

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE *LABOUR RELATIONS ACT, 1995*

BETWEEN:

BEATRICE FOODS INC., ST. GEORGE DIVISION

Employer

- and -

**UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 175**

Union

AND IN THE MATTER OF a grievance by Robert Wentzell

ARBITRATOR: Shari Novick

APPEARANCES:

For the Union: Georgina Watts

For the Employer: Chris Eames

A hearing into this matter was held in Brantford, Ontario on November 16, 2001

AWARD

Background facts

This grievance arises out of a request for vacation time by Robert Wenzell (“the grievor”), around the Christmas and New Year’s holidays in late 2000. The dispute revolves around the parties’ differing interpretations of the effect of certain clauses in their collective agreement relating to paid holidays.

Neither the Union nor the Employer called any witnesses. Both parties filed various documents. These documents and the parties’ submissions set out the following relevant facts:

The grievor works as a dairy operator in the Employer’s plant located in Mitchell, Ontario. He works the night shift, beginning at 11 p.m., five nights per week. His initial request to take a vacation from December 24 to December 29 inclusive was not granted by the Employer. I was advised that given the perishable nature of the products handled by the Employer, employees are discouraged from taking additional time off around paid holidays.

The grievor was subsequently advised in early December that his vacation request had been approved. He was at home sick during this time and therefore the standard vacation request form, indicating the start date of the vacation and the day the employee was scheduled to return to work, was not completed. The parties agreed that the grievor was informed by his supervisor during this telephone conversation that he would be required to return to work for the “Tuesday shift” on January 2, which in fact commenced at 11 p.m. on Monday, January 1.

The grievor took his approved days off and returned to work at the start of the night shift on January 1, as instructed.

Article 21 of the parties' collective agreement addresses payment for statutory holidays and related issues, the relevant part of which provides:

ARTICLE 21 - PAID HOLIDAYS

21.01 The Employer agrees to pay each regular full time employee who has completed his probationary period and who has worked at least ten (10) days or eighty (80) hours during the four (4) weeks immediately preceding the Paid Holiday, one (1) day's pay based on the employee's regular scheduled daily hours, at the employee's regular rate for each of the said Paid Holidays subject to the following conditions:

.....

- (e) Where the Paid Holiday occurs in the period in which an employee is on his scheduled vacation or on his scheduled day off, the employee shall receive a compensatory day off with pay at a mutually convenient time or he shall be paid one day's pay at his regular rate of pay, in addition to his scheduled vacation pay or regular pay period provided he works his last full scheduled work day before and after his scheduled vacation or scheduled vacation or scheduled day off.

.....

21.03 All Paid Holidays are to be observed between Monday to Friday inclusive. In the event that the paid holiday has to be changed from the calendar day upon which it falls, the change shall be discussed with the chief steward at least one (1) week prior to the scheduled holiday or its lieu date.

The Union submitted that Article 20.08 of the agreement is also applicable to this situation. It falls under the "Vacation" clause in agreement and provides as follows:

20.08 If an employee is requested to return to work from vacation, he shall receive either an alternate day off work with pay or double time (2) for each day worked.

The Employer generally pays vacation pay to employees in advance of them taking their vacation. In accordance with this practice, the grievor was issued a separate cheque for the equivalent of three days pay a few days prior to going off on vacation. It appears that the payroll clerk who issued the cheque presumed that as December 25 and 26 were statutory holidays for which all

employees were paid, the grievor did not intend to take them as vacation days. She accordingly issued a cheque for the equivalent of three days of salary.

The grievor subsequently advised that as he had requested five days of vacation, he was entitled to receive five days of vacation pay. The company obliged by issuing a second vacation pay cheque for the equivalent of two additional days of pay.

In summary, the grievor asked for and received five vacation days. Because two statutory holidays fell within those five days, he was entitled to and did receive an additional two days pay. The narrow issue in dispute between the parties is whether he is also entitled to an extra two days off, or the equivalent in pay, under the collective agreement.

Union's position

The Union contended that the grievor's request for five vacation days during a week that includes two statutory holidays designated as "paid holidays" under the parties' collective agreement should entitle him to seven days off with pay.

Counsel stated that as the grievor was entitled to seven days off, and taking into account the manner in which the holidays fell, he should not have been required to return to work until the start of the night shift on July 4. She explained that as December 31 fell on a Sunday and the agreement provides that paid holidays that fall on a weekend are to be observed on a weekday, the grievor would normally not have been required to return to work until 11 p.m. on January 2. However, when the two additional days he accrued from the prior week's entitlement are taken into account, the grievor would not be required to return to work for two further days.

The Union contended that the fact that the grievor was told to return to work prior to January 4 constitutes a request to return to work from vacation, and triggers the application of Article 20.08. Counsel noted that the provision entitles him to be paid double time for the night shifts he worked commencing on January 2 and 3.

Finally, counsel submitted that both common sense and the wording of other clauses in the agreement supported the Union's view that when employees are entitled to extra days off as a result of paid holidays, those days should be taken immediately following the vacation days.

Employer's position

The Employer submitted that it had made all the payments that it was required to make to the grievor under the relevant provisions of the collective agreement.

The Employer's representative disputed the Union's contention that employees who are entitled to additional vacation days as a result of an overlap between their scheduled vacation and paid holidays are automatically entitled to add those days on to their approved vacation days without further discussion.

He pointed out that Article 21.01(e) refers to a compensatory day off being provided at "a mutually convenient time", and contended that that required an explicit agreement by the parties as to when that extra day would be taken. He submitted that in cases such as here, where no such discussion had taken place, the Employer was obliged to provide the second option listed, which was to pay the employee one additional day's pay. He submitted that it was not disputed by the Union that this had occurred, and that the Employer bore no further liability.

The Employer stated that there was no clear language in the parties' agreement to support the Union's contention that any extra days that the grievor was entitled to take would be added on to the end of his approved vacation. He suggested that as the Employer had approved a vacation for Mr. Wentzell from December 24 to December 29, it would have been beyond the realm of anyone's expectation that he would not return until January 4, without any further discussion. Given that the last day off requested by the grievor was December 29, the Employer's representative argued that his supervisor's request that he return for the night shift commencing late on January 1 should not be construed as a request for him to return early from vacation. He contended that Article 20.08 did not apply, and that no further monies or days off were owing to the grievor.

Decision

Article 21 is a fairly detailed provision, setting out the terms negotiated by the parties relating to statutory holidays. Aside from specifying the eleven days to be observed as Paid Holidays, it sets out who is entitled to and who is excluded from receiving payment for these days, the rate of pay for those who are asked to work on a holiday, that those designated days falling on a weekend are to be observed between Monday and Friday and other related details. In a sense, it is a complete code addressing all issues that could be expected to arise in relation to these Holidays.

Article 21.01(e) addresses the question of how an employee is to be compensated when a paid holiday falls during an employee's scheduled vacation. This clearly applies here, as both Christmas and Boxing Day are designated as paid holidays under the agreement and fell within the grievor's scheduled vacation time. The provision, reproduced above, provides for one of two options - either the employee receives a compensatory day off with pay to be taken at a mutually convenient time, or, an extra day's pay. Given that two such holidays fell within the period in question, Mr. Wentzell would either be entitled to two extra days off with pay or to the equivalent of two additional day's pay.

The question of which of these two options was engaged in the circumstances set out above defines the parties' dispute. The Employer claims that when the grievor received the extra two days pay he requested, its obligations under this clause were satisfied. The essence of the Union's position is that Article 21.01(e) permits Mr. Wentzell to extend his vacation by two days, namely January 3 and 4 (January 2 being the substituted day off for December 31, a designated paid holiday that fell on a Sunday). It contends that his supervisor's request that he return to work on January 2 constitutes a request to return to work from vacation two days early, which triggers Article 20.08 entitling him to double time for each of the two days worked.

I find that the Union's position is simply not supported by the language of the agreement. Article 21.01(e) provides that a compensatory day off with pay may be taken at "a mutually convenient time". Neither party suggested that there had been any discussion about when the grievor could take the additional two days off that he was potentially entitled to. In the absence of any such

discussion, and considering that the Employer does not favour dairy employees adding vacation days on to paid holidays in view of the perishable product they handle, I am not prepared to presume that the Employer expected firstly that the grievor had opted for the first of the two options contained in the clause, and secondly that the additional two days would be taken immediately after his five approved vacation days, resulting in a total of nine days off.

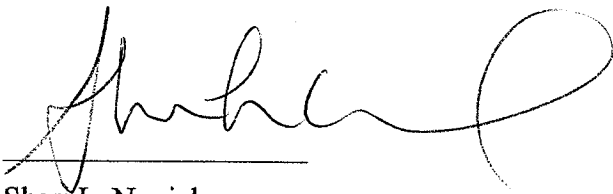
Also, having closely reviewed the language of the agreement, I see no support for the Union's contention that it reveals an intention by the parties that employees add vacation days that they become entitled to due to the overlap of their scheduled vacation time and paid holidays on to their approved vacation in a consecutive manner.

The circumstances that give rise to this grievance are unusual. Had the grievor not been at home when his vacation request was ultimately approved, he likely would have completed the usual request form specifying both the start and end date of his vacation time. It would then have been clear how many vacation days he intended to take, and exactly when he would be returning. If he had specified that he preferred two compensatory days off with pay in accordance with Article 21.01(e), the parties would likely have discussed a mutually convenient time for him to take those days. In the absence of this discussion, and an agreement between the parties regarding when he would be entitled to take his compensatory days off, I am left to conclude that the second option under Article 21.01(e) was engaged.

Accordingly, the grievor is entitled to an additional two days pay under the second part of Article 21.01(e). The Union agrees that he has received this money. As he is not entitled to two additional days off, he would have been required to return to work on January 2, at the start of the night shift. The parties agree that he actually returned one day early, and was paid the triple time to which he was entitled for working on a Paid Holiday under Article 21.01(f). I find that he was not, however, requested to return to work prior to the end of his vacation, and accordingly, Article 20.08 does not apply.

For the above reasons, the grievance is dismissed.

DATED AT TORONTO, ONTARIO THIS 14TH DAY OF DECEMBER, 2001.

A handwritten signature in black ink, appearing to read 'Shari L. Novick', written over a horizontal line.

Shari L. Novick
Arbitrator