

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 710

Heard at Montreal, Tuesday, June 12, 1979

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**CANADIAN BROTHERHOOD OF RAILWAY,  
TRANSPORT AND GENERAL WORKERS**

### **DISPUTE:**

Difference between Mr. F. Hackett's salary and the rate of pay of the position of Car Control Clerk when he was not permitted to assume the position for a period of ten (10) days.

### **JOINT STATEMENT OF ISSUE:**

On 5 October 1978, a vacancy of Car Control Clerk was advertised in the Belleville Carload Centre, in accordance with Article 12.6 of Agreement 5.1. Mr. F. Hackett, a Classified Labourer in the equipment Department submitted an application for the posted vacancy, and was the successful applicant, He also expressed the desire to fill the position pending occupancy by the successful applicant. Mr. Hackett was not allowed to fill the job immediately and for a period of ten (10) days, October 6 to 16 inclusive, the vacancy was filled by the next senior employee who was working in the Carload Centre. The Brotherhood claims that under Article 12.7 Mr. Hackett should have filled the position.

The Company declined this claim.

### **FOR THE EMPLOYEE:**

**(SGD.) J. D. HUNTER**  
NATIONAL VICE-PRESIDENT

### **FOR THE COMPANY:**

**(SGD.) S. T. COOKE**  
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

C. L. LaRoche – System Labour Relations Officer, Montreal  
C. F. Wilson – Employee Relations Officer, Belleville

And on behalf of the Brotherhood..

F. C. Johnston – Regional Vice-President, Don Mills

### **AWARD OF THE ARBITRATOR**

Article 12.7 of the collective agreement is as follows:

**12.7** Temporary vacancies of ten working days or less, and vacancies in other positions pending occupancy by the successful applicant may be filled by a qualified senior employee at the station or terminal affected, who desires the position, without the necessity of advice notice or bulletin. The employee, so assigned, will not be subject to displacement during such period. An employee filling a temporary vacancy pending occupancy by the successful applicant will not be subject to displacement during the first 30 days of occupancy.

In the instant case there was a vacancy in a position "pending occupancy by the successful applicant". Article 12.7, in its operative provisions, permits such a vacancy to be filled by "a qualified senior employee at the station or terminal affected, who desires the position". This particular type of temporary vacancy need not be the subject of an advice notice or a bulletin.

It is, in effect, the grievor's contention that as the senior qualified employee at the station or terminal affected (which it is acknowledged he was), he was entitled as of right to the temporary job if he desired it. It is coincidental that he himself was the successful applicant for the position whose occupancy (by him) was pending. The same question would arise had the grievor not applied under Article 12.6, but had merely sought the job pending its occupancy by someone else. Indeed, the same question would arise as well where the senior qualified employee at a station or terminal sought to be assigned to a temporary vacancy of ten working days or less. The issue is whether the collective agreement in Article 12.7, gives such an employee the right to such a job, if he desires it.

Article 12 of the collective agreement deals in considerable detail with the matter of the bulletining and filling of positions. Article 12.6 provides that certain vacancies, (including the one for which the grievor successfully applied here, and which was "pending occupancy" at the material times) are not to be bulletined, but are to be the subject of an "advice notice" at the station or terminal. Thus, a form of job posting is required even in cases of "temporary vacancies".

Article 12.7, however, deals with the special cases of temporary vacancies of ten working days or less, and "vacancies in other positions pending occupancy by the successful applicant". These cases, which would otherwise come within Article 12.6 and be the subject of that form of posting are, as is often the case, made an exception to the rule. Article 12.7 provides that such positions "may be filled" by "a qualified senior employee ... who desires the position". It is the Union's position that this gives the qualified senior employee the right to insist on such a temporary assignment (and the article deals with assignments of particularly short duration), regardless of the inconvenience or disruption that might be caused the Company. I am unable to accept that contention. The general effect of Article 12.7, read in the context of Article 12 as a whole and particularly read together (as it must be) with Article 12.6 is precisely to spare the Company such inconvenience or disruption.

Article 12.7 speaks of the filling of temporary positions and of the assignment of employees to them. It gives certain protection to the employees so assigned, and it permits the assignment only of those who desire the position, but the option it creates (that of assignment without notice or bulletin) is one which the Company, not the employee, may exercise. The Company, in the particular conditions to which the article applies, may fill a position by selecting "a qualified senior employee". It is not restricted to the selection of "the" senior employee who may happen to desire the position.

This interpretation of Article 12.7 gives effect to what is I think its clear role as constituting an exception to Article 12.6. It is, moreover, consistent with Article 12.11, which provides that where there is no qualified applicant for a position the "junior qualified employee at the station or terminal "may be required to fill it". Under Article 12.7 a senior qualified employee is to be looked for, but may not be forced into a temporary vacancy he may not want. So too, under Article 12.11, where an employee must be required to fill a vacancy, it is the junior qualified employee who is subject to that. In Article 12.7 the reference is to "a" qualified senior employee, while in Article 12.11 it is to "the" junior qualified employee. The article has been carefully drafted and re-drafted over the years, and in my view the use of the indefinite article in one case and of the definite article in the other, is significant.

For the foregoing reasons, it is my conclusion that Article 12.7 does not permit a senior employee to claim, as of right, a temporary vacancy of ten days or less, or a vacancy in another position pending occupancy by the successful applicant. The Company has a discretion in such cases, although of course that discretion must be exercised within the limitations of the article.

Accordingly, the grievance is dismissed.

**(signed) J. F. W. WEATHERILL**  
**ARBITRATOR**