, 30 L.A.C. 2(d) 323 (M.G. Picher) and see, generally, Brown & Beatty,* ***Canadian Labour Arbitration****, 3rd edition, 2:3124 (Toronto, 1992)*). The Arbitrator has been directed to no provision within the collective agreement which would limit the scope of recovery of individual employees where their rights are asserted through a policy grievance. In the result, the Arbitrator must sustain the position of the Union that all affected employees who can establish that they qualified for

a holiday with pay on December 31, 1992 in accordance with article 68.2 of the collective agreement, are entitled to be compensated accordingly.

For the foregoing reasons the grievance is allowed. The Arbitrator finds and declares that the Corporation's notice of December 18, 1992 is contrary to the provisions of article 68.1 of the collective agreement. December 31, 1992 is a general holiday for the purposes of the collective agreement. The Corporation is therefore directed to compensate all employees in the 17th Seniority District (Road) for the holiday, provided they qualify in accordance with article 68.2 of the collective agreement.

July 16, 1993 **(Sgd.) MICHEL G. PICHER**
ARBITRATOR