CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 165

Heard at Montreal, Tuesday, September 9th, 1969

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

DISPUTE:

Claim that the Company violated Articles 14(1)(b) and 13(1) when it declined to pay Mr. M. Crotty the difference between straight time and time and one-half for time worked on February 1 and 8, 1969, and for straight time on February 10, 1969.

JOINT STATEMENT OF ISSUE:

On January 29, 1969 Mr Michael Crotty, who was classified as a regularly assigned Labourer with Saturday and Sunday as rest days, was temporarily assigned to the position of Issuer to replace Mr. J. Ershler who was ill. The assigned rest days of Mr. Ershler's position were Sunday and Monday.

Mr. Crotty worked on the position of Issuer from January 29 to February 10, 1969 inclusive with rest days on February 2, 3, 9 and 10, and then resumed his regular position of Labourer on February 11, 1969 when Mr. Ershler reported back to work. Mr. Crotty was paid for this work at the straight time rate for an Issuer.

The Brotherhood claims violation of Articles 14(1)(b) and 13(1) and has requested that Mr. Crotty be paid the difference between straight time and time and one-half for time worked on February 1 and 8, 1969 and straight time for February 10, 1969.

The Company declined payment of the claim.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) E. E. THOMS	(SGD.) K. L. CRUMP
GENERAL CHAIRMAN	ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

B. Noble	– Senior Agreements Analyst, Montreal
P. A. McDiarmid	– Labour Relations Assistant, Montreal
P. J. Mackey	– Superintendent, Stores Dept., St. John's
J. J. Groves	– Employee Relations Officer, Purchasing & Stores, Montreal

And on behalf of the Brotherhood:

E. E. Thoms	– General Chairman, Freshwater P.B.
W.C.Y. McGregor	– International Vice-President, Montreal
M. J. Walsh	– Local Chairman, St. John's

AWARD OF THE ARBITRATOR

The grievor, as a labourer, worked from Monday to Friday, with Saturday and Sunday as rest days. He worked in that classification on Monday, January 27, and Tuesday, January 28. On Wednesday, January 29, he was assigned to work as an issuer, and his schedule was charged to that of Tuesday to Saturday, with Sunday and Monday as rest days This change of schedule was simply the adoption by the grievor of the schedule of the previous incumbent, who was ill. In any event, the change would seem to have met the requirement of forty-eight hours' notice, set out in article 14.1 (b).

The grievor worked on Saturday, February 1, pursuant to his new schedule. This work, however, was performed after the regularly assigned hours of his former schedule, and fell on what has been his assigned rest day. Having regard to his former schedule, then, the work should have been paid for at overtime rates, pursuant to article 13.1, and also pursuant to article 13.8.

Sunday, February 2, was a rest day for the grievor under either schedule, and no claim is made for that day. Monday, February 3 would have been a working day for him under his old schedule, but it was a rest day under the new. The grievor did not work on that day, and makes no claim for it. He then worked from Tuesday, February 4, until Saturday, February 8. He claims payment at overtime rates for the Saturday, since it was his rest day pursuant to his old schedule. He was on rest days again on Sunday, February 9, and Monday, February 10. On his return to work on February 11, he was assigned his regular job as labourer and returned to his former schedule. The grievor had no notice of this change of schedule. He claims payment in respect of February 10.

The grievor was paid at the issuer's rate for the work he performed as an issuer. He did not, however, receive any payments for overtime, although he did, in the first week, work more than forty hours, and more than five eight-hour days.

Article 14.1 provides as follows;

> **14.1** Unless otherwise excepted herein, a work week of forty hours consisting of five days of eight hours each is established with two consecutive rest days in each seven subject to the following modifications:
>
> **(a)** The work week may be staggered in accordance with the Company's operational requirements.
>
> **(b)** Days of service may, on forty-eight hours' notice, be reassigned when necessary.

The clear intent of the provision is to provide, whenever possible for two consecutive rest days in seven. Saturday, February 1 had been a scheduled rest day for the grievor. While the schedule might be changed on forty-eight hours' notice, pursuant to article 14.1(b), it must be noted that this is only a provision relating to the assignment of rest days. It is not a provision relating to overtime. Indeed, it would defeat the whole purpose of the article if sub-section (b) were to be used so as to permit continuous change of schedule, under which employees would work seven days a week, with no rest days and no overtime.

While an employee's assignment may be changed, so that an employee may be required to work according to a new schedule, this is not to say that an employee's actual work, which would be considered in determining overtime, is to be disregarded. It should be clear that on Saturday, February 1, the grievor was in fact working overtime, and that he should be paid therefore at time and one-half.

No claim is made in respect of Monday, February 3. While this would have been a working day for the grievor under his old schedule, it was a rest day according to the schedule in effect at the time. This schedule was in effect throughout that week, and by that schedule Saturday, February 8, was a working day. It was no longer the grievor's rest day. In fact, it was the fifth working day for the grievor that week. I can therefore see no reason to support any claim for extra payment on that day, and the grievor's claim in respect of February 8 is dismissed.

The grievor was off work on Monday, February 10 as his rest day pursuant to his new schedule. This was the schedule in effect for him at the time, and there would appear to be no more justification for a claim in respect of February 10, than there would have been for a claim in respect of February 3. It was argued by the union that because the grievor was not allowed to protect his assignment as a labourer on February 10, he is entitled to compensation. The answer to this, however, is that the grievor was at that time on a different assignment, and was on his proper rest day. He returned to his assignment as a labourer on the following day.

The company relied in part on the provisions of article 13.8(b) which sets out, as an exception to the requirement of overtime payment for work on rest days, cases where an exception is "mutually agreed". In the circumstances of this case it is not necessary to dwell at length on the sort of agreement which is contemplated, or whether it may be made by an individual employee. In the case of an excepting clause of this sort, it would be up to the company to show that there had been, not simply a willingness on the part of the employee to undertake an assignment, but an express surrender of his right to overtime payment for it. It is sufficient to say that that has not been shown in this case. This aspect of the matter relates only to the claim in respect of Saturday, February 1.

In the result, it is my award that the grievor was entitled to the overtime rate for February 1, and that he be paid the difference between straight time and time and one-half at the issuer's rate for that day. The other claims are dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR