CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 453

Heard at Montreal, Tuesday, June 11th, 1974

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

The Union claims the Company exceeded the time limits as provided for in Rule 11.7 by not rendering a decision within 28 calendar days of receipt of appeal. The Union also claims the Company violated Rule 3.8 when the Company did not call Work Equipment Operator R. Leroux for overtime work on Saturday, September 29, 1973 at Montreal Yard.

JOINT STATEMENT OF ISSUE:

(a) The Union by letter dated December 18, 1973 progressed the claim at Step III of the grievance procedure to Mr. L.M. Poitevin, Assistant Vice-President, St. Lawrence Region, such letter being received and date stamped as of December 27, 1973. The Company by registered letter dated January 22, 1974 denied the claim. The Union claimed a violation of Rule 11.7 which reads as follows.

> A decision at each step of the grievance procedure shall be rendered in writing within 20 calendar days of receipt of appeal, except under Step IV which will be 60 calendar days.

(b) Mr. Leroux is a Group II Machine Operator appointed as such in July 1973. His regular rest days are Saturday and Sunday and he resides in Coteau a distance of approximately 35 miles. At approximately 0430 hours on Saturday, September 29th, a main water pipe broke at the Montreal Yard and the services of a qualified Machine Operator were required. Group 11 Machine Operator R. Brunet, residing in Cote St. Paul, a distance of approximately 5 miles was called to perform the work. The Union claimed a violation of Rule 3.8 which reads as follows:

> Where work is required by the Company to be performed on a day which is not part of any assignment, it may be performed by an available laid off or unassigned employee who will otherwise not have forty hours of work that week. in all other cases by the regular employee.

FOR THE EMPLOYEES: FOR THE COMPANY:

(SGD.) P. A. LEGROS (SGD.) G. H. BLOOMFIELD

SYSTEM FEDERATION GENERAL CHAIRMAN ASSISTANT Vice-President, LABOUR RELATIONS

There appeared on behalf of the Company.

W. H. Barton – System Labour Relations Officer, Montreal

A. D. Andrew – System Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

P. A. Legros – System Federation General Chairman, Ottawa

F. Larose – Local Chairman, Montreal

R. Gaudreau – General Chairman, Montreal

AWARD OF THE ARBITRATOR

This grievance raises two distinct issues, and I shall deal with them in turn.

(a) It will be noted that Article 11.7 provides that the 28-day time period for answering grievances runs from the receipt of the appeal by the Company. It was said that there was no proof of the actual date of receipt of the appeal which was dated December 18, 1973, but there is in fact some material to support the statement that it was received on December 27 of that year, and in any event this case must proceed on that basis as that is what is stated in the Joint Statement of Issue. The Company's reply was made on January 22, which was within the time limit. Accordingly the Union's case cannot succeed on this ground.

It may be noted that under most collective agreements the failure of a party responding to a grievance to make a reply within the time limits provided would not result in forfeiture of the grievance, but would simply mean that the party processing the grievance would be free to proceed to the next step. In this collective agreement, however, the failure to reply within the time stated is, in wage-claim cases (and the instant case is such), expressly made tantamount to the granting of the claim. Thus, if the Company had not replied within the time limit, it would have been liable for the claim, and the grievance would have been allowed on that ground alone. As the previous paragraph indicates, however, the time for reply in this particular case did not begin to run until December 27, and the reply was made in time.

(b) Article 3.8 forms part of Article 3, which deals with rest days. Article 3.8 deals with employees' entitlement to be called to perform work on such days. In the instant case the Company called the employee whom it considered to be the most readily available, qualified employee and who was, as well, the senior employee in the classification. The question is whether this was in compliance with the requirements of the collective agreement.

The Company contended that the breaking of the main waterpipe constituted an "emergency" and that in the circumstances it was justified in taking the course it did. While it may be that the situation might be described as an emergency (I make no finding as to that) it has not been shown that the nature of the work to be done was such as to make it critical that the nearest employee be called. In any event, the collective agreement does not provide an exception to Article 3.b for emergency situations or indeed on any grounds. In the instant case there was work required to be performed on a day which was not part of any assignment. There was no question raised as to any laid off or unassigned employees. In this case, therefore, the requirement of the collective agreement was that the work be assigned to "the regular employee" and the question is whether the grievor was that man.

There is no question in this case (as there has been in other cases) that the work to be done fell within the scope of the classification of Group II Machine Operator. Both the grievor and the man who performed the work were within that classification. Employees in that classification may, as the Company emphasized, be required to operate "any machine in his group or in any lower group on which qualified", pursuant to an agreement relating to job classifications. An employee's classification is not related merely to the operation of a particular machine. Nevertheless, it appears to be the case that employees are in fact regularly assigned to particular machines, and the grievor was in fact considered to be "the regular employee" in the operation of the machine used here.

In some cases, Article 3.8 might require assignment of work within a particular class of employees, and a question might arise, as in **Case No. 252** for example, as to the selection of the appropriate employee within that class. In the instant case, however, it appears, from the material before me, that the grievor was in fact considered as being the regular employee on the machine in question, and that if it had not been for the emergency which was said to have arisen, he would have been called to do the work. The emergency, if there was one, would not, as I have said, justify a departure from usual application of the provisions of the collective agreement.

Whatever may be the rights of the Company with respect to the assignment of employees within a classification, those rights are limited in some cases by the rights of employees to be called in on rest days. The extent of these rights will depend on the particular circumstances. In the instant case, for the above reasons, it is my conclusion that the grievor was "the regular employee" within the meaning of Article 3.8 and that he was entitled to be called for the work. The material before me does not suggest that this would have involved any very significant delay.

For the foregoing reasons, the grievance is allowed.

(signed) J. F. W. WEATHERILL

ARBITRATOR