CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 748

HEARD AT MONTREAL, WEDNESDAY, MARCH 11,1980

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Claim of Car Control Clerk L.S. Mann for punitive rate of pay for hours worked on May 6 and May 7, 1979.

JOINT STATEMENT OF ISSUE:

Mr. Mann was working a temporary vacancy May 1 to May 5 with assigned days off May 6 and May 7. Mr. Mann was called and instructed to protect his regular assignment May 6 and May 7 and was compensated at the pro-rata rate of pay.

The Brotherhood claims that May 6 and May 7 were the rest days of the temporary vacancy and Mr. Mann should have been compensated at the punitive rate of pay for these two days in accordance with Article 5.8.

The Company has declined the claim.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(SGD.) J. D. HUNTER	(SGD.) S. T. COOKE
NATIONAL VICE PRESIDENT	ASSISTANT VICE-PRESIDENT - INDUSTRIAL RELATIONS & L.O.

There appeared on behalf of the Company:

J. A. Fellows - System Labour Relations Officer, CNR, Montreal
R. Groome - Labour Relations Assistant, CNR, Montreal
E. E. Sahli - Carload Manager, CNR, Windsor, Ont.

And on behalf of the Brotherhood:

F. C. Johnston - Regional Vice President, CBRT, Toronto

AWARD OF THE ARBITRATOR

Article 5.8 of the collective agreement is as follows:

"Employees required to work on their assigned rest days shall be paid at one and one-half times their hourly rate with a minimum of three hours for which three hours' service may be required,

except:

a) as otherwise provided in Article 6;
b) where such work is performed by an employee moving from one assignment to another in the application of seniority or as locally arranged;
c) where such work is performed by an employee moving to or from an extra, laid-off or preferential list".

This is not a case for which Article 6 makes any special provision: the general requirement that employees be assigned two rest days in each seven-day period applies.

The grievor was a regular crew clerk-baggageman assigned to the 0001 - 0800 shift, with Wednesday and Thursday as rest days. He claimed a temporary vacancy in a day shift assignment as crew clerk, caused by the vacation of the incumbent of that position. The temporary vacancy was for the 0800 - 1600 shift, with Sundays and Mondays as rest days. This temporary vacancy was successfully claimed by the grievor, pursuant to Article 12.7 of the collective agreement.

The grievor began work on the temporary vacancy on Wednesday, May 2, and he worked as well on Thursday, May 3 and Friday, May 4. The Wednesday and the Thursday would have been the grievor's rest days on his regular assignment. Since he appears to have worked on those days because he moved from one assignment to another in the exercise of seniority, the grievor's case came within the exception set out in Article 5.8 (b) to the general provisions of Article 5.8 calling for a premium rate for work on rest days. On Saturday, May 6, the grievor was off work because he had by then worked six straight days in the "Code Work Week", and the provision of Part III of the Canada Labour Code applied.

As noted above, Sunday and Monday were the rest days of the assignment the grievor occupied as a temporary vacancy. The regular employee had five days' vacation at that time. The Company concludes, it seems, that the vacancy ended on the fifth working day, that is, on Saturday, May 5. The grievor, therefore (not having exercised any right under Article 12.14, by which he might perhaps have gone to some other assignment), was instructed to return to his regular 0001 - 0800 assignment commencing Sunday, May 6. He worked that assignment and had Wednesday May 9 and Thursday May 10 as rest days.

It is the Union's contention that Sunday, May 6 and Monday, May 7, were rest days for the grievor, and that for working on those days he ought to have been paid at time and one-half, pursuant to Article 5.8. When the grievor returned to his regular shift after filling the temporary vacancy, I do not consider that that move was "in the application of seniority" as it had been when he went to the temporary vacancy. In any event the Union's contention is that the grievor was really still entitled to the benefit of the schedule of the temporary vacancy, whose rest days were Sunday and Monday. In this, the Union relies in part on Case No. 623, where it was said that "It seems clear to me that on being temporarily transferred, the grievor became subject to the schedule of the assignment to which he was transferred". That seems to me to be, in general, correct. The

particular question to be decided in the instant case, however, is, when did the temporary transfer come to an end?

The parties have, on at least two occasions, been involved in arbitrations in which this question was in issue. In the Recchi case, Judge Reville, in an award made in 1964, held that the grievor was governed by the terms of his new assignment, including its rest days, and not by those of a previous assignment. In fact it would appear, the grievor did have rest days, as contemplated by the collective agreement, in each of the seven-day periods there considered. Judge Reville considered that there was nothing in the collective agreement to prevent the Company from making temporary assignments in such a manner that the employees concerned would never be given any rest days at all. While that might (subject now to the provisions of the Canada Labour Code) be a possibility as far as the actual assignment of work is concerned, it does not, I think deal with the question of payment for work performed on rest days, and appears, with respect, to overlook the implications of Article 5.8 (b). Where an employee moves from one assignment to another in the application of seniority, there is an exception to the general rule that he be paid at premium rates for work on a rest day. Thus, the agreement, in my view, contemplates that where employees lose a rest day because of a change in assignment, they are to be paid at premium rates - except, to put it roughly, where that change was at the employee's own request.

The other arbitration case was the Rice case, decided by Mr. Goldenberg in 1967. In that case an employee whose position was abolished sought to exercise seniority rights in respect of the last two days in which the assignment was in existence, those days being his regular rest days. That case involved precisely the question in issue here: when did the assignment end? The Company's position, which the arbitrator upheld, was that "assigned rest days are as much a part of the assignment as hours, rates of pay, etc., and, that the determining date for exercising seniority is the date of abolition of the position". The view that the rest days are part of the assignment is consistent with that later stated in Case No. 623. In the instant case, if the Company's position were correct, it could avoid the necessity for rest days simply by its choice of the "date of abolition of the position". This, as has been indicated, would be contrary to Article 5.8, which contemplates the right of an employee to premium payment where he is required to work on a rest day, even (with the exceptions noted) where this requirement arises by reason of a change in assignment.

In the circumstances of the instant case, it is my view that the temporary vacancy which the grievor filled was one which expired not on Saturday, May 5, but rather on Monday, May 7, the second rest day to which an employee holding that assignment would have been entitled. May 6 and 7 were therefore still "rest days" for the grievor within the meaning of Article 5.8, and he was entitled to payment in accordance with the general provisions of that article.

For the foregoing reasons, the grievance is allowed.

J. F. W. WEATHERILL
ARBITRATOR