CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 503

Heard at Montreal, Tuesday, April 8th, 1975

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The Brotherhood alleges that the Company violated Article 12.6 when it allowed Mr. G. Rainville to work his regular assignment and commence a temporary vacancy on the same day. The Company denies this allegation.

JOINT STATEMENT OF ISSUE:

Mr. G. Rainville was employed as a Senior Transportation Clerk on the 00:01-08:00 hour shift at Capreol, Ontario. Mr. N. Rainville was employed as a Car Control Clerk on the 00:01-08:00 hour shift at Capreol. Mr. G. Rainville was the successful applicant for a temporary vacancy of Car Control Clerk on the 16:00-24:00 hour shift also at Capreol, scheduled to commence on March 13, 1974. Mr. G. Rainville worked his regular assignment of Senior Transportation Clerk (00:01-08:00 hours) on March 13, 1974 and then picked up and worked his new assignment of Car Control Clerk (16:00-24:00 hours) on the same date.

The Brotherhood alleges that in allowing Mr. G. Rainville to work two assignments on the same date March 13, 1974, the Company violated the provisions of Article 12.6, claiming that Mr. N. Rainville was available to work as a Car Control Clerk on the 16:00-24:00 hour shift on March 13, 1974 and that he should have been called to work the temporary vacancy on that date at punitive rates of pay. The Company contends that its actions were not in violation of Article 12.0 as alleged. This grievance has been carried through the various steps of the grievance procedure and ultimately to arbitration.

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:

P. A. McDiarmid – System Labour Relations Officer, Montreal
C. F. Wilson – Employee Relations Officer, Capreol

And on behalf of the Brotherhood:

J. D. Hunter – Regional Vice President, Toronto

AWARD OF THE ARBITRATOR

This grievance is, in essence, a claim by Mr. N. Rainville that he should have been called to work as Car Control Clerk on the 16:00-24:00 shift at Capreol on March 13, 1974.

Mr. Rainville was a Car Control Clerk on the 00:01-08:00 shift. He was, it is said, first up on the overtime list. He was qualified and, from his point of view, was "available" for the work. The Company, however, assigned the work to the successful applicant for a temporary vacancy in such job. The Union contends that this assignment was in violation of Article 12.6. That Article provides as follows:

> **12.6** Temporary vacancies, newly-created positions and seasonal positions when known to be for 60 calendar days' duration or less, will not be bulletined. However, suitable advice notice will be posted, as required, at the station or terminal affected. Such position shall be awarded to the qualified senior employee on the Area who makes application therefor within five calendar days from the date notice is posted. Applications from regularly assigned employees will only be accepted when it is known the vacancy is for more than five working "days or when it involves an increase in rate of pay, or a change in shift, or rest day or days. When other qualified employees are available regularly assigned employees will not be allowed to commence work on a temporary vacancy and their regular assignment on the same day.

Now the successful applicant for the temporary vacancy (who was Mr. G. Rainville, the grievor's brother), was a regularly assigned employee who had worked his regular assignment, as Senior Transportation Clerk, on the 00:01 to 08:00 shift on the day in question. Since his work as Car Control Clerk on the temporary vacancy was due to changing shifts and to the application of seniority rules, it would seem that he would be paid as Car Control Clerk at hourly rates, even though it was his second shift that day. The question, however, is whether he was properly assigned to the work at all on that day. If "other qualified employees" were "available", then the assignment of Mr. G. Rainville was, by the last sentence of Article 12.6, improper.

Mr. N. Rainville was, as we have seen, another qualified employee. The Company contends that he was not "available" within the meaning of Article 12.6, because if he were assigned to the shift, he would be entitled to payment at overtime rates. It is the Company's position that to be "available" within the meaning of the last sentence of Article 12.6 means "to be without work on that date and to be a spare and relief employee available to work vacancies of this nature". This is, with respect, to put a considerable gloss on the term "available" which does have a well-understood ordinary meaning and is capable of being applied without difficulty. In **Case No. 496**, it was held that an employee was not "available for service" because he was prevented by the operation of the **Canada Labour Code** from working the overtime hours in question. It was common ground that, having regard only to the terms of the collective agreement, he would have been entitled to the work in question. He was, that is to say, ready and willing, and physically able to get to work and do the job. But because he could not perform the whole assignment without violating the law, he was "unavailable". No such constraint affected Mr. N. Rainville on the day in question. He too was ready, willing and, one assumes physically able to do the job. The Company takes the position, essentially, that he was unavailable because he would have had to be paid at overtime rates.

It appears that the practice at Capreol has been to assign "spare" or "relief" employees to such work, if any are available. No doubt such persons – laid-off employees were suggested as an example – would have a superior claim for the work in question. Nevertheless, in the absence of such claims, an employee such as N. Rainville – that is, an employee already working in the position in question – would appear to be entitled to overtime assignments if such are to be made. His availability for work is a distinct matter from that of the rate to which he would be entitled for doing it. In my view, the collective agreement is not ambiguous, and evidence of past practice should not be received in a matter such as this. In any event the evidence in this case is only as to the practice at Capreol whereas the collective agreement is national in its scope. Article 12.6 is not one of those which contemplate local arrangements, but is a provision of general application.

In my view, the apparent purpose of the last sentence of Article 12.6 is expressly to prevent the sort of assignment which was made in this case, whereby the payment of overtime is avoided by assigning an employee who would be subject to the change-of-shift exception set out in Article 5.3.

For the foregoing reasons, the grievance is allowed.

(signed) J. F. W. WEATHERILL
ARBITRATOR