Cited as:

Plymouth Productions and International Alliance of Theatrical Stage Employees Moving Pictures Technicians, Artists and Allied Crafts of United States and Canada, Local 21.2 (Holiday Pay Grievance)

IN THE MATTER OF a Grievance Arbitration
Holiday Pay During Production Shutdown
Between
Plymouth Productions Honey I Shrunk the Kids TV Series, referred to as the "employer", and
International Alliance of Theatrical Stage Employees Moving Picture Technicians, Artists and Allied Crafts of United States and Canada, Local 212, referred to as the "union" or "IATSE"

[1998] A.G.A.A. No. 82

File No. Alta. G.A.A. 98-100

Alberta
Grievance Arbitration

A. Ponak, Arbitrator

Heard: Calgary, Alberta, August 24, 1998
Award: October 4, 1998

(20 pp.)

The union grieved that employees should have received holiday pay for Christmas, Boxing Day, and New Year's during a temporary production shutdown between December 20, 1997 and January 4, 1998. The arbitrator denied the grievance. It was concluded that under the collective agreement temporary production shutdowns were to be without compensation, a concept broad enough to cover holiday pay. The Alberta Employment Standards code was reviewed. It was concluded that because the holidays were not work days for the employees (due to the production shutdown), the Code did not require holiday pay.

Appearances:

Michael Ford, for the employer.
Murray McGown, for the union.

ISSUE

1 The issue in this case is payment for three statutory holidays, Christmas, Boxing Day, and New Year's, which fell during a two week shutdown in the production of the television series "Honey I Shrunk the Kids". The Union took the position that a number of employees should have received pay for the three holidays, either pursuant to the material contract language or under the Alberta Employment Standards Code (referred to as "Code"). The Employer argued that under the collective agreement, the shutdown, which it viewed as a common industry occurrence known as an "hiatus", was to be without compensation; accordingly, there was no entitlement to holiday pay. The Employer also disagreed with the Union's interpretation of the Code, submitting that the legislation did not require holiday payment in the circumstances of the case.

2 The following EXHIBITS were presented at the outset and during the course of the hearing:

1. Collective agreement between Union and Employer, 1997 Edition.
2. Memo to "Cast and Crew" from Eda Lishman, December 8, 1997.
3. Letter to Grace Gilroy from Deborah Braun, February 10, 1998.
4. Letter to Deborah Braun from Jonathan Hackett, May 6, 1997.
5. Letter to Jon Hackett from Deborah Braun, May 30, 1997.
6. Memo to Chooch Paglaro from Deborah Braun, October 16, 1997.
7. Letter to Deborah Braun from Eda Lishman, December 11, 1997.
8. Memo to "All Crew" from "Accounting", December 5, 1997.
9. Memo to Eda Lishman from Deborah Braun, February 11, 1998.
10. Memo to Lynn Elston from Deborah Braun, January 6, 1998.
11. Letter to Deborah Braun from Grace Gilroy with attachments, January 9, 1998.
12. Memo to Union Executive Committee from Deborah Braun, January 10, 1998.
13. Letter to Grace Gilroy from Deborah Braun, January 21, 1998.
14. Letter to Deborah Braun from Grace Gilroy, January 29, 1998.
15. Memo to Grace Gilroy from Jonathan Hackett, January 29, 1998.
16. Biography of Grace Gilroy.
17. Deal Memo, "Honey I Shrunk the Kids".

EVIDENCE

3 The Union called no witnesses, presenting its case through documents tendered as Exhibits. The Employer called one witness, Ms. Grace Gilroy, Associate Producer, Plymouth Productions.

4 Little of the material evidence is in dispute. Documents and the testimony showed that Plymouth Productions is responsible for producing the television series "Honey I Shrunk the Kids" for the Disney channel. The series is being filmed in Calgary and the production crew is represented by IATSE Local 212 and covered by their collective agreement (Ex. 1). Ms. Deborah Braun is the Business Representative of Local 212. For purposes of the arbitration, a distinction was made between two types of employees: regular or weekly employees working Monday to Friday; and daily employees working on an occasional basis. The issue in dispute pertained to weekly employees and those daily employees who worked December 17, 18, & 19, the three days prior to the Christmas shutdown.

5 According to the evidence, the year's production run of 22 episodes of the series began in June 1997 and was completed in March 1998. (It resumed again in June 1998 for a second year of the series.) Ms. Gilroy testified that production temporarily halted twice; once in early November and again between December 20, 1997 and January 4, 1998 inclusive. Production took place before these shutdowns and continued after them. Ms. Gilroy characterized each shutdown as an "hiatus" which she defined as a period of time where there is no work. She stated that hiatus periods are common in the industry and are used for script writing, among other things. According to Ms. Gilroy, an hiatus is defined in the collective agreement and is without pay.

6 The November shutdown was for November 4, 5, and 6 and was for the purpose of script preparation. In return for production continuing on November 11, Remembrance Day, a statutory holiday, November 7 was added to the shutdown period. This allowed work to continue on November 11 without interruption. Eligible employees were therefore paid for November 7 (Ex. 6).

7 Ms. Gilroy described the next shutdown, over the Christmas/New Year period, as very common in the industry. Correspondence between the Union and Employer, as well as internal communications within each party, showed that the question of holiday pay during the Christmas shutdown was raised before and after the shutdown.

8 On May 6, 1997, the Employer proposed a number of changes to the collective agreement including that "any Public Holidays that fall during the hiatus period will not be paid" (Ex. 4). A few weeks later, the Employer agreed to a number of modifications but the agreement did not include its earlier proposal on holiday pay during an hiatus period. The document signed by the Employer and Union specified that "the terms and conditions of the 1997 IATSE Local 212 collective agreement will apply with the following modifications" and made no mention of holiday pay during an hiatus (Ex. 5). Other correspondence between the Union and Employer, not provided among the exhibits, apparently contained a rejection by the Union of the Employer May 6 proposals on holiday pay during an hiatus. The Union referred to this correspondence in a January 21, 1998

letter to the Employer in which the Union stated that it had responded "unfavourably regarding the hiatus request" on May 15, 1997 (Ex. 13).

9 On December 8, 1997, the Employer issued a memo to "All Cast and Crew" entitled "Christmas Hiatus" which stated that "effective Saturday December 20, 1997 there will be a temporary layoff through to Sunday January 4, 1998" (Ex. 2). On December 11, 1997 a letter was sent by the Employer to the Union requesting a waiver from the Union for several matters including "consideration to temporarily lay off all Honey Production employees" from December 20 to January 4 without "issuing any pink slips nor redoing any deal memos. Our expectations are that our crew as it stands will return en force" (Ex. 7).

The Union responded the next day as follows (Ex. 9):

> Under the terms of the collective agreement, this break in productions does not constitute a "layoff'. While the Company is not obliged to follow the regular layoff procedures we appreciate the fact that the crew was given more than adequate notice of the impending hiatus.
>
> Article Four(j) states that both the employer and employee do retain an employment relationship for breaks in production of less than 30 days. Since the Company retains recall rights, the affected personnel are still considered employees of the company. As such they retain their employment rights to holiday pay during this temporary break.

The Union requested pay for Christmas Day, Boxing Day and New Year's Day.

10 Following the temporary shutdown, the Union clarified its position in a further letter to the Employer on January 6, 1998. It was reiterated that "all Employees who were temporarily layed off during the Christmas Hiatus are eligible for general holiday pay, as per the contract" (Ex. 10). In addition, Section 26(1) of the Alberta Employment Standards Code was cited as requiring holiday payment. The Employer responded on January 9 by asking the Union to reconsider its position, stating that it is the norm "that a 'Hiatus Period' is a period of unpaid work and unpaid holidays" (Ex. 11). Clauses from other collective agreements were attached as illustrative of the industry norms in this regard.

11 The correspondence did not result in a change of position by either side, however, and as a result the current grievance was filed and proceeded to arbitration.

COLLECTIVE AGREEMENT

ARTICLE FOUR - UNION PERSONNEL AND CREW CALLS

In the event of a hiatus (a break or gap in a continuing production or series of productions without compensation) which exceeds thirty (30) days, Employees shall be free to seek employment on other production and each party shall be deemed to have provided sufficient notice to the other of the termination of employment.

ARTICLE 12 - HOLIDAYS VACATION PAY

(a) The following days are recognized as Paid Statutory or proclaimed holidays: New Year's Day .. Christmas Day .. Boxing Day ..

(d) Weekly Employees who do not work on a Statutory Holiday shall receive one day's additional pay calculated as one-fifth (1/5) of the weekly salary of the employee concerned.

(f) Daily Employees who do NOT work on a Statutory Holiday but did work three consecutive workdays prior to the Holiday, shall be paid for the Holiday the equivalent of eight hours at the basic hourly rate.

ALBERTA EMPLOYMENT STANDARDS CODE

26(1) An employee is eligible for general holiday pay if the employee has worked for the same employer for 30 work days or more in the 12 months preceding the general holiday.

(2) An employee is not entitled to general holiday pay if the employee

(a) does not work on a general holiday when required or scheduled to. do so, or

(b) is absent from employment without the consent of the employer on the employee's last regular work day preceding, or the employee's first regular day following, a general holiday.

27(1) If an employee works on an irregular schedule and there is doubt about whether a general holiday is on a day that would normally have been a work day for the employee, the doubt is to be resolved in accordance with subsection (2).

(2) If in at least 5 of the 9 weeks preceding the work week in which the general holiday occurs the employee worked on the same day of the week as the day on which the general holiday falls, the general holiday is to be considered a day that would normally have been a work day for the employee.

28

If

(a) a general holiday falls on a day that would normally have been a work day for the employee, and
(b) an employee does not work on a general holiday,

the employer must pay the employee general holiday pay of an amount that is at least the average daily wage of the employee.

UNION ARGUMENT

12 The Union started from the premise that the shutdown of production over the Christmas period constituted a layoff in the traditional sense of what a layoff means. Employees were advised that work would cease for a specific period and then resume following the layoff period. The Union pointed to the language used by the Employer in its letter of December 11, 1997 (Ex. 7) where it used the term "to temporarily lay off all ..... employees" to describe its intentions for the Christmas period and also referenced pink slips and new deal memos (individual employment contracts permitted under the collective agreement) The Union argued that it was important to view the Christmas shutdown as a layoff because layoffs were not governed by the collective agreement but fell under the Alberta Employment Standards Code.

13 Under section 26(1) of the Code, according to the Union, employees are entitled to holiday pay if they have worked for 30 days or more for their Employer in the past 12 months. Furthermore, the holidays fell on what would have been normal work days as defined by section 27. Therefore, the Union asserted, employees were entitled to general holiday pay pursuant to section 28. Any conflict between the collective agreement and the Code must be resolved in favour of the Code in the Union's submission.

14 With respect to the collective agreement, the Union noted that holiday pay was governed by Art. 12. Under that provision, the Union argued, Christmas, Boxing Day, and New Year's are recognized as paid statutory holidays (Art. 12(a), emphasis added). The only prerequisite, in the Union's view, was to be found in Art. 12(f) which required a daily employee to have worked three consecutive workdays prior to the holiday in order to qualify for the paid holiday. The Union argued that there were no other preconditions; therefore all daily employees who had worked the last three workdays prior to the shutdown and all weekly employees were entitled to holiday pay.

15 The Union drew attention to the Employer's attempt to negotiate different contract language as evidence that the Employer understood that the collective agreement, as presently written, provided for holiday pay during temporary production shutdowns. In the Union's view, while the Employer's proposals would have accomplished its objective of no holiday pay during shutdowns, the current

contract language did not. The Union contrasted the current collective agreement to sample contracts provided by the Employer in one of its letters to the Union (Ex. 11). In the Union's view, those contracts and the current one were very different, reinforcing the Union's position.

16 Finally, the Union submitted that Art. 4(j) should be interpreted with some caution as it was clearly directed to matters that had nothing to do with holiday pay. It addressed termination of employment obligations in the event of a production shutdown in excess of thirty days. Accordingly, the Union argued that the clause should not be applied to deprive employees of rights set out elsewhere in the contract.

17 In support of its position the Union provided two cases: Re Carling O'Keefe Breweries and Western Union of Brewery Beverage Winery and Distillery Workers, Local 287 (1989) Unreported (Peterson); and Re Reliable Printing Ltd. and Graphic Communications International Union, Local 255-C (1994) 39 L.A.C. (411) 212 (McFetridge).

EMPLOYER ARGUMENT

18 The Employer took the position that the temporary production shutdown during the Christmas period was properly characterized as an hiatus. The Employer argued that a careful reading of the correspondence between the Union and Employer, notwithstanding some inconsistent use of terminology, showed that both parties viewed the shutdown as an hiatus rather than a lay off. Furthermore, according to the Employer, the evidence of Ms. Gilroy, an industry expert, indicated that the shutdown was an hiatus and that hiatus periods were meant to be without compensation. The Employer drew attention to other contract clauses in the industry which, in its view, typified the non-compensation element inherent to hiatus periods.

19 The Employer then referred to the current collective agreement between the parties, arguing that Art. 4(j) decided the issue in dispute. According to the Employer, this provision defined an hiatus as "a break or gap in a continuing production or series of productions without compensation" (emphasis added). It was submitted that "compensation" is a broad term that encompassed statutory holidays and that the specific wording in Art. 4(j) overrode the general holiday provisions in Art. 12. The Employer argued that its interpretation was consistent with the scheme of the collective agreement which, in its view, contained "a pay as you go" or "if you don't work you don't get paid" approach. Articles 10(e), 11, and 9 were cited as examples of this approach.

20 Alternatively, the Employer contended that even if its interpretation of Art. 4(j) was not accepted, daily employees still did not qualify for statutory holiday pay because they had not worked three consecutive days prior to the holidays. Art. 12(f) was cited in this regard. It was the Employer's position that December 22, 23, and 24 were the required days for Christmas and Boxing Day and December 29, 30, and 31 were the necessary three workdays for New Year's Day entitlement. Thus, even if weekly workers were eligible for the holiday pay under the collective agreement, daily workers were not.

21 Finally, the Employer submitted that the Code did not settle the issue in favour of the Union. It was accepted that the Code applied to the Employer and that it set minimum standards. However, when sections 26, 27, and 28 were read together, according to the Employer's submission, it showed that employees were entitled to holiday pay only if the holiday fell on a regular work day (or what would have been a regular work day for employees with irregular schedules). Because December 20 to January 4 were not regular work days, owing to the hiatus, employees were not entitled to holiday pay.

22 In support of its position, the Employer provided the following authorities: Canadian Labour Arbitration (3d); Re Bums Food Ltd. and Canadian Food and Allied Workers, Local P-234 (1973) 4 L.A.C. (2d) 4 (Norman); Re Enterprise Fawcett Inc. and Glass Workers International Union, Local 140B (1990) 12 L.A.C. (4th) 123 (Outhouse); Re Clarke Lithographing Ltd. and Graphic Arts International Union, Local 12-L (1977) 14 L.A.C. (2d) 414 (Brunner); Re C.W Carry Ltd. and United Steelworkers of America, Local 5575 (1994) 42 L.A.C. (4th) 237 (Power); Re Caravelle Foods and Almagamated Meat Cutters and Butcher Workmen of North America (1980) 26 L.A.C. (2d) 1 (O'Shea); Re Dorr-Oliver Canada Ltd. and United Steelworkers, Local 4697 (1986) 23 L.A.C. (3d) 92 (Weatherill); and Re T.C.F. of Canada Ltd. and Textile Workers' Union of America, Local 1332 (1972) L.A.C (1st) 382 (Adell).

DECISION

23 The starting point for my analysis is the collective agreement. Article 12 governs paid statutory holidays of which Christmas Day, Boxing Day, and New Year's Day[1] are three. For weekly employees the only prerequisite for entitlement appears to be employment status as there are no preconditions set out in Article 12 or elsewhere in the contract. Art. 12(d) simply sates that "weekly employees who do not work on a statutory holiday shall receive one day's additional pay ...".

24 The situation for dairy employees is different as Art. 12(f) does establish a precondition to holiday payment, namely that they "work[ed] three consecutive workdays prior to the holiday ..... Mirroring debate among arbitrators (see, Re Bums Food and Re Clarke Lithographing) the Union and Employer parted ways as to whether daily employees who worked December 17, 18, and 19, the last three days of work before the production shutdown, had met the prerequisite. The Employer argued that the three workdays before Christmas and Boxing Day were December 22, 23, and 24 and that the three workdays before New Year's was December 29, 30, and 31; because daily employees did not work on those days they did not qualify for holiday pay. The Union focussed on the word "workdays", submitting that the December 17, 18, and 19 were the last three workdays, as opposed to days, prior to the production shutdown and daily employees working those days qualified for holiday pay.

25 Examining the respective arguments and the extensive case law on this issue, I agree with the Union's position. Interpretation of clauses such as this one are based on the precise contract

language used and arbitrators have closely construed such language (Re Carling O'Keefe and Re C.W. Carry). It is my conclusion that use of the term workdays in Art. 12(f) is determinative and can only refer to December 17, 18, 19, the last three workdays prior to the production shutdown. Thus, it is my conclusion that daily employees who were at work on those dates satisfied the preconditions for holiday pay on Christmas Day, Boxing Day, and New Year's Day. If there were no other language in the contract outside of Article 12 that bore on the issue of holiday pay, the Union's grievance would succeed. However, Art. 40) provides a definition of an hiatus, defining it as "a break or gap in a continuing production or series of productions without compensation'(emphasis added). The Union and Employer differed as to whether the temporary production shutdown from December 20 to January 4 (inclusive) was an hiatus or a layoff but I am satisfied, despite some inconsistent use of terminology in correspondence, that the parties both saw the shutdown as an hiatus. Certainly Ms. Gilroy testified forcefully to that effect and Ms. Braun, the Union's Business Representative, repeatedly referred to the shutdown in correspondence (though other terms are used as well) as an hiatus (Exs. 3, 6, 9, & 12). The definition also precisely describes what in fact occurred between December 20 and January 4 - namely, there was a temporary break in a continuing production. In industry parlance, and according to the collective agreement, this constitutes an hiatus.

26 Does the definition in Art. 4(j) of an hiatus as a period "without compensation" mean that during the Christmas hiatus employees were not eligible for the holiday pay they would otherwise have received under Article 12? The definition of hiatus is very clear and, despite that fact that it is found in a provision about employment termination following a certain length of hiatus, states plainly that an hiatus period is without compensation. Holiday pay is a form of compensation in my opinion and I conclude therefore that employees are not entitled to holiday pay during an hiatus. I agree with the Employer that Art. 4(j) is clear on its face and overrides Art. 12. The period December 20 - January 4, inclusive, was an hiatus and therefore without compensation. Employees who would otherwise have been entitled to holiday pay under Art. 12 lost their entitlement to such pay because of the hiatus period and the provisions of the contract that state that hiatus periods are without compensation.

27 In reaching this conclusion I have considered the evidence of the Employer's unsuccessful attempts to negotiate specific contract language stating that holidays shall be unpaid during hiatus periods. Whatever the intention of such proposals, whether for further clarity or uncertainty whether Art. 40) was sufficient to accomplish the same objectives, my role as arbitrator is to interpret the existing contract. It is my conclusion that the existing contract language means that employees do not receive holiday pay during an hiatus. The fact that the Employer attempted and failed to negotiate more explicit language to that effect does not change my interpretation of the contract as currently worded.

28 Finally, I turn my attention to the implications of the Alberta Employment Standard Code for the current dispute. The Union argued that even if the contract did not support its position, the Code did entitle employees to holiday pay during the period in question. The Union submitted that the

Code supersedes the collective agreement where the two are inconsistent, a position with which the Employer did not quarrel. Can it be said that the employees were entitled to holiday pay under Division 5 of the Code (sections 25 - 31)? In their arguments, Union and Employer counsel provided their interpretation of the relevant provisions of the Code, arriving at opposite conclusions. I requested case law on these provisions and was advised that none existed. Without the guidance of previous decisions I turn now to my interpretation of the application of the Code to the current dispute.

29 Section 25 specifies 9 general holidays; the list includes New Year's Day and Christmas Day but does not include Boxing Day. However, Boxing Day has been designated as a paid holiday under the collective agreement and would therefore be considered a general holiday under sec. 25(k).

30 Section 26 sets out eligibility for general holiday pay, specifying that to be eligible an employee must have worked for the employer "for 30 days or more in the 12 months preceding the general holiday" (sec. 26(1)). Employees may lose their eligibility if they are refuse to work on a general holiday when asked to do so (sec. 26(2)(a)) or are absent from work without consent just prior to or following the general holiday. Under section 26, most of the employees covered by the grievance would appear to be eligible for general holiday pay, having worked the requisite thirty days in the preceding 12 months[2] and not falling under the restrictions in section 26(2).

31 Section 27 helps define what is meant by "a day that normally would have been a work day for the employee" for employees on irregular schedules. Under section 27(2), if an employee has worked on the day that the general holiday falls in five out of the preceding nine weeks, "the general holiday is to be considered a day that would normally have been a work day for the employee". While it was not argued that the employees in this case were on an irregular work schedule, section 27 is important in my view because it suggests that holiday pay entitlement is dependent on whether the holiday falls on a normal day of work.

32 Section 28 reinforces the concept of making holiday pay dependent on whether it falls on a "normal work day". It specifies that employees must receive their average daily wage if they do not work on a general holiday "that would normally have been a work day for the employee" (sec. 28(a)). It is this provision, the Union argued, that entities the eligible daily and weekly employees to holiday pay.

33 Sections 29 and 30 deal with what occurs in the event an employee works on a general holiday. The current proceedings focus on what is to occur when an employee does not work on a general holiday and sections 29 and 30 have little relevance for our purposes. The same can be said for sections 32 and 33 which consider the calculation of holiday pay in incentive pay and overtime situations.

34 Finally, section 31 addresses the situation of a general holiday occurring during an employee's annual vacation. It specifies that an employee on vacation is entitled to the holiday if the holiday is

one to which "the employee would have been entitled had the employee not been on annual vacation" (sec. 31(1)). It is noteworthy in my view, that there is no parallel language in the Code that covers the situation, like the current one, in which the employee is temporarily off work because of a work shutdown.

35 Based on the above, I draw the following conclusions relevant to this case. First, most, if not all of the employees covered by the current grievance are eligible for general holiday pay, having worked for the Employer for 30 or more days in the 12 months previous to the Christmas shutdown (sec. 26(1)).

36 Second, eligibility and entitlement to general holiday are not one and the same. An employee may be eligible for holiday pay, having worked 30 days in the previous 12 months, but still not be entitled to such pay. Based on my reading of sections 27 and 28, I conclude that actual entitlement to holiday pay depends on whether the holiday falls on a normal work day for the employee. For example, if Wednesday July 1 is a normal work day for an employee, the employee is entitled to general holiday pay for Canada Day (assuming the basic eligibility requirements are met under sec. 26); if, on the other hand, Wednesday July 1 was not a normal work day for an employee, he would not be entitled to general holiday pay.

37 Third, I conclude that there is no provision for general holiday pay for employees who are temporarily laid off or subject to some other type of production shutdown which results in the general holiday not being a normal work day for them. This remains true, in my view, even if except for the temporary shutdown, the general holiday falls on what would otherwise have been a normal work day. My reading of the Code leads me to conclude that employees who would not have been at work on the general holiday are not entitled to general holiday pay. The two explicit exceptions are employees on an irregular schedule, provision for which is made in section 27, and employees on their annual vacation, which is governed by section 31. There is nothing in the Code (and I reviewed other sections as well) that entities employees subject to a temporary shutdown to holiday pay if the temporary shutdown means that the general holiday is no longer a normal work day for those employees.

38 In the current situation, this is exactly what occurred. Except for the Christmas hiatus, Christmas Day, Boxing Day, and New Year's Day would have fallen on what likely would have been normal work days for most employees. The Christmas hiatus, by shutting down production for two weeks beginning December 20 meant that these three holidays ceased to fall on a normal work day for employees. As a result, it is my conclusion that the Code does not require the payment of general holiday pay.

39 To summarize, I have concluded that the Christmas shutdown constituted an "hiatus" in production and that hiatus periods are without compensation according to Art. 40) of the collective agreement. Thus, holiday pay that would otherwise be payable under Art. 12 of the agreement is not applicable. Further, I have concluded that holiday pay is not payable under the provisions of the

Alberta Employment Standards Code because, as a result of the temporary shutdown, Christmas Day, Boxing Day, and New Year's Day were no longer normal work days for the employees covered by the grievance. As such they were not entitled to general holiday pay under the Code.

AWARD

40 For all the above reasons, the grievance is denied.

qp/s/ala

1 It is noted that Art. 12(a) includes New Year's 1997 but not New Year's Day 1998. However, the latter is clearly established as a statutory holiday under the Alberta Employment Standards Code and the collective agreement must be read to include New Year's Day 1998.

2 The parties agreed that should section 26(1) become an issue they could determine which employees qualified.