Canada Industrial Relations Board Conseil canadien des relations industrielles

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BY WEB PORTAL

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In the matter of the *Canada Labour Code (Part III–Standard Hours, Wages, Vacations and Holidays)* and a request for review treated as an appeal, pursuant to section 251.101(7) of the *Code*, filed by Canadian Pacific Railway Company, applicant; Darren J. Arthur, respondent. (035264-C)

Further to the hearing held in the above-noted matter, the parties will find enclosed the Reasons for decision issued by a panel of the Canada Industrial Relations Board (the Board) composed of Ginette Brazeau, Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code*.

To comply with section 20 of the *Official Languages Act*, the Reasons will be translated and published on the Board's website at www.cirb-ccri.gc.ca. A copy may be obtained upon written request to the undersigned.

Sincerely,

Martine Paradis
Team Leader, Registry

Encl.

c.c.: Danijela Hong
Véronique Milot
Lindsay Foley

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Reasons for decision

Canadian Pacific Railway Company (now known as Canadian Pacific Kansas City Railway),

applicant,

and

Darren J. Arthur,

respondent,

and

Head of Compliance and Enforcement.

Board File: 035264-C
Neutral Citation: 2024 CIRB **1114**
March 11, 2024

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, sitting alone pursuant to section 14(3.1) of the *Canada Labour Code* (the *Code*).

Counsel of Record

Ms. Trisha Gain, for Canadian Pacific Railway Company;

Mr. Michael A. Church, for Mr. Darren J. Arthur;

Mesdames Renée Darisse and Véronique Milot, for the Head of Compliance and Enforcement.

[1] This matter concerns the calculation of the regular rate of wages for the purpose of paid personal leave under the *Code*. The issue arises in the context of an appeal of a payment order issued by a labour affairs officer (LAO) of the Labour Program of Employment and Social Development Canada.

[2] The question in dispute is whether an employee will be compensated for the personal leave based on an average of their daily earnings for the 20 days of work immediately preceding the first day of leave or based on a method provided in the applicable collective agreement.

[3] To address this issue, the Board must examine section 206.6 of the *Code* and section 17 of the *Canada Labour Standards Regulations*, CRC, c 986 (the *Regulations*).

I. Background and Context

[4] The Board notes that during this proceeding, Canadian Pacific Railway Company acquired Kansas City Southern, and the company changed its name to Canadian Pacific Kansas City Railway (CPKC or the employer). The Board will refer to CPKC throughout this decision as the relevant employer.

[5] There are several appeals before the Board that raise this same issue and involve the same employer. After conferring with the parties in a case management meeting, the Board decided to proceed with the present case to provide guidance on the interpretation and application of the particular legislative provisions in dispute.

[6] This matter involves Mr. Darren J. Arthur (the employee), a train conductor working at CPKC, who filed a monetary complaint with the Labour Program on February 21, 2021. He alleged that the employer had not compensated him correctly for a day of personal leave taken on January 24, 2021.

[7] Mr. Arthur's terms and conditions of employment are generally governed by the collective agreement in place between CPKC and the Teamsters Canada Rail Conference (the TCRC or the union). At the time of his leave, Mr. Arthur was on the spareboard, filling conductor and brakeperson vacancies. His hours of work differed from day to day, and he was compensated on a basis other than time. His compensation varied depending on the number of miles he travelled and the different allowances that were available based on several factors (train length, turns, miles travelled, deadheading, etc.).

[8] The employer paid him $193.19 for the day of personal leave. This is the basic daily rate of pay for brakepersons under the collective agreement in force at the time of the leave. In his complaint,

Mr. Arthur took the position that he should have been paid $288.73 based on the 20-day average of his wages, as provided by section 17(a) of the *Regulations*. He also indicated that he should be paid at the conductor rate of pay.

[9] The LAO of the Labour Program requested information from the employer on April 16 and August 11, 2021. The employer did not provide the requested information. Based on the information provided by the employee, the LAO initially determined that Mr. Arthur was entitled to $603.43 for the day of personal leave based on the average earnings of the previous 20 workdays as established by the pay records he had provided. The LAO issued a payment order for $610.24, which took into account the amount of $193.19 already paid by the employer and an additional administrative fee of $200.00. In the written submissions filed with the Board, the Head of Compliance and Enforcement of the Labour Program (the Head) subsequently modified Mr. Arthur's entitlement to $569.38 as the Head agreed with the employer that payments for being held away should not be included in the calculations.

[10] The employer filed a request for review of the LAO's determination. The Head referred the request for review to the Board on November 23, 2021, for it to be treated as an appeal pursuant to section 251.101(7) of the *Code*. The Head provided the Board with the LAO's report and the documents on which she had relied to make the determination.

[11] In addition to the documents that the Head had provided, the employer, the TCRC and the Head provided written submissions on the issues raised in the appeal. A hearing was held on March 29, June 29 and 30 and July 27, 2023, and the Board heard the testimony of three witnesses: Mr. John Bairaktaris, Director of Labour Relations at CPKC; Mr. Don Ashley, National Legislative Director at the TCRC; and Mr. Dave Fulton, General Chairperson (CTY West) at the TCRC.

II. Issues

[12] In its request for review, the employer raises three questions: Should the employee's complaint proceed under section 251.01 of the *Code*?

1. For the purpose of calculating the regular rate of wages for personal leave, should section 17(a) or (b) of the *Regulations* apply in this case?

2. What is the correct amount owing to Mr. Arthur for his personal leave day?

[13] The Board has to determine whether the LAO made an error when interpreting and applying section 17 of the *Regulations*. As the party challenging the LAO's determination, the employer bears the onus of demonstrating through evidence and legal submissions that there is reason to vary or rescind the payment order. The Board makes its own assessment based on the material that was before the LAO at the time of the determination and any new information or evidence it obtains through its own inquiry (see *7892985 Canada Corporation*, 2020 CIRB 926).

[14] The Board will address the issues successively.

A. Should the employee's complaint proceed under section 251.01 of the *Code*?

[15] Initially, CPKC took the position that the dispute should be dealt with through the dispute resolution process under the collective agreement. In fact, the union has initiated multiple grievances regarding the payment of personal leave days that have all been placed in abeyance. Although the employer accepts that the Head and an arbitrator appointed under the collective agreement have concurrent jurisdiction to determine this matter, it submits that the Board should exercise its discretion and defer the matter to grievance arbitration.

[16] At a case management teleconference held on February 28, 2023, the Board raised the public interest in having it provide an interpretation of section 17 of the *Regulations* as this is the first time it has been called upon to do so in the context of the new personal leave provision in the *Code*.

[17] After discussion, all the parties agreed that the Board should proceed to determine the merits of the appeal.

B. For the purpose of calculating the regular rate of wages for personal leave, should section 17(a) or (b) of the *Regulations* apply in this case?

[18] There is no dispute that the employee in this case is entitled to be paid for the personal leave day he took on January 24, 2021, pursuant to section 206.6(2) of the *Code*. There is also no dispute that the employee's hours of work vary from day to day and that there are no regular or normal hours of work.

[19] Mr. Arthur was on the spareboard, meaning he was called in to work to fill available jobs as a conductor or brakeperson. The pay information submitted to the Board shows that he had worked as a conductor for the majority of the 20 working days prior to the day of personal leave.

[20] He was paid on a mileage basis that varied from trip to trip, and his earnings varied from day to day as a result. Generally, his pay is a function of the terminal from which he works, the miles travelled, and the time spent on other events while running the train. Accordingly, there is no regular rate of wages.

[21] The issue to be determined is the method of calculating the regular rate of wages for the purpose of compensating the employee for this personal leave.

III. Positions of the Parties

A. The Employer

[22] The employer argues that the "basic day" as defined in the collective agreement has consistently been used by the parties to calculate wages in a variety of circumstances. As such, it takes the position that this is the method of calculation that applies pursuant to section 17(b) of the *Regulations*. The employer disagrees with the LAO's assessment that the collective agreement does not deal with the subject matter of the complaint. It argues that although the collective agreement may not specifically reference "personal leave" under section 206.6(1) of the *Code*, it clearly contemplates circumstances where employees may require a leave of absence to deal with personal matters.

[23] Should the Board determine that section 17(a) of the *Regulations* applies, the employer submits that the calculation of the 20-day average should not include penalty payments and payments for being held away.

B. The TCRC as representative of Mr. Arthur

[24] The union submits that it is section 17(a) of the *Regulations* that applies in this case and that the wage rate for personal leave must be calculated based on an average of earnings in the 20 days worked immediately prior to the leave.

[25] The union indicates that the parties have not agreed to a method of calculating pay for the purpose of personal leave and that no such provision exists in the collective agreement. Accordingly, it argues that section 17(b) of the *Regulations* is inapplicable. It disputes the employer's view that the basic day applies to personal leave as it exists for a different purpose and does not establish a wage rate for the purpose of personal leave taken by employees pursuant to their right under section 206.6 of the *Code*.

C. The Head of Compliance and Enforcement of the Labour Program

[26] Similarly, the Head takes the position that there is no method agreed upon between the parties in the applicable collective agreement for calculating a regular rate of wages for the purpose of personal leave under section 206.6 of the *Code*. The Head argues that the basic day is a minimum payment only and cannot be assimilated to a regular rate of pay for the purpose of personal leave. Further, it does not align with the purpose of the legislated right to personal leave with pay, which is to provide employees with the ability to take a day of leave without losing their regular wages.

[27] In reviewing other types of leave included in the collective agreement, the Head indicates that none expressly state or imply that the method of calculating compensation applies for the purpose of personal leave.

[28] Should the Board find that there is a provision in the collective agreement that provides a method of calculating compensation that could apply to personal leave, the Head argues that personal leave established in the *Code* serves a different purpose than other types of leave. The Head also points to section 168 of the *Code* and argues that it provides for the greater benefit to apply when comparing the methods of compensation under section 17 of the *Regulations*. In the Head's view, for section 17(b) of the *Regulations* to apply, the applicable collective agreement must set out a method of calculating the regular rate of wages for the purpose of personal leave, and that method must be more favourable to the employee than the method prescribed under section 17(a) of the *Regulations*. It is not appropriate to compare the method of compensation provided at section 17(a) of the *Regulations* with a broader, overall method of calculating the regular rate of wages in the collective agreement that serves a different purpose and that does not directly relate to the paid personal leave in the *Code* and the *Regulations*.

IV. Analysis

[29] The *Code* was amended in 2019 to add a right for employees to take five days of personal leave. Employees have a right to be compensated for the first three days of such leave:

> **206.6 (1)** Every employee is entitled to and shall be granted a leave of absence from employment of up to five days in every calendar year for
>
> **(a)** treating their illness or injury;
>
> **(b)** carrying out responsibilities related to the health or care of any of their family members;
>
> **(c)** carrying out responsibilities related to the education of any of their family members who are under 18 years of age;
>
> **(d)** addressing any urgent matter concerning themselves or their family members;
>
> **(e)** attending their citizenship ceremony under the *Citizenship Act*; and
>
> **(f)** any other reason prescribed by regulation.
>
> **(2)** If the employee has completed three consecutive months of continuous employment with the employer, the employee is entitled to the first three days of the **leave with pay at their regular rate of wages for their normal hours of work**, and such pay shall for all purposes be considered to be wages.
>
> (emphasis added; version in force on January 24, 2021)

[30] Section 206.6(5) of the *Code* provides the Governor in Council with the authority to make regulations for the purpose of defining the expressions “regular rate of wages” and “normal hours of work.”

[31] Section 17 of the *Regulations* sets out the method of calculating the regular rate of wages for different types of leave:

> **Regular Rate of Wages for Purposes of General Holidays, Personal Leave, Leave for Victims of Family Violence and Bereavement Leave**
>
> **17** For the purposes of subsections 206.6(2), 206.7(2.1) and 210(2) of the Act, the regular rate of wages of an employee whose hours of work differ from day to day or who is paid on a basis other than time shall be

> **(a)** the average of the employee's daily earnings, exclusive of overtime hours, for the 20 days the employee has worked immediately preceding the first day of the period of paid leave; or
>
> **(b)** an amount calculated by a method agreed on under or pursuant to a collective agreement that is binding on the employer and the employee.

(version in force on January 24, 2021)

[32] The Head concluded that the collective agreement did not include a method of calculation that was applicable to personal leave. Accordingly, the Head applied section 17(a) of the *Regulations* and calculated the amount owing by averaging the employee's earnings for the 20 working days prior to the day of leave.

[33] To resolve this appeal, the Board must provide an interpretation of the *Regulations* and review the applicable collective agreement.

A. Interpretation of Section 17 of the *Regulations*

[34] It is important to note at the outset that the minimum labour standards set out in Part III (Standard Hours, Wages, Vacations and Holidays) of the *Code* are provisions of public interest, the application of which is mandatory for any employer whose business is governed by the *Code*.

[35] The underlying principles of statutory interpretation are well established. In *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65, the Supreme Court of Canada (the SCC) stated the following:

> [117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership* v. *Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

[36] The Board is also mindful of section 12 of the *Interpretation Act*, which establishes the broader principle that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[37] The Head relies on *Bristol-Myers Squibb Co.* v. *Canada (Attorney General)*, 2005 SCC 26 (*Bristol-Myers*), and submits that these principles apply equally to the interpretation of regulations; in addition, regulations must be read in the context of their enabling statute, having regard to the language and purpose of the statute (see paragraphs 37–38). In *Bristol-Myers*, the SCC also found it appropriate to consider the relevant regulation-making enabling provisions to guide its interpretation of the specific regulation at issue (see paragraphs 50–56).

[38] The Head referred the Board to the decision of the Federal Court of Appeal (FCA) in *Dynamex Canada Inc.* v. *Mamona*, 2003 FCA 248 (leave to appeal dismissed by the SCC in *Dynamex Canada Inc.* v. *Mamona*, No. 29932, March 4, 2004), for a description of the purpose of Part III of the *Code*. In that decision, the FCA stated the following:

> [31] There is no preamble to Part III, so its object must be inferred from its content. A review of Part III as a whole indicates that it falls into the category of labour standards legislation. A useful statement of the purpose of such legislation appears in the Canadian Labour Law Reporter (CCH Canadian Limited) at 5105 (page 6205):
>
> > The terms and conditions of employment were once considered a private matter, properly left to the determination of the employee, employer and the marketplace. However, by the early 1900s, exploitation in the workplace resulting in widespread worker unrest prompted the passage of labour welfare legislation such as minimum wage laws.
> >
> > Today, all jurisdictions in Canada, whether federal, provincial or territorial, have in place labour standards legislation providing not only for minimum wages but also for minimum age of employment, maximum hours of work, overtime pay rates, entitlement to annual paid vacation, statutory holidays, leaves of absence and protection on termination of employment.
> >
> > Labour standards legislation is designed to do two things. First, it provides protection to the individual worker, and second, it creates certainty in the labour market by requiring basic employment practices. The legislation requires that all employers establish employment conditions that meet at least the minimum standards set out in the legislation.
>
> …
>
> [35] In summary, the object of Part III of the *Canada Labour Code* is to protect individual workers and create certainty in the labour market by providing minimum labour standards and mechanisms for the efficient resolution of disputes arising from its provisions.

[39] In other words, Part III of the *Code* sets a minimum floor for the terms and conditions of employment in the federally regulated sectors, and it must be interpreted in a way that encourages compliance with those minimum requirements.

[40] The personal leave provision was introduced in 2019 to provide five days of personal leave for specific circumstances listed in section 206.6(1) of the *Code*, namely: for the treatment of an illness or injury, for family-related care, for responsibilities related to a child's education, for urgent matters concerning a family member or for attendance at a citizenship ceremony. The employee is entitled to be paid for the first three days of leave for those purposes at their regular rate of wages for their normal hours of work (see section 206.6(2)).

[41] The Regulatory Impact Analysis Statement that accompanied the 2019 amendments to section 17 of the *Regulations* states that the personal leave provision was introduced as part of several changes made to the *Code* to support employees in achieving better work-life balance, to support women's participation in the labour market and to contribute to inclusive growth.

[42] The personal leave provision is essentially aimed at mitigating the financial consequences of an absence from work due to specific personal obligations.

[43] Section 17 of the *Regulations* provides the mechanism for calculating pay for such leave when an employee does not have a regular rate of pay. The Board notes that the "title" that appears before section 17 refers to different types of leave. Section 17 of the *Regulations* was amended in 2019 to add "Personal Leave" and "Leave for Victims of Family Violence" in the title and to add a reference to sections 206.6(2) and 206.7(2.1) of the *Code* in the introductory language. This same provision was in place prior to 2019 and provided for the method of calculating the regular rate of wages for bereavement leave. Aside from the change to the title, the only change made to the wording of this provision in 2019 was to add the reference to sections 206.6(2) and 206.7(2.1) of the *Code*.

[44] The Head and the TCRC contend that for section 17(b) of the *Regulations* to apply, the applicable collective agreement must set out a method of calculating the regular rate of wages specifically for the purpose of personal leave.

[45] The Board is of the view that this is incorrect. There is nothing in section 17(b) that suggests that the method of calculation must be specific to each type of leave. Rather, the provision is of a general nature and provides that "the regular rate of wages… shall be… an amount calculated by a method agreed on under or pursuant to a collective agreement." This is applicable to three types of leave. The grammatical and ordinary sense of the wording in this section suggests that, if the collective agreement contains a method of calculation for a regular rate of wages, it could apply for the purposes of the three types of leave listed.

[46] Further, the Governor in Council did not make a separate regulation for the purpose of section 206.6 of the *Code*. Instead, the Governor in Council chose to apply an existing regulation that recognized that parties to a collective agreement may have agreed to a method of calculating a regular rate of wages when employees' wages and hours of work vary from day to day. There is no ambiguity in the language found at section 17 of the *Regulations*. Even when considering the overall purpose of the statute, there is no indication that each type of leave needs to be addressed separately. The purpose of paid days for personal leave, bereavement leave and leave for victims of family violence is the same; they provide compensation to employees requiring such leave to minimize the economic impact on those employees.

[47] There is no requirement in section 17 of the *Regulations* that the method of calculation be specific to each type of leave. The fact that the collective agreement between CPKC and the TCRC does not include a method of calculation specific to personal leave does not resolve the issue.

[48] The TCRC filed three grievance arbitration awards dealing with the interpretation and application of section 17 of the *Regulations* in similar contexts: the award issued by Arbitrator Christine Schmidt in *Teamsters Canada Rail Conference (TCRC) and Via Rail Canada Inc.*, AH 767, February 3, 2022; the award issued by Arbitrator Michelle Flaherty in *Canadian National Railway Company and Teamsters Canada Rail Conference*, CROA Case No. 4816, May 30, 2022; and the award issued by Arbitrator John Stout in *Canadian National Railway Co.* v. *Teamsters Canada Rail Conference (Robert Grievance)*, [2023] C.L.A.D. No. 118 (QL). Arbitrator Flaherty's award was upheld on judicial review in *Canadian National Railway Company* v. *Teamsters Canada Rail Conference*, 2023 ONSC 3365 (*CNR*). Although the Board is not bound by the arbitrators' awards, they provide helpful guidance and analysis of the issues raised in the present appeal.

[49] In her award, Arbitrator Flaherty stated the following:

> 15. Section 17(b) of the *Regulations* respects the freedom to contract between parties to a collective agreement. It allows parties to agree on a method of calculation, which accounts for unique features of the workplace and maintains any balance achieved between the parties through collective bargaining. Importantly, however, section 17(b) applies only where the parties have agreed on a method for calculating the compensation.
>
> 16. As noted, the parties have not had an opportunity to bargain what constitutes a "regular rate of wages" for the purposes of PLDs. This does not necessarily preclude the application of paragraph 17(b). In the circumstances, I must consider the existing provisions of the Collective Agreement and determine whether they contain an agreed upon method for calculating compensation that is applicable to PLDs.

[50] Similarly, the Board is of the view that the calculation method provided in the collective agreement does not need to specifically relate to the personal leave under section 206.6 of the *Code* to apply. There is no language to this effect in section 17 of the *Regulations*.

[51] This provision recognizes that the parties to a collective agreement may have contemplated a method of calculating a regular rate of wages for certain circumstances. The collective agreement must be reviewed to determine whether the parties turned their minds to establishing a method of calculation for a regular rate of wages that would be applicable to personal leave.

[52] That said, in reviewing and assessing the method that may be established in the collective agreement, the Board must be cognizant of the overall objective of the paid leave, which is to minimize the financial and employment-related impacts on the employees requiring such leave.

B. The Collective Agreement

1. Basic Day

[53] The employer takes the position that the "basic day" is a method agreed to by the parties that is consistently used to calculate wages in a variety of circumstances. The basic day is defined at article 4.01 of the collective agreement:

> 4.01 **BASIC DAY STRAIGHTAWAY AND TURNAROUND SERVICE**
>
> In all freight, mixed, unassigned passenger, light running (engine and caboose), pusher and helper service, 100 miles or less, 8 hours of less, constitute a day's work, exclusive of payment for switching, initial terminal detention and time at turnaround points.

[54] The evidence suggests that the concept of the basic day has been in the collective agreement for a very long time. It is a method of calculating compensation per 100 miles travelled for road service classifications. This definition of a “basic day” is referred to in several articles of the collective agreement, for example, articles 49.06, 68.01(1), 68.16(2), 95.01 and 107.01. None of these articles relate to a leave of absence from work.

[55] The conductors are paid primarily on a per-mile basis. The pay rates for different classifications (engineers and conductors) are set out in article 1 of the collective agreement and represent a set rate per 100 miles or eight hours of work. Employees are paid for the miles travelled based on the set rate. In addition to the miles travelled, an employee receives allowances based on various factors and events that occur during the trip (type of train, train length, switching, deadheading, etc.).

[56] CPKC’s witness estimated that approximately 12 to 18 percent of assignments are paid only the basic day. However, this was not supported by any documentary evidence. Conversely, the union’s witnesses were of the opinion that conductors were rarely paid just a basic day. Although the witnesses were unable to give a precise account of how many times an employee may be paid a basic day as daily compensation, it is apparent to the Board that the basic day (or 100 miles) does not reflect the normal wages earned as a brakeperson, conductor or locomotive engineer. A basic day is paid in limited circumstances, for example, when an employee is called to the terminal but the assigned train does not start (a missed turn). The Board was not persuaded that this is a regular or frequent occurrence. A basic day is also paid for deadheading, meaning the employee is compensated based on a basic day when travelling from one terminal to another without performing service. Mr. Arthur’s pay records indicate that he was paid one basic day for deadheading in the 20 working days prior to his leave of January 24, 2021.

[57] Counsel for the employer described the compensation scheme as a “jungle of complexity.” That appears to be a fair assessment of the many variables that can play into the calculation of an employee’s pay on any given day for a tour of duty. Having reviewed the evidence presented, the Board is satisfied that the basic day applies only in limited circumstances and does not reflect the regular or normal compensation for locomotive engineers or conductors. The Board concludes that the basic day represents a minimum entitlement that only provides part of the equation for calculating an employee’s wages.

[58] Counsel for the employer argues that the entitlement to a paid leave is clear and that the parties cannot contract out of that minimum legislated requirement. However, she submits that the *Code* or the *Regulations* do not set a minimum entitlement in terms of the amount to be paid for that leave. She submits that the *Regulations* provide that an employee is to be paid at the regular rate of wages or based on a method agreed to by the parties. Nothing prohibits this payment from being a minimum entitlement, and the *Regulations* do not specify that the payment must be greater than the minimum payment available under the collective agreement. She indicates that the basic day is a minimum payment available when an employee loses a tour of duty and that this method is agreed to by the parties and should apply for the purpose of section 17 of the *Regulations*.

[59] The Board is not persuaded by this argument. It is important to consider the purpose of the personal leave with pay provision, which is to minimize the financial impact of taking leave for any of the personal circumstances listed at section 206.6(1) of the *Code*. The basic day is only a minimum payment and is paid in some limited circumstances. By no means does it represent a method of calculating a regular rate of pay for employees in road service (locomotive engineers, conductors and brakepersons), and it does not represent what the employee could have expected to earn under normal circumstances. It was not contemplated by the parties to be a method of calculating wages for the purpose of compensating employees for any of the types of leave set out in section 17 of the *Regulations*.

[60] For these reasons, the Board rejects the argument that the basic day is a method agreed to by the parties for the purpose of section 17(b) of the *Regulations*.

2. Leave Provisions

[61] The Head and the TCRC are of the view that the Board's conclusion above should suffice to address this appeal since the onus is on the applicant to demonstrate that the Head erred in concluding that the basic day was not a method of calculating the regular rate of wages for the purpose of personal leave.

[62] However, at the Board's request, the parties presented evidence regarding other types of leave in the collective agreement. The Board was particularly interested in assessing whether the

parties had contemplated the basic day or another method of calculating pay for other types of leave that could be considered analogous to personal leave.

[63] This is consistent with the Board's broad power to inquire into the matter as it deems necessary (see section 16(f) of the *Code*).

[64] The collective agreement includes a provision that addresses bereavement leave (article 32). Under this circumstance, an employee is paid the amount of lost earnings exclusive of overtime. This means that the employee is paid the amount they would have earned had they not been on leave. This amount is determined based on the amount that another employee made for filling the missed turn (or tour of duty) because of the bereavement leave. Based on this method, Mr. Arthur's lost turn would have earned him $391.00 in pay for the leave taken on January 24, 2021. This is less than the amount he would have received based on a 20-day average.

[65] The collective agreement also provides leave for family care (article 33). This leave is not paid, but the employer offers a loan for a certain period that is repayable by the employee.

[66] Other types of leave, such as jury duty and most absences for company business, are paid based on lost time, similar to bereavement leave.

[67] The review of these various provisions confirms that the basic day does not serve as a standard method of pay when an employee is entitled to take any form of personal leave with pay. On this basis, it cannot be said that the parties intended for the basic day to apply as the method of calculating the rate of pay for personal leave.

[68] The Board inquired as to whether the method agreed to by the parties for bereavement leave could be considered a method of calculating the regular rate of wages for the purpose of section 17(b) of the *Regulations*. As indicated above, bereavement leave is one of the types of leave listed in section 17, and, in the Board's view, the parties' agreement on the method of compensation for such leave could potentially apply to the other types of leave referred to in that section.

[69] The employer maintained that the basic day is the method that is universally accepted by the parties as a general method of compensation for different types of scenarios where an employee

misses a tour of duty. It argues that the basic day meets the requirements of section 17(b) of the *Regulations* and should apply to determine pay for the purpose of personal leave. In final argument, the employer asserts that, should the Board not be persuaded that the basic day is a method agreed to by the parties for the purpose of section 17(b) of the *Regulations*, it would be appropriate for the Board to consider the method of calculation agreed to by the parties for the purpose of bereavement leave.

[70] The TCRC is of the view that the bereavement leave provisions cannot be applied for the purpose of personal leave as this is not a method agreed to by the parties for the purpose of personal leave. In its view, section 17(b) requires that the parties agree on what constitutes a regular rate of wages specifically for personal leave and does not allow one of the parties to rely on another provision in the collective agreement that is unrelated to personal leave.

[71] Similarly, the Head takes the position that section 17(b) of the *Regulations* requires a method of calculation that is specific to personal leave. In addition, in this case, the Head argues that section 168 of the *Code* is not met since the amount calculated pursuant to the method applicable to bereavement leave would be less than the amount calculated based on the 20-day average pursuant to section 17(a) of the *Regulations*.

[72] Having carefully reviewed and considered the applicable collective agreement and the arguments of the parties, the Board finds that there is no method agreed to by the parties for the purpose of section 17(b) of the *Regulations*.

[73] As explained above, there is no requirement to have a provision in the collective agreement that specifically establishes a method of compensation for the purpose of personal leave. Bereavement leave is comparable to personal leave. It is leave that relates to personal or family circumstances and that can be taken in unforeseen and unpredictable situations and on very short notice. This leave is established at section 210 of the *Code*, and an employee is entitled to pay for the first three days of bereavement leave. When an employee is paid on a basis other than time, section 17 of the *Regulations* applies to determine a regular rate of wages for the purpose of compensating an employee for the leave.

[74] Given the similarities in the purpose of and the statutory provisions regarding personal leave and bereavement leave, it could be reasonable to find that parties who have agreed on a method of calculating the rate of wages for one type of leave would intend for that method to apply to similar types of leave.

[75] The Board carefully considered the decision in *CNR* issued by the Divisional Court of the Ontario Superior Court of Justice. It is of note that the Court and the arbitrator who wrote the original decision did not address this issue as the focus of the case was on the basic day. Neither of them had been asked to consider other provisions of the collective agreement or other methods that the parties had negotiated, nor did they inquire into these issues. The Court was satisfied that the arbitrator's decision was reasonable when she had concluded that the basic day was not a method of calculating the regular rate of wages for the purpose of personal leave:

> [32] The Arbitrator's interpretation of "regular rate of wages" is fully consistent with the purpose of s. 206.6 (2) of the *Labour Code*. That purpose is to ensure that employees who must miss work because of personal reasons do not suffer a wage loss. The legislative intent underlying s. 206.6 (2) therefore is to ensure that federally regulated workers, such as the grievor, have access to fair leave in such circumstances and will receive fair compensation.

[76] In the present case, the parties have agreed on a method of calculating wages for the purpose of bereavement leave. They agree that an employee on bereavement leave will be paid the amount they would have earned had they not missed their tour of duty. In effect, the result is that the employee does not lose the compensation they would have expected to receive had they not taken leave.

[77] However, the evidence also shows that the collective agreement contains various methods, paid or unpaid, that apply to different types of leave. There is no consistency on any method of calculating wages for the purpose of leave. There is no indication that the parties intended for the agreed-to method for bereavement leave to apply to similar types of leave that could be considered analogous for the purpose of section 17 of the *Regulations*. Nor is there any indication that they contemplated this possibility. Given the circumstances of this case, the Board is not prepared to infer that the method applicable to bereavement leave is applicable to the personal leave mandated by section 206.6 of the *Code*.

[78] On this basis, the Board is not persuaded that the parties have agreed on a method of calculating wages for the purpose of section 17(b) of the *Regulations*. The employer has not met its onus of demonstrating that the LAO erred when she concluded that section 17(a) of the *Regulations* applied in this case.

[79] Although this is sufficient to dispose of the appeal, the Board wishes to make the following observations regarding the Head's argument relating to section 168 of the *Code.*

[80] As the evidence shows, the amount of wages paid based on the method agreed to by the parties for bereavement leave will vary depending on the missed assignment. That is the reality of the fluctuating compensation for employees who work on a basis other than time. As indicated above, based on this method, Mr. Arthur would have earned less for the day of personal leave on January 24, 2021, than the 20-day average. On another day, his tour may have earned more. For example, based on the record, if Mr. Arthur had taken leave on January 3, 2021, his lost tour of duty would have earned him $982.54. If he had taken leave on January 14, 2021, his lost tour of duty would have earned him $744.55.

[81] The Head argues that the parties cannot rely on this method as it results in an amount that is inferior to the benefit the employee would have received using the 20-day average pursuant to section 17(a) of the *Regulations*. The Head submits that section 168 of the *Code* provides that the greater benefit must apply. Section 168(1) of the *Code* provides as follows:

> **168 (1)** This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

[82] The difficulty with the approach suggested by the Head is two-fold. First, it may be that in some cases, the 20-day average will be less than the amount the particular employee would have earned for the missed tour of duty. As with the daily earnings, the 20-day average will also fluctuate constantly. Second, the approach suggested by the Head would mean that when the parties have agreed to a method (such as the one they agreed to for bereavement leave in this case), they would still be required to compare every day of leave to the 20-day average to determine whether the method provides better compensation for each day of leave.

[83] In the Board's view, that would render section 17(b) of the *Regulations* meaningless and would lead to an absurd result. The legislation specifically recognizes the parties' ability to negotiate and agree on a method for the purpose of calculating payment when the hours of work differ from day to day and payment is made on a basis other than time. It recognizes that there is no standard rate of pay and that the daily earnings may fluctuate from day to day.

[84] Section 168 of the *Code* ensures that parties cannot contract out of the minimum rights and benefits granted by Part III of the *Code*. It provides that the *Code* and the *Regulations* apply despite the fact that a contract is in effect between the parties. The specific provision at play in this case is section 17 of the *Regulations*.

[85] There is no dispute that section 17 of the *Regulations* applies in this case. It provides for a method of calculation; it does not provide a specific right to the greater amount between the two methods at sections 17(a) and (b). There is no requirement to compare the two methods to determine which one leads to a better payment for each instance of leave.

[86] Section 17 of the *Regulations* cannot be interpreted to mean that for every single day of leave, there must be a comparison between the 20-day average and the method agreed to by the parties, and that an employee will be paid the highest amount in every case. If the Governor in Council had wanted this result, they could easily have provided for the greater amount to apply.

[87] Where parties turn their minds to the issue and agree on a method that compensates an employee fairly and best represents what that employee would have earned considering their workplace reality, this will meet the requirements of section 17(b) of the *Regulations* and the objectives of the *Code.* The whole purpose of section 17(b) is to recognize that the parties to a collective agreement may have turned their minds to the fluctuations in pay and may have addressed this issue by providing for a method that will bring certainty and ensure an employee does not suffer a wage loss when taking personal leave.

[88] However, the question in the present appeal is whether the employer met its burden of demonstrating an error in the LAO's payment order. For the reasons expressed above, the Board has concluded that the LAO did not err when she determined that the parties had not agreed to a method of calculating the regular rate of wages for the purpose of section 17 of the *Regulations*.

V. Calculation of the Amount

[89] The LAO found that the employee was entitled to $603.43 for the day of personal leave. This amount was later revised by the Head as the Head considered that amounts related to held-away pay should be excluded from the calculations.

[90] The written submissions on file are sufficient to deal with some of the issues raised by the parties.

[91] The employer argues that held-away pay should not be included in the calculations. It submits that arbitral jurisprudence in the railway industry has consistently distinguished these payments from wages and time claims. In support of this contention, it cites the award issued by Arbitrator Michel G. Picher in *Canadian National Railway Company and United Transportation Union Ex Parte*, CROA Case No. 3408, April 20, 2004.

[92] The union takes the position that held-away pay should be included as part of the calculations since an employee receives this pay for performing work that kept them away from their home terminal. The union argues that this type of payment is comparable to statutory holiday payments, which are included in the calculations and in the definition of “wages,” even though an employee is not performing duties during that time.

[93] Further, the union submits that the right to personal leave with pay was intended to guarantee an employee’s total earnings during the period of leave. Section 17(a) of the *Regulations* is clear in that only overtime payments are excluded. Other payments that normally consist of an employee’s earnings should be included.

[94] Article 8 of the applicable collective agreement provides for a payment when an employee is held at a terminal other than their home terminal for longer than 10 or 11 hours (depending on the location) without being called for duty. The Head relied on the words “without being called for duty” to conclude that the payment had not been made in exchange for work performed and should therefore be excluded from the calculations.

[95] Section 17(a) of the *Regulations* provides that the regular rate of wages is the average of an employee’s daily earnings, exclusive of overtime hours, for the 20 days that employee worked

immediately preceding the first day of leave. The expression “daily earnings” is not defined in the *Regulations*. However, the FCA has interpreted the term broadly to include many forms of remuneration received for a service or work (see *Cité de la Santé de Laval* v. *Canada (Minister of National Revenue)*, 2004 FCA 119) and to include benefits received for having performed work (see *Canada (Attorney General)* v. *Roch*, 2003 FCA 356).

[96] In the Board’s view, the payment for being held away is related to work performed that required an employee to be away from the home terminal for an extended period. The Board agrees with the union’s contention that if an employee had not performed work for the employer, they would not have been required to be away from their home terminal for that period. Whether an employee is actively on duty is not the determinative factor. It clearly is not a factor to whether statutory holiday pay is included in the calculation. There is no exclusion from the calculation other than payment related to overtime. There is no basis to exclude held-away pay simply because the employee is not on active duty for a period of time. Accordingly, the held-away pay is to be included in the calculation of earnings for the purpose of section 17(a) of the *Regulations*.

[97] The employer also raised a similar argument with respect to penalty payments. However, it did not identify any specific payments that should be excluded. The Board also indicated at the hearing that it would deal with specific calculations separately if required.

[98] Accordingly, the Board remits the matter to the parties to implement this decision with respect to Mr. Arthur and other complainants whose matters are held in abeyance pending this decision. The Board will remain seized of this matter to deal with any dispute over the calculations.

Ginette Brazeau
Chairperson