

IN THE MATTER OF AN ARBITRATION

BETWEEN:

BC RAIL

(hereinafter referred to as the "Railway")

AND:

CANADIAN UNION OF TRANSPORTATION EMPLOYEES, LOCAL #1

(hereinafter referred to as the "Union")

(W. Benedict - General Holiday)

Dispute:

Claim for General Holiday pay to W. Benedict for December 25, 2000.

Joint Statement of Issue

At the material times of this grievance, Locomotive Engineer Benedict was assigned to the spareboard at Prince George.

On December 21, 2000 at 1825, Mr. Benedict completed his last tour of duty prior to the December 25, 2000 General Holiday at which time he booked eighty-seven hours and five minutes personal rest plus a two hour call. This rest and call made Mr. Benedict available for 1130 on December 25, 2000.

The requisite 72 hours notice was served under Article 14.2 that that one spareboard employee would be designated as being required on the General Holiday. As the grievor was first out on the spareboard at 2200 on December 24th the Company designated him as "required".

At 0730, December 25, 2000, a Tramp Yard was called. Mr. Benedict was not called for this service as his personal rest had not yet expired.

The Union contends that Mr. Benedict has satisfied the requirements of availability on the General Holiday and has requested payment of 10 hours as per Article 14.4.1(3).

The Company contends that Mr. Benedict was not available as defined in Article 14.3(2) and has declined payment.

FOR THE UNION:

Robert Samson
General Chairperson
C.U.T.E. Local 1

FOR THE RAILWAY:

D.A. Lypka
General Manager
Operations

Arbitrator:

H. Allan Hope, Q.C.

Counsel for the Railway:

Michael Keiran and Paul Straszak

Counsel for the Union:

Robert Samson and Wayne Benedict

Place of Hearing:

Vancouver, B.C.

Date of Hearing:

April 10, 2002

A W A R D**I - Dispute**

In a grievance filed on January 9, 2001 the Grievor, Wayne Benedict, claimed entitlement to general holiday pay for December 25, 2000. He was first out on the Prince George spareboard at the time. Holiday pay is paid to all engineers who have performed some work in the 10 days prior to a general holiday. Spareboard engineers who do not work and who are not required to be available for work receive either eight or 10 hours pay depending on their class of service prior to the holiday. The pay is 10 hours for engineers who, like the Grievor, had been in road service. Additional premiums are paid to engineers who are required to be available to work and to engineers who are called to work. The dispute arose when the Grievor, who was considered by the Railway to have been "named" to be available, booked rest that extended into the first half of Christmas Day that made him unavailable when the only assignment of the day was called.

The Union made alternative submissions, the first being a claim for holiday pay on the basis that the Grievor was not named to be available. The alternative claim was that if he could be seen as having been required to be available, he was in fact available within the meaning of the agreement and was entitled to an additional premium for standing by. I note in that context of those claims that engineers who are required to be available who are not called to work receive an additional eight hours pay. This dispute arose when the Grievor was denied holiday pay entirely despite the fact that he was qualified to receive it in

the sense of having met the general 10-day precondition. The language in question reads as follows:

14.3 Qualifications

In order to qualify for payment on a General Holiday an employee must:

- (1) Have rendered some compensated service during the ten (10) calendar days immediately preceding the General Holiday. This qualification (1) does not apply if an employee works on a General Holiday.
- (2) Be available for duty on the General Holiday if bulletined as being required on the holiday. This qualification (2) does not apply in the event that an employee receives approved leave of absence from the Crew Supervisor for the General Holiday. (emphasis added)

The Union's alternative position was that the provision does not require that engineers be "available for duty" for the entire holiday. The fact that he was available for approximately half of the 24 hours, said the Union, was sufficient to earn the premium if in fact he could be seen as having been "required" to be "available". The position of the Railway was that the Grievor was not entitled to any holiday pay because he had been bulletined to be "available" for work if "required" and, despite the bulletin, he had booked rest that made him unavailable.

The Grievor's assignment to be available was not direct, it came in the application of a bulletin in which one engineer from the Prince George spareboard was listed as "required on the holiday" and to be "available for duty" on Christmas Day. The

Grievor was deemed by the Railway to have been designated as required for duty because he was first out on the Prince George spareboard. To place the dispute in perspective, it is necessary to emphasize that engineers who "have rendered some compensated service during the 10 calendar days immediately preceding the general holiday" are entitled to general holiday pay even though they have not been "bulletined as being required" to be "available" on the holiday.

On the Railway's interpretation of the collective agreement, the Grievor, who met the 10-day requirement, was denied the general holiday pay received by other engineers who were not designated as required and who did not stand by to perform work if required. The Railway concluded that, as first out on the spareboard, the Grievor was required to be available for duty throughout the holiday despite the fact that he had booked rest for a period that extended to the first half of the 24-hour holiday. The Grievor's resulting failure to be available disentitled him to the holiday pay he had earned under Article 14.3(1), said the Railway.

I pause to note an anomaly in the Union position. Its submission was that the Christmas bulletin did not serve to designate the Grievor as required because he had booked rest for the first half and could not be seen as available. However, it also submitted that the Grievor had remained available in the last half of the shift. The question arising is, if the Grievor did not consider himself as required to be available for the first half of the holiday by reason of having booked rest, why would he see himself as required to be available in the second half? There

was no evidence of any communication between the Railway and the Grievor as to his status at any material time. However, as I will detail later, it is not necessary to address that anomaly.

II - The Facts

As stated, at all material times the Grievor was the first out engineer on the Prince George spareboard. At 1.35 p.m. on December 21, 2000, the Railway posted running trades requirements for December 25, 2000. The requirements included one spareboard engineman for Prince George. That notice was published in compliance with Article 14.2 which requires the Railway to give 72 hours notice of general holiday assignments. The effect of the notice at the time was to designate the Grievor as required to be available for work assignments on December 25.

That obligation arose in accordance with what the Railway described as the standard practice with respect to designating which spareboard engineers would be required to be available on a general holiday. That practice was addressed by the Railway in its submission in the following terms:

Spareboard employees operate on a "first in, first out" basis, and the long established process for determining which will be the designated required employee on a general holiday is to name that employee who is first out at approximately 2200 [10 p.m.] on the eve of the holiday as being required. In this case, only one such employee was required, and it is undisputed that at the time this designation was made, Mr. Benedict was the first out spareboard employee. In fact, at this time he had been the first out

spareboard employee for some time past. At any rate, we are agreed that the grievor was properly designated as the "required" employee. (emphasis added)

Based on that practice, the position of the Railway was that the Grievor, as the first out engineer, was automatically designated to be available for December 25. The difficulty arose when he booked rest which, with call time, made him unavailable until 11:30 (11.30 a.m.) and thus, he was not available to take the 07:30 (7.30 a.m.) tramp yard assignment. The Union position was that the Grievor remained available from 11.30 a.m. forward but that no other assignment was called that day.

I pause to note that the Railway questioned but did not challenge the assertion that the Grievor remained available for assignment for the last 12 hours of December 25. In its submission the Railway used the term, "purportedly available for service". However, no facts were established which would support a finding that the Grievor did not consider himself as required to be available during the last half of the holiday. His understanding in that regard was consistent with existing practice. In particular, engineers who book rest while they are first out on a spareboard are stood down until their rest expires, after which they resume their first out status.

In short, the circumstances invite the speculation that the Grievor was in fact available and would have answered a call if one came. It was on that basis that the Union took its alternative position that if the Grievor was required to be available by reason of the Christmas bulletin and his status as

first out on the spareboard, his lack of availability for the first half of the holiday would not disentitle him from claiming holiday pay under the clear language of the collective agreement.

Returning to the facts, the Grievor booked rest at 6.25 p.m. on December 21, 2000. As stated, with call time, it expired at 11.30 a.m. on December 25, 2000. The bulletin filed in the proceedings by the Railway in which the requirement for one spareboard engineman was posted is dated December 21 at 1.30 p.m. The understanding of the Union expressed in its submission was that the Grievor "was already on personal rest when the requirements [for one spareboard engineman] were made available to the work force and had no way of knowing (and was not informed by the Company) that it had apparently designated him as "required" on the General Holiday". However, the copy of the bulletin filed in the proceedings discloses that it was posted approximately five hours before the Grievor booked rest.

The Grievor knew that he was first out on the Prince George spareboard and, accepting that engineers are required to keep themselves informed of bulletins affecting them, the Grievor was responsible for knowing that, barring an intervening event, he would be required to be available on the general holiday. On the facts, what the Grievor did not know was that the Railway would continue to view him as required to be available throughout the general holiday despite his having booked rest which would continue into the holiday. The position of the Union on that point was expressed as follows in its submission:

The Company contends that, in designating a spare Locomotive Engineer as "required" on a General Holiday, it has been its past practice to designate the physically first out spare engineer at 00:01 of the General Holiday as being "required" irrespective of whether that Locomotive Engineer is on personal rest or not. This was apparently done in the instant case. The union has made it clear to the Company that [the grievance] is in response to the union's first known experience with BC Rail's interpretation of Article 14 and that the union strongly disagrees with it; both as unreasonable and as contrary to the explicit terms of the collective agreement. If, in fact, the company has applied Article 14 as it contends in the past, the union was not aware of it until the instant case and grieved it right away.

In summary, the facts are that the Grievor, at all material times, was the first out on the Prince George spareboard, and, when the Railway's requirements for December 25, 2000 were published at 1.35 p.m. on December 21, was effectively put on notice under Article 14.2 that he would be required to be available for the general holiday. Article 14.2 reads as follows:

14.2 Notice of Requirement

The Railway shall advise by bulletin at least seventy-two (72) hours in advance of a general holiday at each Home Terminal, or points where spareboards are maintained, the number of unassigned crews and individual assignments required at each terminal and the number of spareboard men required on each spareboard for that holiday.

On that language and existing practice, posting of the December 21 bulletin by the Railway with respect to spareboard requirements in Prince George was effective notice to the Grievor that he would be required to be available on December 25. That is, to the extent that the parties agreed on prevailing practices, the Grievor, as first out on the Prince George spareboard, would be required to be available. Accepting that the obligation of the Grievor was to remain informed with respect to bulletins affecting his employment obligations, he must be presumed to have been aware when he booked rest approximately five hours after the bulletin that he would not be available for the first half of the general holiday.

However, a similar assumption also arises with respect to the Railway. That is, it is to be presumed that the Railway was aware as of 6.25 p.m. on December 21, when the Grievor booked rest, that he would not be available until 11.30 a.m. on December 25. More particularly, it can be presumed that the Railway was aware of that fact at 10.00 p.m. on December 24 when, according to its practice, it "named the employee who is first out ... on the eve of the holiday as being required". In terms of entitlement, there was no question that the Grievor met the requirements in Article 14.3(1). However, there is a question about whether he had been "bulletined as being required on the holiday" within the meaning of Article 14.3(2). The question arising is whether he was required to be "available for duty" on December 25 despite having booked rest. In terms of remedy, the provision governing entitlement to payment under which the Grievor's alternative claims are made reads as follows:

14.4 Payment

14.4.1 An employee who qualifies in accordance with Clause 14.3 shall receive pay as follows:

(1) Regularly assigned yard and work train engineers if not required to work on the General Holiday shall receive eight (8) hours pay at the pro rata rate and if required to work on a General Holiday shall receive in addition, pay at the time and one-half rate for all hours worked on the General Holiday.

(2) Regularly assigned road engineers if not required to work on the General Holiday shall receive eight (8) hours pay at the pro rata rate and if required to work on a General Holiday, shall receive in addition, pay at the time and one half rate for all hours worked on the general holiday.

(3) Spareboard and auxiliary spareboard engineers, if not required to work on the General Holiday shall receive either eight (8) hours pro rata pay at the yard rate or ten (10) hours pro rata pay at the road rate depending upon which class of service was performed on the last tour of duty prior to the General Holiday. If required to work on a General Holiday, Spareboard or Auxiliary Spareboard engineers shall be paid under Clause 14.4.1(1) if worked in yard or work train service or under Clause 14.4.1(2) if worked in Road Service.

14.4.2 A spareboard engineer who is bulletined as required on the General Holiday and not used shall receive, in addition to the pay provided in Clause 14.4.1(3), eight (8) hours at the straight time rate of the last service performed prior to the General Holiday. (emphasis added)

In the context of that provision, the remedies claimed by the Union were summarized in its submission as follows:

In the matter of rectification, the union asks that the arbitrator find that BC Rail must:

Should the arbitrator find that Mr. Benedict was not required, settle GP 2001-02 in accordance with the union's interpretation of Article 14.3 and pay Mr. Benedict ten (10) hours road rate in accordance with Article 14.4.1(3).

In the alternative, should the arbitrator find that Mr. Benedict was required, settle GP 2001-02 in accordance with the union's interpretation of Article 14.3 and pay Mr. Benedict ten (10) hours road rate in accordance with Article 14.4.1(3) and in addition eight (8) hours at road rate in accordance with Article 14.4.2

III - Positions of the Parties

(i) - The Union

The essence of the Union's first position is that the Grievor qualified for holiday pay under Articles 14.3(1) and 14.4.1.(3). That is, he met the requirement of having worked within the previous ten days under Article 14.3(1) and, having booked off, was an engineer who was "not required to work" and was thus entitled to ten hours pay based on his prior class of service.

The Union's alternative position is that if the Grievor can be seen as having been bulletined as required on the holiday, the language in question does not require engineers to be available throughout an entire holiday, they are simply "required" to be "available for duty" for some portion of it. The Grievor was "available", said the Union, for more than 12 of the 24 hours. The facts relied on to bring the Grievor within that phrase were summarized in the Union's submission as follows:

Mr. Benedict was available to take a two hour call at 09:30 for an 11:30 assignment on the December 25th General Holiday. He was therefore available for 12.5 hours or 52% of the General Holiday. It is patently clear that he was "available for duty on the General Holiday". Was he available for the entire calendar day of the General Holiday? No, however, the phrase in question does not require him to be available for duty on the entire calendar day on the general holiday; it states that he/she be "available for duty on the General Holiday", which he clearly was.

The Railway's practice of naming the engineer first out the evening before the holiday as required had not been applied to its knowledge to engineers on rest, said the Union. Its position was that such a practice is inconsistent with the rest provisions of the collective agreement and, in any event, could not be relied on to deny the Grievor the holiday pay he earned through service in the 10 days prior to the holiday.

(ii) - The Railway

The position of the Railway was that the provision in question contemplated that employees would be available for service as required. Its position is summarized as follows in its written submission:

At 0730 on December 25th, it was found necessary to call a Tramp Yard assignment. This call, whether on a general holiday or any other day would go to the first out spareboard employee. As noted previously however, Mr. Benedict was the only employee on the spareboard who was designated as "required" on that day, and this fact alone would qualify him as the "first out employee". The other spareboard employees had been previously notified that they would not be required to hold themselves available on that day. Unfortunately, as he was on rest, it is somewhat academic as to whether he was first out or not; the simple fact remains that he was not available for the call. Another employee was eventually found to perform this service, and Mr. Benedict remained first out on the spareboard and was only subject to call after his rest expired on 0930. There were no work assignments called after the grievor eventually did become available, so he never was called on this date. The election to take rest is an option to be taken at the employee's discretion and that it not within the Company's authority to unilaterally alter or cancel the term of rest an employee has individually taken. It would have been inappropriate for the Company to have called Mr. Benedict for service on the 0730 assignment as this would defeat the employee's purpose in booked personal rest

and arguable would be in violation of Article 9.2.6. (emphasis added)

The position of the Railway is that the language of the provision requires that engineers who meet the preliminary qualification in Article 14.3(1) in the sense of having "rendered some compensated service during the 10 calendar day" preceding the holiday must go further and bring themselves within Article 14.3(2) in order to claim holiday pay or a standby or work premium. The position of the Railway was that the Grievor, having been required to be available by reason of being first out on the spareboard at 10.00 p.m. on Christmas Eve, took himself outside all of the payment options when he was not available when required to perform the 7.30 a.m. tramp yard assignment.

IV - Decision

As indicated, both parties incorporated submissions with respect to what they described as "past practice" in the administration of the general holiday language. However, on the facts, it would appear that the circumstances that gave rise to this dispute are anomalous in terms of prior practice. There was no evidence of a specific practice with respect to engineers on rest who have nevertheless been considered as having been designated as required on the general holiday on the basis of being first out on the spareboard at 10.00 p.m. on the night before the holiday and who are unavailable for an assignment on the holiday because they have booked rest.

It was not clear on the Railway's assertion of its past practice that first out engineers who are on rest at 10.00 p.m. on

the eve of the holiday which is to extend into all or part of the holiday, would nevertheless be deemed to have been notified that they were required to be available and would be denied holiday pay if they were not available for a work assignment that arose while they were still on rest.

The Railway's reason for denying the Grievor compensation was that he was not available throughout the entire 24-hour period of the holiday. But the real question is whether Article 14.3(2), properly interpreted, permits the Railway to consider engineers as being required on a general holiday on the basis they are first out on the particular spareboard despite the fact that they have booked rest for a portion of the holiday.

In my view the Railway cannot rely on its existing practice or the collective agreement to support the contention that the Grievor had been designated as required to be available on December 25 within the meaning of Articles 14.2 and 14.3(2). The Railway could not ignore the fact that the Grievor had booked rest for the first 12 hours of the holiday prior to being "named" as "required" at 10.00 p.m. on December 24 and then deny him holiday pay on the basis that he was not available for an assignment that fell during his period of rest.

Conversely, engineers who could otherwise claim a standby premium on the basis of being first out on the applicable spareboard must be seen as having waived the first out priority if they book rest for all or part of the holiday. It has been decided between these parties that engineers who book rest take themselves out of service and cannot claim benefits that apply

expressly or by implication to engineers who are in service. That reasoning also applies to engineers who are entitled to claim benefits arising from their first out status. For periods during which they have booked rest they will be seen as having taken themselves out of service and thus unavailable to exercise the rights accorded engineers who occupy that status.

That understanding is in accord with practice generally. That is, engineers who occupy a first out status on a spareboard are stood down during periods when they have booked rest and they do not resume their status until their rest has expired. I digress to note that the Union sought to extend that practice to support the contention that the Grievor was entitled in these circumstances to claim the standby premium on the basis that he was available on the holiday after his rest had expired. In terms of that submission, I agree with the Railway that engineers who are available for part of a holiday cannot be seen as being available in the context of the provision. Availability must be taken to mean available throughout the entire holiday for any assignment that may arise.

Returning to the facts in this dispute, I note that the same reasoning that prevents engineers who have booked rest on a general holiday from claiming a standby premium applies with equal force to the Railway. In particular, engineers who have taken themselves out of service by booking rest on a holiday cannot be treated as if they had remained in service. On the facts, the Grievor must be taken to have waived any first out rights arising with respect to the general holiday when he booked rest for the first half of the holiday.

Equally, the Railway was not at liberty to ignore the Grievor's unavailability arising from having booked rest when it "named" the Prince George spareboard engineer on December 24 who was "required" to "be available" on Christmas Day. In the result, I conclude that the grievance should be allowed. The Grievor is entitled to the first remedy claimed. That is, he is entitled to receive the holiday pay which is payable to engineers who are not required to be available on a general holiday. In the Grievor's case, that remedy amounts to ten hours pay at the road rate, together with interest.

DATED at the City of Prince George, in the Province of British Columbia, this 27th day of August, 2002.

"H. Allan Hope, Q.C."

H. ALLAN HOPE, Q.C. - Arbitrator