

**In the Matter of an Arbitration  
Under the Canada Labour Code, Part I**

**Case YM2718-4075**

**Between:**

Direct General Partner Corporation dba Canada Cartage  
(the “Employer”)

**And:**

Teamsters Local Union No. 31  
(the “Union”)

**Lieu Day Grievance**

**Arbitration Board:** Sylvia P. Skratek

**Appearing for the Employer:** Benjamin Hecht

**Appearing for the Union:** Grant Coleman

## INTRODUCTION

This is an arbitration under the *Canada Labour Code*, Part I between Direct General Partner Corporation on behalf of Direct Limited Partnership o/a Canada Cartage System and Teamsters, Local Union No. 31. By letter dated April 25, 2017 the Union filed a policy grievance over Article 23, General Holidays of the Collective Agreement. Article 23 provides:

- 23.1 The Company recognizes the following general holidays with payment and entitlement provisions as set out below:
- 23.2 The recognized holidays shall be: New Year's Day, Family Day (starting February of 2016), Good Friday, Victoria Day, Canada Day, B.C. Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day, Boxing Day and in the event a general holiday is proclaimed by the Federal Government, such holiday shall be observed as a general holiday. The rates of pay for these general holidays will be at the regular applicable work time rate.
- 23.3 The Company, upon advance written notice to the Union, may choose to substitute another day for any holiday listed in 23.2 above, in which event the substituted holiday shall be deemed to be the general holiday in accordance with this Article 23.
- 23.4 Employees entitled to those paid holidays shall have been on the payroll thirty (30) calendar days previous to the holiday.
- 23.5 Employees absent by reason of leave of absence, discharge, quit or suspension shall not be entitled to general holiday pay.
- 23.6 The employee who is terminated or discharged for just cause within the thirty (30) calendar day period shall not be entitled to general holiday pay. If an employee who has been laid off temporarily is returned to work within thirty (30) calendar days after the holiday, he shall be entitled to the paid general holiday.
- 23.7 When a general holiday falls on a regular employee's regular day off, then such employee will be granted a day off in lieu of such general holiday on either the last working day preceding or the first working day following such general holiday.
- 23.8 A full day's holiday, (i.e. eight (8) hours for dock workers; nine (9) hours for city drivers; ten (10) hours for highway drivers) at the regularly hourly rate shall be granted to each regular full-time employee for the holidays set out in Article 23.2.
- 23.9 Employees required to work on any one of the holidays listed in Article 23.2 shall, in addition to the holiday pay in 23.8 above, be paid at time and one-half (1 ½) for all hours worked, with a minimum of four (4) hours. Employees required to work on a holiday will be entitled to another day off in lieu of the holiday at a time to be agreed upon with the Company; provided the employee provides not less than seven (7) days written notice, and subject to reasonable operational requirements, the Company shall not unreasonably deny an employee the selection of the alternate day off.
- 23.10 Employees on vacation during a period in which one of the above holiday(s) is observed shall receive an additional day(s) vacation.
- 23.11 The work week shall be reduced by the appropriate number of hours each general holiday(s) as outlined in Federal Labour Standards.

The grievance states in pertinent part:

The Union became aware of this issue last year, when some of its members on the Home Depot account reported that they were paid time-and-a-half for Monday, December 26, 2016 (Boxing Day), but only straight time for Tuesday, December 27, 2016 (which was supposed to be a lieu day for Christmas day which fell on Sunday). Since December, 2016, the Union had been trying to work with the Company to resolve this discrepancy, primarily with Adam Wood (formerly of Canada Cartage) who indicated that this had affected more than just employees working on the Home Depot account (approximately 50)....

Please provide the Union with a list of all affected employees and the monies owed to them so that we may proceed with the grievance procedure.

After filing the grievance, the Union made several attempts to address the matter with the Company as indicated by its written communications dated May 11, 2017; June 19, 2017; July 13, 2017; August 8, 2017. Prior to the filing of the grievance, the Union had exchanged several emails with Company representatives regarding the issue: January 24, 2017; February 1, 2017; February 15, 2017; March 1, 2017; April 18, 2017.

By email dated August 9, 2017 Ms. Rhonda Leason, the National Senior Director, Human Resources, advised the Union that:

We are a 24/7 operation and did not substitute any of the days as per the following:

23.3 The Company, upon advance written notice to the Union, may choose to substitute another day for any holiday listed in 23.2 above, in which event the substituted holiday shall be deemed to be the general holiday in accordance with this Article 23.

So Christmas Day which fell on a Sunday was not substituted to the Tuesday. I am happy to reconsider our position that this was paid correctly if you can provide me with any evidence to the contrary as per 23.3.

The Union responded to Ms. Leason's email on August 23, 2017 stating in part that the

"...Grievance is not in regards to the Company (with advance written notice to the Union) substituting another day for a general holiday as outlined in Article 23.3 ...Rather, it is in regards to when a stat (general holiday) falls on an employees regular day off as outlined in Article 23.7 of the collective agreement."

Subsequent discussions between the parties did not result in a resolution of the matter and the Union requested the appointment of an Arbitrator. By letter dated September 19, 2017 I was

appointed as the Arbitrator to hear the grievance. A hearing was convened on March 26, 2018. At the hearing the parties had full opportunity to make opening statements, examine and cross examine witnesses, introduce documents, and make arguments in support of their positions.

## **ANALYSIS**

### **Position of the Union**

The Union maintains that the evidence supports a conclusion that the Company does not recognize lieu days. As the documents within Tab 1 of the Union's Exhibit 4 show: Mr. Riske received statutory pay for November 13, 2017 but did not work on that day; Mr. Baxter received overtime payment for working the July 1, 2017 statutory holiday and also received payment for the lieu day of July 3, 2017 but did not work on that day; Mr. Gill received payment for the lieu day of July 3, 2017; Mr. Forsyth received payment for the statutory holidays of December 25 and 26, 2016 as well as payment for the lieu day of December 27, 2016; Mr. Dhami received payment for the statutory holidays of December 25 and 26, 2016 and the statutory holiday of January 1, 2017 as well as the lieu day of December 27, 2016; Mr. Lundy was paid for working on the statutory holiday of July 1, 2017 at the provided overtime rate and was also paid for working the lieu day of July 3, 2017 at the provided overtime rate. As noted on the payroll adjustment sheet for Mr. Lundy his pay for July 3, 2017 was adjusted to accommodate "Day in lieu s/b paid at overtime rate". Union Exhibit 2 further shows that Mr. Lundy was paid for the statutory holiday of November 13, 2017 at a rate of 227.80 for 10 hours and was also paid for working November 13, 2017 at the rate of \$367.33 reflecting the overtime rate. The actual date of the statutory holiday was November 11, 2016 and as Business Representative Paul Simms testified notice had not been provided to the Union that the Company had substituted November 13 as the holiday in accordance with Section 23.3 of the Collective Agreement. Mr. Lundy received both statutory holiday payment for November 11, 2017 and payment at the overtime rate for working what would have been the lieu day in accordance with Section 23.7 of the Collective Agreement.

The language within the Collective Agreement is not new language and has been in the agreement since its inception. The initial negotiation proposal from 2010 represents common language throughout the industry and is consistent with language contained within other

agreements within the industry as confirmed by the testimony of Richard Van Grol, Secretary-Treasurer of the Union. Mr. Van Grol has negotiated several of the agreements within the industry. Mr. Van Grol further testified that when a statutory holiday results in a day in lieu that an employee is entitled to overtime payment for working on the day in lieu.

### **Position of the Employer**

The Employer maintains that there is nothing within Article 23 that sets out how to pay an employee who works on a lieu day. Article 23.9 provides payment for employees who are required to work on “any one of the holidays listed in Article 23.2” but does not make any provision for payment for employees who are required to work on a lieu day. Article 23.3 allows the Company to substitute another day for any holiday listed in 23.2 and the substituted holiday shall be deemed to be the general holiday in accordance with Article 23. The Company exercised its right to substitute a day for November 11, 2016 and thereby deemed November 13, 2016 as the general holiday. Nothing similar happened with the holiday dates that are at issue in this matter. The Company did not exercise its right to substitute another day for the holiday dates. If Saturday, December 25, 2016 (Christmas) was an employee’s regular day off then Tuesday, December 27, 2016 was their lieu day. If an employee worked on December 27, 2016 then they were paid at their regular rate of pay. Nothing with Article 23 provides that a lieu day should be paid in accordance with Article 23.9. The Company emphasizes that there have been no prior complaints regarding its interpretation of Article 23. It further emphasizes that its interpretation is consistent with Section 193 of the *Canada Labour Code* which states:

#### *General holiday falling on day off*

- **193** (1) Except as otherwise provided by this Division and subject to subsection (2), when a general holiday falls on a day that is a non-working day for an employee, the employee is entitled to and shall be granted a holiday with pay at some other time, which may be by way of addition to his annual vacation or granted as a holiday with pay at a time convenient to both the employee and the employer.

#### *Alternative day for holiday falling on non-working Saturday or Sunday*

(2) Except as otherwise provided by this Division, when New Year’s Day, Canada Day, Remembrance Day, Christmas Day or Boxing Day falls on a Sunday or Saturday that is a non-working day, the employee is entitled to and shall be granted a holiday with pay on the working day immediately preceding or following the general holiday.

The Company recognizes that Section 193 is not binding in this matter however it is instructive as to the interpretation of the language in the collective agreement.

The Company cites *Canadian Labour Arbitration* by D.J.M. Brown and D.M. Beatty (4<sup>th</sup> ed.) to set forth interpretative principles that have been well established:

- 1) When faced with a choice between two linguistically permissible interpretations, arbitrators have been guided by the purpose of the particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies. (At paragraph 4:2100)
- 2) Arbitrators have generally assumed that the language before them should be viewed in its normal or ordinary sense unless to do so would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense. (At paragraph 4:2110)
- 3) The express mention of one person or thing implies the exclusion of other persons or things of the same class not mentioned. (At paragraph 4:2142)

The Company further cites *Collective Agreement Arbitration in Canada* by Ronald M. Snyder and Earl E. Palmer (4<sup>th</sup> ed.) to set forth an additional interpretive principle that “the collective agreement is to be construed as a whole.” (At page 28) To further support its position the Company provides several grievance and arbitration decisions: *Wire Rope Industries Ltd. v. U.S.W.A., Local 3910*, 1982 CarswellBC 2620; *T.S.T. Overland Express v. Teamsters, Local 938*, 2002 CarswellOnt. 5252; *Tamborriello v. Canada (Treasury Board-Department of Transport)* 2006 CarswellNat 1530, 2006 PSLRB 48, 2006 CRTFP 48, 86 C.L.A.S. 81; *Halifax Regional Municipality v. Canadian Union of Public Employees, Local 108 (Halifax Civic Workers Union)*, 2011 CarswellNS 592; *Oshawa (City) and Oshawa Professional Firefighters’ Association Local 465 (Overtime on Recognition Pay)* 2016 CarswellOnt 19525, 129 C.L.A.S. 251 L.A.C. (4<sup>th</sup>) 57.

When all of the above citations are taken into consideration in making a determination in this matter the Company contends that it is the plain meaning of the terms of the Article that must prevail. It is only logical that if an employee gets the holiday off, in this matter Christmas Day, then the lieu day of December 27<sup>th</sup> would be compensated in a regular manner. Article 23.9 does not incorporate the “in lieu” day but rather incorporates only the specific days listed in Article 23.2. There was no evidence that the Company had “deemed” December 27<sup>th</sup> “to be the

general holiday” as provided in Article 23.3. It is the normal or ordinary sense of the words that must be used in the interpretation of the Article. A lieu day is not a general holiday. A lieu day is not expressly mentioned in the Article as being a holiday. The Teamsters are a very experienced Union and if they had wanted to have a lieu day as a holiday they had the expertise to write the specific language to do so.

An employee who was not required to work on the general holiday had the advantage of spending that day with their family members. They received holiday pay for that day and they received a lieu day as provided at Article 23.7. If they work on their lieu day there is nothing within the agreement that requires compensation beyond their regular rate of pay.

### ***Discussion***

As the Company has emphasized a determination in this matter must take into consideration the established principles of contract interpretation. If one were to focus on the normal or ordinary sense of the words then it is the Union’s interpretation that must prevail. While the Company argues that a “lieu day” is not a holiday that argument is inconsistent with the normal or ordinary sense in which a day off immediately preceding or following the general holiday is viewed. One need only look at Section 193 of the *Canada Labour Code* to find that an employee shall be granted “a holiday with pay at some other time” when a “general holiday falls on a non-working day”. The word itself, “lieu”, is defined as “in the place of” or “instead”.<sup>1</sup> In effect when an employee is “...granted a day off in lieu of such general holiday...” as provided at Article 23.7 that employee is being granted a day off “in the place of” or “instead of” the general holiday. The day off thus takes the place of the general holiday. This is consistent with the normal or ordinary sense of the words within Section 193 of the *Canada Labour Code*. The Company’s position that the employee shall be paid the regular applicable work time rate for any work that is performed on the lieu day leads to an interpretation that borders on nonsensical and unreasonable. As the Union argued why would anyone work on their granted day off if the rate of pay would be no different than if they had remained at home?

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<sup>1</sup> Webster’s Third New International Dictionary of the English Language Unabridged, Merriam-Webster, Inc., 2002.

It is clear from Union Exhibit 4 Tab 1 that an employee is paid straight time for a day that is granted but not worked when a holiday falls on a regular day off. For example Mr. Baxter worked July 1, 2017 and was paid at time and one-half for the hours worked; Mr. Baxter did not work on the lieu day, July 3, 2017, and was paid straight time for that day. Mr. Gill did not work on July 3, 2017 and he was paid straight time for the day. Neither Mr. Baxter nor Mr. Gill worked on the granted day of July 3, 2017 but they were paid at their regular rate of pay. Also within Union Exhibit 4 Tab 1 there is evidence that an employee, David Lundy, worked July 1, 2017 and July 3, 2017 and was paid at the overtime rate for both days that were worked. As the Union has emphasized why would Mr. Lundy work on July 3<sup>rd</sup> if he was going to be paid at the same rate of pay provided to the two employees who did not work on July 3<sup>rd</sup>, Mr. Baxter and Mr. Gill? There is no reason or incentive for an employee to work on the day that is granted “in lieu of such general holiday” for straight time payment. The *Canada Labour Code* recognizes this fact when it specifically grants a “holiday with pay at some other time” to an employee when a “general holiday falls on a non-working day”. The Collective Agreement in this matter may not state at Section 23.7 that an employee will be granted a “holiday” but it does make it clear that an employee “will be granted a day off in lieu of such general holiday”. To uphold the Company’s contention that “a day off in lieu” is anything other than a day that “takes the place of” the holiday or a day “instead” of the holiday I would have to conclude that there is no holiday for employees who do not work on the actual holiday itself. Such a conclusion would render the language of the Collective Agreement meaningless. Such a conclusion would also deny an employee the negotiated benefits of the day off in lieu of the statutory holiday. An employee who works on his day off in lieu would receive nothing more than his regular rate of pay for working what has been commonly recognized as a holiday with pay when the general holiday falls on the employee’s non-working day.

The testimony of Richard Van Grol, Secretary-Treasurer of the Union, regarding the negotiating history was instructive. Mr. Van Grol is an experienced negotiator who has negotiated several of the collective agreements within the industry. He credibly testified that the language within Article 23 is similar to language contained within other collective agreements in the industry. The proposal at Union Exhibit 1 that was put forward during the negotiations between the parties for the first agreement in 2010 is consistent with language contained within



other collective agreements in the industry. The language may not be as precise as one would prefer however that is not unusual in the realm of collective agreements. It is an arbitrator's responsibility to ascertain the mutual intent of the parties as well as the real-life expectations of the parties. In this matter the evidence leads to the conclusion that if an employee works on the "day in lieu" the employee will be paid in accordance with Article 23.9 at time and one-half for all hours worked. The Company emphasizes that some of the evidence presented by the Union represents dates after the December 2016 incidents that triggered the grievance however I cannot ignore the fact that the Company maintains control of the payroll records. If there were documents that provided contradictory information it would have been within the Company's ability to bring those forward. It did not do so.

The Company's reliance on the fact that there were no prior complaints about its payments fails to take into consideration that no evidence was presented as to how the Company had paid the worked lieu days in the past. The Union noted that it had not received payment complaints prior to December of 2016. Mr. Van Grol testified that the Union does not go "fishing for grievances". It is not unreasonable to assume that the lack of complaints indicated that the employees were either being paid consistent with the Union's interpretation in this matter or had not brought any inconsistencies to the attention of the Union. The Company provided no evidence to the contrary.

The Company is correct that an employee who does not work on the General Holiday is able to enjoy that day off with his family however, as in the *Halifax* case at paragraph 46, that same employee could also look forward to the extra day off that was provided in the collective agreement. If that employee is called in to work on his "extra day off" that takes the place of the general holiday thereby losing the benefit of the day off in lieu provided at Article 23.7 then he is entitled to the payment provided for work on a holiday as set forth in Article 23 at time and one-half for all hours worked.

## **CONCLUSION**

Based on all of the foregoing and for the reasons set forth in the Analysis above I conclude that the Union's position shall prevail and that the grievance is therefore allowed. The Company shall compensate any and all affected employees for any and all work that they performed on the "day off in lieu" of a general holiday at a rate of time and one-half for all hours worked. Said compensation shall be provided for work performed by employees beginning with the period represented by the policy grievance filed regarding dates in December of 2016 through the date of this Award. Within fourteen calendar days of the receipt of this Award the Company is hereby ordered to produce and provide to the Union any and all documents necessary to determine the amounts of compensation that are due to the affected employees. The Company and the Union shall then verify and confirm the amounts that are due to each employee and payment shall be made to the employees within thirty days of the receipt of this Award.

I will remain seized for the purposes of dealing with any disputes concerning the interpretation, application or implementation of this Award including the calculation of the amounts due to the affected employees.

**It is so awarded.**

Dated this 4<sup>th</sup> day of May 2018 at Tsawwassen, British Columbia.

A handwritten signature in black ink, appearing to read "Sylvia P. Skratek", with a long horizontal line extending to the right.

**Sylvia P. Skratek**  
**Arbitrator**