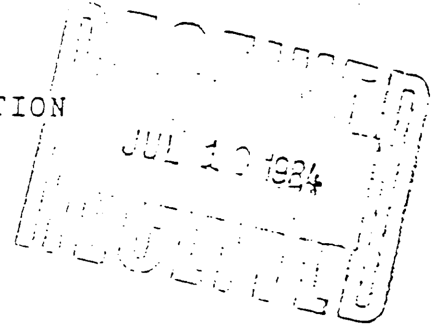
IN THE MATTER OF AN ARBITRATION



BETWEEN

WESTAR TIMBER LIMITED
(CELGAR LUMBER OPERATIONS)

(the company)

AND

INTERNATIONAL WOODWORKERS OF AMERICA
LOCAL 1-405

(the trade union)

(Statutory Holiday Pay)

Arbitrator	:	Donald R. Munroe
For the company	:	T. A. Roper
For the trade union	:	F. A. Schroeder
Date & place of hearing	:	July 4 and 5, 1984 Castlegar, B.C.

The parties agreed that I was properly constituted as an arbitration board under their collective agreement.

The dispute arose when the company witheld statutory holiday pay from the six grievors for Thanksgiving Day -- October 10, 1983.

The collective agreement establishes a number of "qualifying conditions" for entitlement to payment for statutory holidays. These are found in Article XV, Section 2 (d)-(h):

(d) An Employee, to qualify for holiday pay, must have been on the payroll thirty (30) calendar days immediately preceding the holiday and must have worked his/her last regularly scheduled work day before, and his/her first regularly scheduled work day after the holiday, unless his/her absence is due to illness or compensable occupational injury which occurred within six (6) months of the holiday, or the Employee is on authorized leave of absence.

(e) In the case of illness or injury the Employer shall have the right to request a certificate from a qualified medical practitioner.

(f) Notwithstanding any of the foregoing provisions, if the Employee fails to work one day before and one day after the holiday, both of which must fall within a period of sixty (60) calendar days, the Employee shall not be entitled to be paid for any Statutory Holiday during that period.

(g) Employees while on leave of absence under Article XIII, Section 2(a) or 2(b), shall not qualify for paid Statutory Holidays.

(h) It is agreed that casual labour shall not qualify for paid Statutory Holidays.

The sole issue in this proceeding is whether the six grievors "...worked his/her...first regularly scheduled work day after the holiday..." The company submits that such was not the case. The trade union argues otherwise.

The company operates a sawmill near Castlegar, B.C. The mill has three production lines. For two of the lines, the principal source of power is steam. The steam is obtained from an adjacent pulp mill.

In the evening of Friday, October 7, 1983, a picket line appeared at the adjacent pulp mill. The pickets were from a local of another trade union -- the Pulp, Paper and Woodworkers of Canada (the PPWC). At the time, the PPWC was engaged in a collective bargaining dispute with several of the pulp mills in the province.

Somewhat to the company's surprise, the afternoon shift at the sawmill continued working and completed the shift (which was the last shift prior to the long Thanksgiving weekend). In the past, the sawmill employees have refused to handle "hot" steam. And, the adjective "hot" has always been regarded (by the employees and the trade union) as being automatically applicable where the steam is flowing from behind a picket line.

Over the years, the "hot steam issue" has been a source of friction between the parties. On the one hand,

there is nothing in the collective agreement which appears to sanction a refusal to work with "hot" materials. Indeed, Article XXXI, Section 3 prohibits "...sympathetic strike(s) or other interference(s) with work..." On the other hand, there is the reality of trade union solidarity.

In any event, as I have indicated, on this occasion the employees in the sawmill continued working. The reason was given in evidence by Tony Ferreira, the trade union's plant chairman. He said that fairly recently, the trade union adopted the position that steam from the pulp mill would not be regarded as "hot", regardless of the presence of a picket line, until and unless there was official notification by the PPWC, either to himself or the trade union's business agent, of such a designation. On the Friday evening, neither Ferreira nor the business agent received the necessary notification.

The picket line was removed by the PPWC later the same evening. However, at about 10:00 p.m. on Monday, October 10 (Thanksgiving Day), Ferreira received notification from the PPWC that the pickets had returned to the pulp mill; further, that effective 11:00 p.m., the steam from the pulp mill was declared "hot".

The first shift at the sawmill following the long weekend was scheduled to commence at midnight --i.e., some

two hours later. It was a maintenance shift. Among others, there were six millwrights scheduled to work. The six millwrights are the grievors in this proceeding.

Ferreira went to the sawmill and met with the maintenance crew at about 11:50 p.m. He told the crew that the steam from the pulp mill had been declared "hot". he indicated his expectation that the declaration would be respected.

In the meantime, the company's industrial relations manager, Al Blessin, had also learned of the return of the picket line. At approximately 10:00 p.m., he and Neil Kennedy, the maintenance superintendent, met by telephone to formulate a plan of action. Their hope was that the events of the Friday evening would be repeated --i.e., that the steam from the pulp mill would not be treated by the sawmill employees as being "hot". However, it was clear that a contingency plan was desirable.

Before outlining the plan, I should comment on the normal duties of the incoming maintenance shift. Simply stated, the duties were twofold. The first was to follow preventative maintenance routines and attend to any necessary repairs. The second was to "crack" the steam. On the first shift following any weekend, one of the millwrights is assigned to "crack" the steam. Although it requires a measure of skill, it is quite a simple function,

assuming no problems are encountered. One begins by giving a slight turn to the steam valve. This allows a small amount of steam into the pipes. Thus, the pipes are gradually warmed. Some 30 minutes later, the valve is opened a bit more. More heat and pressure is generated. Another 30 minutes later, the valve is given another turn, etc. One of the witnesses testified that "cracking" the steam involves about five minutes' work, spread over some two hours. The desirable practice is to commence the process at the beginning of the shift, in case any problems are encountered. However, it is possible to wait until the last two or three hours.

That possibility was at the heart of the plan formulated by Blessin and Kennedy. As I have stated, the shift was to begin at midnight. It was to end at 8:00 a.m. It was resolved that management should do nothing unusual at the outset. The millwrights (and others) should simply be allowed to go about their normal maintenance functions. However, if the "cracking" of the steam had not commenced by 4:30 a.m. (immediately following lunch break), the foreman should instruct each of the millwrights, in turn, to start the process. If the foreman was met with refusals, the millwrights should be informed that no further work was available for them. And the foreman should "crack" the steam himself.

The foreman for the shift was Nick Rebalkin. According to plan, he gave each of the millwrights his normal "job slip" at the outset of the shift. Almost immediately, there was a problem. Two of the millwrights indicated uncertainty whether they could work on a steam-activated cylinder. They consulted with Ferreira (who was still at the sawmill) who advised them to perform the work provided that steam was not actually flowing. The two informed Rebalkin that they would do the repairs but would decline to "crack" the steam.

A few minutes later, Rebalkin learned from another millwright that he, too, would be declining to "crack" the steam.

Apart from the "cracking" of the steam, the shift worked in normal fashion until about 4:30 a.m. At that point, Rebalkin approached each of the millwrights with a request and then a direction to "crack" the steam. The requests and directions were refused. One of the millwrights suggested to Rebalkin that he, Rebalkin, "crack" the steam; that the millwrights could carry on with their other duties; that they should "let day shift battle it out". Rebalkin replied that his instructions were that no further work was available for the millwrights if they refused to "crack" the steam.

In the result, the millwrights finished what they were doing and punched out at 5:00 a.m. Thereupon, the others on the shift also left the plant. In the view of the others, the millwrights should have been allowed to complete their remaining duties. None of the others was instructed to leave or was told that work was not available.

Neither the millwrights nor the others were paid for the last three hours of the shift. That action by the company was not the subject of a grievance. In addition, all of the employees were deducted the statutory holiday pay for Thanksgiving Day. As I have already indicated, the company's view was (and is) that the employees failed to "...[work] his/her... first regularly scheduled work day after the holiday..." Apart from the millwrights, that action has also been accepted. However, the contention of the trade union is that statutory holiday pay should not have been witheld from the millwrights.

In Palmer, Collective Agreement Arbitration in Canada 2nd ed., the following appears at p. 684:

> It is common, indeed almost universal, for the collective agreement to impose a qualification on statutory pay known as a "day-before day-after"clause. That is, to receive statutory holiday pay an employee must work the day before and the day after the relevant holiday as a prerequisite of being paid. It has been suggested that the determination of whether an employee meets the qualification is fraught with difficulty and almost devoid of guidance and

that "there are almost as many views on the subject as there are arbitrators".

It is true that different arbitrators have reached different conclusions on substantially similar fact patterns. But it is also the case that a few guiding principle have emerged and found acceptance. The first is the so-called "earned benefit doctrine" (cf. Belkin Packaging Ltd. (1977) 15 L.A.C. (2d) 231 at 233 (Larson)). As was observed at p. 384 of T.C.F. of Canada Ltd. (1972) 1 L.A.C. 382 (Adell):

> ...unless the collective agreement indicates otherwise, holiday pay is not basically a means of indemnifying employees against losing a day's wages through not being allowed to work on the holiday. Rather, it is an additional form of payment for work already done, and it must therefore be viewed not from the vantage point of the holiday itself by from that of the period of work for which it provides extra renumeration.

The second is the universal recognition of the purpose of a "qualifying days" provision. It is to avoid or reduce absenteeism on a day or days when greater-than-normal absenteeism might otherwise be feared. In the instant case, both parties acknowledged that to be the purpose of the provision in question.

The third consensus one can glean is the arbitral tendency to fairly strictly construe the typical "day before/day after" clauses. This tendency has not arisen in

the abstract. Really, it is a product of the two guiding principles I have mentioned to this point. The so-called "earned benefit doctrine" holds that entitlement to statutory holiday pay is acquired over a period of time. It is not earned simply by the employee's presence on the qualifying days. From that perspective, a qualifying days provision is not a benefits clause; rather, it is a disqualification clause. And, a provision for disqualification from an otherwise earned benefit should be interpreted and applied according to its purpose. So, for example, in Goodyear Tire & Rubber Co. of Canada Ltd. (1977) 15 L.A.C. (2d) 15 (McLaren) the question was posed whether the conduct of the employees ran counter to the purpose of the qualifying condition -- the prevention of absenteeism around the paid holiday. Similarly, in Photo Engravers & Electrotypers Ltd. (1969) 21 L.A.C. 41 (Weatherill), it was observed that the "...failure to work did not relate to the matter of qualification for holiday pay."

That brings me to the final guiding principle which is the virtually unanimous acceptance of the notion of substantial compliance wherever the language of the collective agreement permits. Nor does this notion stand in the abstract. It, too, is the logical result of the first two guiding principles, and "...is but an example of the strictness by which qualifying days are interpreted" (Belkin Packaging Ltd., cited earlier, at p. 233).

Certainly, where a collective agreement explicitly states that employees must work a "full shift" on the qualifying day(s), considerations of substantial compliance would not be proper. See, for example, Patons & Baldwins (Canada) Ltd. (1980) 25 L.A.C. (2d) 332 (Brunner) and Thomas Built Buses of Canada Ltd. (1980) 27 L.A.C. (2d) 409 (Weatherill).

However, in the earlier-cited Photo Engravers decision, where the collective agreement required that the employees be "at work" on the qualifying days, it was held that:

> Although token attendance would not be sufficient, it does not follow that attendance throughout the entire shift is required, unless of course it is expressly so under the collective agreement. In our respectful view, certain of the earlier arbitration cases have gone beyond the terms of the collective agreements in requiring such attendance. In the instant case, the collective agreement requires employees to be "at work" on the qualifying days. The employees did comply with the literal requirements of the agreement: they were "at work" on the Thursday. This was more than a token attendance, and their failure to work their full scheduled shifts did not relate to the matter of qualification for holiday pay. In the circumstances, we find that there was in fact substantial compliance with the requirements of art. 10.03, as far as the Thursday was concerned. This determination, it should be emphasized, is made having regard to the particular circumstances of this case.

Similar sentiments were expressed in Stran-Steel Division (1980) 28 L.A.C. (2d) 153 (Betcherman). There,

the collective agreement provided that permanent employees were entitled to statutory holiday pay provided they were "not absent" on the qualifying days. The board in that case applied the "doctrine of substantial compliance" (p. 155) with the following added observations (p. 156):

> The Photo Engravers award cautions against confusing the employee's right to holiday pay with the employer's right to discipline. We draw from this that while leaving without permission where work is available might warrant a stiffer penalty than where there is little to do, the distinction would not, in itself, affect holiday pay entitlement. There are two different contractual obligations involved. The logic of this interpretation is underlined by the fact that holiday pay disentitlement is fixed (four days' loss of pay in this instance) while discipline can be tailored to fit the misconduct.

Counsel for the company submitted that in the present circumstances, I am foreclosed from an application of the notion of substantial compliance. That was for the following reasons. As is well known to these parties, the collective agreement at hand draws a distinction between disputes involving "interpretation", and grievances not involving "interpretation". Under the agreement, there is a single Interpreter and a panel of Arbitrators (I am an Arbitrator). The Interpreter decides disputes regarding "interpretation"; the Arbitrators do the rest. It is important to note that the Interpreter has the final say over the meaning to be given to the words and phrases of the agreement.

That is the system employed in the forest industry throughout the province. The statutory holiday language of the Coast Master Agreement is the same in substance as the language of the agreement between these parties. In 1971, the then-Interpreter under Coast Master Agreement was asked this question:

> Where an employee fails to work his last regular shift because of the unlawful refusal of certain employees to process material, thereby causing the employer to send employees home, are the employees, other than those certain employees, disentitled to their statutory holiday pay?

The circumstances were as follows. There was a strike in the towboat industry, with the result that some of the logs going to sawmills were declared "hot". The boom boat operators at one or more of the sawmills refused to handle the logs. The refusal was on a qualifying day for a statutory holiday. The boom boat operators were sent home. The fact that logs were not being fed to the mill(s) meant that there was no work for the other employees. So, the other employees were also sent home. Statutory holiday pay was witheld from all the employees who were sent home. That action was upheld by the Interpreter.

Contrary to the submission by counsel for the company, I do not regard that award as dispositive. It simply does not deal with questions of substantial compliance. While there is no acceptance of the notion, nor is it rejected. It is not clear whether the refusal to

handle "hot" logs was at the outset of the shift, or part way through the shift. Although the award is quite terse, I think it safe to assume the former. On the face of the award, the Interpreter was more concerned with the meaning of "authorized" leave (as an exception to the qualifying conditions) than with the interpretation of the phrase "...must have worked...."

In my view, the more pertinent award by an Interpreter is that of Mackoff, J. (the present Interpreter under the Coast Master Agreement) dated January 25, 1983. The circumstances giving rise to the dispute were as follows. An employee was injured on the job on October 30. It was a compensable injury. On November 30, the employee returned to work but left mid-way through the shift because of his injury. He was then off work until January 15. The issue was whether the employee was entitled to pay for all of the statutory holidays which fell between October 30 and January 15 -- i.e., Remembrance Day, Christmas Day, Boxing Day and New Year's Day. That was an issue because of the proviso in the Coast Master Agreement that:

> Notwithstanding (ii) above, the employee must have worked one day before and one day after the holiday, both of which must fall within a period of sixty (60) calendar days.

That is similar, and identical in purpose, to Article XV, Section 2(f) of the agreement at hand (reproduced earlier). In sum, unless the partial shift on November 30 counted, the

employee would not have satisfied the "60 day" qualifying condition.

The answer given by the Interpreter was expressed as follows:

> The issue in dispute is the meaning to be given to the words "must have worked one day..." The Industry contends that in order to comply with this qualifying condition the employee must have worked a full shift. In support for this contention counsel for the Industry points to Article V, Section 1 in the Master Agreement, which provides that the regular hours of work shall be eight (8) hours per day. Therefore, says counsel, when the parties used the term "worked one day..." they must have meant an eight-hour day and since the employee worked only one-half shift he has not met the qualifying conditions above set out.
>
> For the Union it is submitted that there has been substantial compliance with the section and therefore the employee has met the qualifying conditions.
>
> It is to be noted that [the] subsection...above does not say that the employee must have worked one full day before the holiday. The Collective Agreement only requires the employee to "have worked" one day before the holiday. The employee, in this case, did comply with the literal requirement of the Agreement; he did work one day before the holiday. While token attendance would not be sufficient, that is not the case here. On the particular facts and in the circumstances set out in the question there was substantial compliance with the qualifying condition.

Counsel for the company submitted that an award on the "60 day" proviso has no bearing on a dispute concerning the "day before/day after" proviso. That was for two reasons. First, the "60 day" qualification serves a

different purpose. It is to ensure that employees claiming a benefit have a current employment nexus with the particular employer. It goes more to the "earned benefit doctrine" than to the control of absenteeism. Thus, so it is submitted, the notion of substantial compliance can reasonably be incorporated into the "60 day" qualification, but not the "day before/day after" qualification.

In my judgment, that is a distinction without a difference. If the notion of substantial compliance poses an undue arbitral threat to either purpose, the threat is posed to both. Moreover, each of the arbitrators who has applied substantial compliance to the typical "day before/ day after" qualification (and this award cites only a sampling) has done so with an acknowledgement that the purpose of the qualification is to control absenteeism at a time when the employer is most vulnerable.

Alternatively, counsel noted that the "60 day" proviso does not contain any exceptions, whereas the "day before/day after" proviso contains an agreed-upon list of acceptable excuses. Counsel referred to the maxim inclusio unius est exclusio alterius, and submitted that the existence of a specific list of exceptions implied that no others -- e.g. substantial compliance -- were permissible.

In reply, counsel for the trade union submitted, correctly in my view, that the notion of substantial compliance (where properly applicable) is not an _exception_ at all. Rather, it goes to the question at the threshold: whether the employees "have worked" their qualifying days. In addition, there was another maxim -- the mirror image of the _inclusio_ maxim -- to which the Interpreter in the "60 day" dispute might have had resort if he considered proper. I refer to the maxim _expressio unius est exclusio alterius_. Where a list of exceptions exists for particular and defined occasions (the "day before/day after" qualification), but no list of exceptions is provided for another occasion (the "60 day" qualification), an intention to exclude _any_ exceptions -- e.g. substantial compliance -- might be inferred. The Interpreter did not follow that path. Again, substantial compliance is not an exception to to the requirement that the employees "...must have worked..." the qualifying days. It goes to the qualification itself.

In my view, the Interpreter in the "60 day" dispute has made it clear, if ever there was doubt, that the notion of substantial compliance is a permissible consideration in the arbitral application of the phrase "...have worked..." as it appears in the statutory holiday language of the forest industry collective agreements.

I return to the facts at hand. While the question is not before me, I agree with the trade union's judgment that the non-millwrights on the contentious maintenance shift disqualified themselves from statutory holiday pay by walking off the job. As I earlier intimated, substantial compliance is not determined merely by examining the number of hours worked. It is determined as well by the purpose of the "day before/day after" proviso. The employees, other than the millwrights, left the work site without permission and without being informed that no further work was available. From a functional perspective, they were wholly uninvolved in the problems concerning "cracking" the steam. Theirs was a situation of complete volunteerism.

However, I consider the millwrights to be in a different category. They worked normally for better than half the shift. Then, they were told that no further work was available for them, which is the equivalent of being told to punch out. Certainly, it was the millwrights' refusal to handle the "hot" steam which triggered the deprivation of further work. No doubt, refusals to follow instructions from a foreman is not something to which the company is required to turn a blind eye. A disciplinary response may well have been warranted.

But that is not what happened. Counsel for the company sought to have me pivot this award, at least in some measure, around two considerations. The first was the

contention that the refusals to handle the "hot" steam were a violation both of the collective agreement and the Labour Code. The second was the proposition that an insubordinate refusal to perform assigned duties imposes no obligation on an employer to assign or allow the performance of other duties: Great Canadian Oil Sands Ltd. (1979) 22 L.A.C. (2d) 426 (Lucas).

Were this a discipline case, those would be pertinent considerations. I agree with counsel for the company that questions of discipline and issues of entitlement to statutory holiday pay can become intermingled. See, for example, Canadian Trailmobile Ltd. (1966) 17 L.A.C. 189 (Arthurs) and Evans Products Companv Limited, unreported, June 18, 1984 (Munroe). But that generally occurs where the employer has in fact meted out a disciplinary suspension, and the suspension is coincident with a qualifying day. The intermingling of issues is the result of the belief expressed by arbitrators that in determining whether the discipline was excessive, one should have regard to the total financial impact thereof, including any loss of statutory holiday pay.

In my view, it is proper to ask, in cases such as this one, whether the event in issue should have been approached by the company as a disciplinary incident -- i.e., as distinct from an incident giving rise to a