CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 3703

Heard in Montreal, Thursday, 16 October 2008

Concerning

VIA RAIL CANADA INC.

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

EX PARTE

DISPUTE:

Policy grievance on whether Louise McCrae, and others, are entitled to eight (8) hours pay on a General Holiday for time not worked.

UNION'S STATEMENT OF ISSUE:

Ms. McCrae booked sick on December 25, 2005 and missed a 12 hour trip. She booked back on, as required, at 08:30 on December 26, 2005 prior to calling hours. It is the Union's contention that she was available for duty on December 26, 2005 and therefore eligible for General Holiday pay of 8 hours.

The Corporation contends the layover is the period of time the employee is entitled to for rest after a trip. The assigned employee(s) must work to earn their layover days. As none of the employees listed in the grievance worked their trip prior to the holiday, they were not on lay over, and therefore, were not "available" as defined by the Collective Agreement. The Corporation contends no violation of the Collective Agreement.

It is the Union's position that the Corporation is In violation of Articles 8.5 (a) and Appendices 22 and 23 of the Collective Agreement #2. The Union further contends that the employees in question were "available" on the holiday as they were available for call that day. The Union does not agree with the Corporation's interpretation of "layover". In the Union's opinion employees need not work the trip prior to be entitled to Statutory Holiday pay. The Union seeks eight (8) hours pay for any and all employees who may have been affected by the Corporation's policy.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

There appeared on behalf of the Corporation:

L. Béchamp	– Counsel, Montreal
D. Stroka	– Sr. Advisor, Labour Relations, Montreal
B. Casey	– Manager, Train Operations
D. Rasinger	– Sr. Manager, Customer Experience, Toronto
J. Pastor	– Advisor, Labour Relations, Montreal
J. Rankin	– Agent, Labour Relations, Montreal

And on behalf of the Union:

D. Andru	– Regional Representative, Toronto
D. Olshewski	– National Representative, Winnipeg
R. Fitzgerald	– President, Council 4000, Toronto
S. Auger	– Regional Representative, Montreal

AWARD OF THE ARBITRATOR

The record reveals that the grievor, Ms. McCrae, held the position of Sr. Service Attendant in assigned service. She was accordingly scheduled to work trains 73/78 between Toronto and Windsor on December 25, 2005. The following day, December 26, 2005 was a scheduled day off. In fact she booked sick and did not work on December 25, 2005. In the circumstances the Corporation declined to pay for the holiday of December 25, as she was unavailable for duty. It appears that on December 26, which was also a statutory holiday, Ms. McCrae did call a crew dispatcher to "book back on" and indicate and she was available for work on that day, although it was her scheduled day off. On that basis she submitted an 8 hour time claim for the general holiday of Boxing Day, December 26. That claim was denied. The Corporation's response to the grievance offers, in part, the following explanation:

> This has always been the practice of the corporation not to pay an employee on their layover day if they failed to work the prior trip. As you mention that Ms McCrae booked sick on December 25th off her assignment train 73-78 therefore

> it is the corporation contention that Ms McCrae was not available to report for work until she picked up her next assignment again which was not until December 27.

The Union's claim is made under article 8.5(a) of the collective agreement. That provision, which is relatively new to the parties, reads as follows:

> **8.5(a)** An assigned employee qualified under Article 8.3 and who is not required to work on a general holiday shall be paid eight (8) hours' pay at the straight time rate applicable to the position in which such employee worked his last tour of duty prior to the general holiday.

The Union also relies upon Appendices 22 and 23 of the collective agreement. Those appendices, introduced in June of 2001, deal with changes in the averaging procedures for employees and reflect the understanding of the parties that regularly assigned employees who fail to complete an assignment will have their guarantee reduced by an amount equal to the ORS hours of the trip in question, however such reduction is not to include their layover. In other words, the layover is to be credited for the purposes of averaging, notwithstanding that a trip was missed.

In the Arbitrator's view Appendices 22 and 23 do not speak directly to the issue at hand. I am also satisfied that the language of article 8.5(a) is clear and unambiguous. It plainly contemplates that an assigned employee, which is an person in the position of the grievor, not required to work on a general holiday is to be paid 8 hours pay at the straight time rate, based on the last tour of duty worked prior to that holiday. I am satisfied that the Union is correct in its interpretation of article 8.5(a).

The real issue is the alternative grounds of estoppel advanced by the Corporation. It stresses that notwithstanding the changes made in 2001, the

Corporation has never varied from the long-standing practice of declining to pay statutory holiday pay to an employee who fails to work on his or her regular assignment on the day immediately prior. In that regard it places in evidence before the Arbitrator some thirty instances of employees who were denied statutory holiday pay in precisely that circumstance in the period 2002 through 2005. The Corporation argues that in that circumstance, failing the filing of any grievance or any objection by the Union, which must be taken to have been aware of the Corporation's practice, the Union is estopped from now applying the strict terms of article 8.5(a) of the collective agreement.

The Arbitrator is compelled to conclude that the Corporation's assertion of estoppel is well grounded in the case at hand. It is apparent that there have been renewals of the collective agreement during the period of the Corporation's consistent practice, the most recent being in June of 2005, an agreement effective January 1, 2004. In these circumstances it is fair to conclude that the Corporation has proceeded on the understanding that its holiday pay liability would be limited to the extent that, in keeping with past practice, employees who fail to work on regularly assigned shift immediately prior to a statutory holiday cannot claim statutory holiday pay for the subsequent holiday which falls on their day off. In all of the circumstances I am satisfied that the Corporation was entitled to believe that that understanding would operate for the life of the collective agreement. The Arbitrator therefore finds and declares that the Union is estopped from claiming the strict application of article 8.5(a) in the case at hand, and that the estoppel in question shall continue to operate until such time as the parties return to the bargaining table to renew their collective agreement, at which point it will be at an end.

On the foregoing basis the grievance must be dismissed.

October 20, 2008

(signed) MICHEL G. PICHER
ARBITRATOR