CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 496

Heard at Montreal, Tuesday, February 11, 1975

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DlSPUTE:

Claim on behalf of Mr. W. H. Mayo, Halifax, N.S., for a total of twelve hours, May 25, 1974.

JOINT STATEMENT OF ISSUE:

On Saturday, May 25, one Assistant Pier Foreman was required for a tour of duty at Halifax Wharf, beginning at 18OO. Mr. W. H. Mayo was the senior qualified employee for the work in question, but because Mr. Mayo had already worked 47-1/2 hours that week, the Company called another employee instead, who was Junior to Mr. Mayo. In respect of this incident, Mr. Mayo submitted a claim for five hours at time and one-half and seven hours at double time.

The Company declined the claim on the basis that the maximum-hours-of-work provisions of Part III of the Canada Labour Code precluded the employment of Mr. Mayo. The Brotherhood has progressed a grievance contending that the Company's failure to call Mr. Mayo constituted a violation of Article 3.7 of Agreement 5.62, and that the claim should be paid.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(SGD.). J. A. PELLETIER	(SGD.) S. T. COOKE
NATIONAL VICE-PRESIDENT	ASSISTANT VICE-PRESIDENT LABOUR RELATIONS

There appeared on behalf of the Company:

A. D. Andrew	System Labour Relations Officer, C.N.R., Montreal
D. J. Matthews	Asst. Labour Relations Officer, C.N.R., Moncton
R. R. Goodwin	Manager Wharf Operations, C.N.R., Halifax

And on behalf of the Brotherhood.

L. K. Abbott	Regional Vice President, C.B.R.T., Moncton
J. A. Pelletier -	National Vice-President, C.B.R.T., Montreal

AWARD OF THE ARBITRATOR

Article 3.7 of the collective agreement provides as follows:

> "3.7 In filling unassigned positions, employees will be required to report to a central calling point designated by the Company and shall be called in seniority order starting from the top of the list."

Article 3.8 of the agreement should be set out as well:

> "3.8 When a qualified senior unassigned employee is available for service at the central calling point and a Junior unassigned employee is used in his stead, the senior unassigned employee who should have been called shall be paid four hours at the prevailing rate of pay."

It would appear to be common ground in this case that the grievor would, (having regard only to the terms of the collective agreement), have been entitled to be called for the work in question. In fact, a Junior employee was used. If the grievor, as a qualified senior unassigned employee was indeed available for service at the point in question, then, since a junior unassigned employee was used in his stead, it would seem that the grievance should succeed at least to the extent that the grievor would be entitled to the four hours' pay at the prevailing rate which is provided for by Article 3.8 in such circumstances (no basis for the time claimed in the joint statement was made out).

The question at issue, however, is not whether the grievor would be entitled to the assignment under Article 3.7 (it appears that he would), but rather is one of the effect of the Canada Labour Code in the circumstances and of my jurisdiction to consider it. The Canada Labour Code, which is binding on the parties, deals, inter alia, with the matter of hours of work. To put the matter very briefly, its effect, for the purposes of the instant case, is to prevent an employee such as the grievor from working more than forty-eight hours in any one week. The Company did not, at the material times hold any permit which would permit any exception to this at the location in question. At the time of the assignment, the grievor had worked forty-seven and one-half hours during a week, within the meaning of the Code.

Having regard to the provisions of the Canada Labour Code: I find that it was not open to the employer to assign the grievor, nor to the grievor to accept an assignment to work more than one additional half-hour during the week in question. (The Code refers to "the total hours that may be worked by any employee".) The Code is quite clearly, a "statute which is involved in the issues" which have been brought before me here, and it is my obligation to construe it: McLeod v. Egan ("re Galt Metal lndustries"), (1974 46 D.L.R. (3rd) 150 (S.C.C.).

I find, then, that by reason of the provisions of the Code (as it then applied with respect to the operation in question), the grievor was in fact not available to perform the assignment which the Company required to be performed at that time. It is not, I think, sufficient that he might have been available for some relatively

small portion (one-half hour) of that time; he was not in fact available for the assignment as such.

In the "Galt Metal" case referred to above (McLeod v Egan) it was held that the statute (there the Ontario Employment Standards Act), by prescribing maximum hours of work, had superseded the right of the employer to require an employee to work beyond such hours. Under the statute in question here, the Canada Labour Code, it must be said that the Act has superseded the right of the employer to require work beyond such hours and as well, as I have noted above, the right of the employee (which the grievor would have under the collective agreement) to insist, in circumstances such as these, to work beyond those hours.

For the foregoing reasons it is my conclusion that while the grievor was a "senior qualified unassigned employee", he was not, by the effect of the statute, "available for service" in respect o1 the assignment then required. The Company could not assign him to the work, and he could not accept such an assignment. He is not, therefore, entitled to the relief which would otherwise be his under the collective agreement. Accordingly, the grievance must be dismissed.

J. F. W. WEATHERILL
ARBITRATOR