

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1307

Heard at Montreal, Tuesday, December 11, 1984

Concerning

VIA RAIL CANADA INC.

and

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

DISPUTE:

Claim for 8 hours' pay at overtime rate by Counter Sales Agent K. Perry, Regina.

JOINT STATEMENT OF ISSUE:

On February 9, 1984, a Counter Sales Agent at Regina was granted a four-day leave. The vacancy was to be filled under article 12.7 of collective agreement 1.

Because none of the personnel at Regina were available or indicated willingness in filling the four-day vacancy, it was assigned to Mr. R.A. Nelson whose regular assignment was at Moose Jaw.

The Brotherhood maintained that the Corporation violated article 12.7 by assigning an employee from outside the terminal (Regina) and request, as a result, that the senior employee at Regina, Mr. K. Perry, be compensated for eight hours at the punitive rate.

The Corporation declined the Brotherhood's contention.

FOR THE BROTHERHOOD:

(SGD.) TOM MCGRATH
NATIONAL VICE-PRESIDENT

FOR THE CORPORATION:

(SGD.) ANDRÉ GAGNÉ
DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

A. Leger – Manager, Labour Relations, Montreal.
W. R. Hohan – District Supervisor, Station Sales & Services, Saskatchewan.

And on behalf of the Brotherhood:

Wm. M. Matthew – Regional Vice-President, Winnipeg

AWARD OF THE ARBITRATOR

This is a claim by R.A. Nelson for payment at the overtime rate for the alleged violation article 5 of the collective agreement when the Company filled “a temporary vacancy” with an employee from outside the Regina terminal.

There is no dispute that this grievance was precipitated by an unanticipated request for four days’ vacation leave by the incumbent from her counter sales position at Regina, Saskatchewan. The parties are also agreed that the Company was obliged under article 12.7 to fill the temporary vacancy from the ranks of the employees at the Regina terminal. However, no eligible employee at that terminal was interested in filling that vacancy. Article 12.7 reads 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. When it is known that a temporary vacancy will occur, employees desiring the position may be required, as locally arranged, to make their intentions known some time prior to the starting of the vacancy.

The issue, squarely put, is whether after their refusal, the Company was obliged under article 12.7 of the collective agreement to offer the same employees at the Regina terminal the said work at the overtime rate of pay. Or, alternatively, could the Company, once the employees at the Regina terminal were approached, select an employee from the Moose Jaw terminal (or any other terminal) to fill the vacancy?

It is clear that article 12.7 was inserted into the collective agreement in order to enable the Company to bypass procedures that must be followed in filling permanent vacancies or vacancies of more than ninety (90) days duration (see **CROA 710**). In lieu thereof, the Company may select a replacement for a temporary vacancy (as in this case) from a senior employee located at the terminal or station in which the temporary vacancy arose.

The problem in this case, however, was that no employee from within the Regina terminal “desired” to fill the position. And, it is my view, that after the Employer canvassed all eligible employees at Regina with respect to their desire to fill the position and those efforts were not successful its obligation under article 12.7 became spent. Clearly, those employees were not available to assume the position and thereafter could not claim entitlement to the same position at the overtime rate of pay.

What the grievor is really claiming by making his request for overtime is that an eligible employee at the Regina terminal may be desirous of filling the vacancy provided he or she is paid at the punitive rate. And, failing that, the employee has no interest in exercising rights under article 12.7. In my view, the Trade Union, in supporting this claim, is attaching to article 12.7 a condition (i.e. payment of the overtime premium) that the clear language of the provision does not support. Needless to say, should an employee exhibit a desire to fill a temporary vacancy he or she assumes the position at the straight time rate of pay that attaches to the position.

In summary, once the Company made a sincere effort to select a replacement for the temporary vacancy from employees at the Regina terminal and no employee responded affirmatively to that overture the Company was then released from its obligations under article 12.7. It could then fill that vacancy by requesting other employees from outside the Regina terminal to perform the work.

For all the foregoing reasons the grievance is denied.

(signed) DAVID H. KATES
ARBITRATOR