

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 1523

Heard at Montreal, Tuesday, June 10, 1986

Concerning

### CANADIAN NATIONAL RAILWAY COMPANY

and

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

#### **DISPUTE:**

Grievance of Mr. T. McCrindle, Classified Labourer, Symington Yard at Winnipeg, forced to assume position of General Clerk.

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

On April 1 and 8, 1985, Mr. W. Bay, regular incumbent of the General Clerk position, booked off. Mr. McCrindle, who worked the same shift, was temporarily assigned to the General Clerk's position and paid the higher rate in accordance with article 21.1 while his regular position was blanked.

The Brotherhood contends that employees cannot be assigned to a position under article 21 which deals with "Relief Work and Preservation of Rates" and that the "Filling of Positions" can only be accomplished through article 12 and, failing that, through article 5 dealing with "Overtime".

The Company denies a violation of Agreement 5.1 and claims that Mr. T. McCrindle was properly assigned under article 21.1.

#### **FOR THE BROTHERHOOD:**

**(SGD.) TOM MCGRATH**  
NATIONAL VICE-PRESIDENT

#### **FOR THE COMPANY:**

**(SGD.) D. C. FRALEIGH**  
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS.

There appeared on behalf of the Company:

D. Lord – Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

A. Cerilli – Regional Vice-President, Winnipeg

#### **AWARD OF THE ARBITRATOR**

The Joint Statement of Issue indicated that on April 1 and 8, 1985, Mr. Bay, the incumbent in the General Clerk's position booked off. Mr. T. McCrindle, Classified Labourer, was assigned Mr. Bay's duties and responsibilities and was paid the higher rate of pay as provided under article 21.1 of the collective agreement for the period worked. Articles 21.1 and 21.2 read as follows:

21.1 An employee temporarily assigned for one hour or more, cumulative, in any one day, to a higher-rated position, shall receive the higher rate while occupying such position, due regard being had to apprentice or graded rates. An employee temporarily assigned to a lower-rated position shall not have his rate reduced.

21.2 A "temporary assignment" contemplates the fulfillment of the duties and responsibilities of the position during the time occupied. Assisting a higher rated employee due to a temporary increase in the volume of work does not constitute a temporary assignment.

Mr. McCrindle's complaint in this case, despite his being paid at the higher rated General Clerk's position, is that he should not have been required to fill the alleged "vacancy" created by Mr. Bay's temporary absence. In support thereof the Trade Union submitted that the Employer was obliged, initially, to have resorted to article 12.7 of the collective agreement. Article 12.7 reads in part;

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.

In the event that a qualified employee was not available for selection under article 12.7 the Trade Union then argued that the Company was obliged to fill the alleged "vacancy" through recourse to the overtime provisions (see article 5.1) and, failing that, to the spare employees on lay-off (see: articles 13.3 (b) and 13.5).

The parties are agreed that if the Employer chose to leave the alleged "vacancy" unoccupied (i.e. "blanked") then the Company would have been under no obligation to resort to article 12.7.

And, indeed, the Company has submitted that its rearrangement of the duties and responsibilities of Mr. McCrindle so as to encompass the duties of Mr. Bay simply constituted the type of "temporary assignment" that is contemplated under article 21.1 of the collective agreement. And, in that light, so long as the Employer paid the grievor at the higher rate of the General Clerk there was full compliance with the collective agreement. But of more significance, the Company argued that Mr. Bay's position was not filled but was left vacant by virtue of "the temporary assignment" of his duties to Mr. McCrindle.

As a result the issue to be decided is whether a "temporary vacancy" existed that required the Company to invoke, as the Trade Union argued, article 12.7 of the collective agreement.

This case may be resolved by recourse to the definition of "temporary vacancy" provided under article 1.4 of the collective agreement;

TEMPORARY VACANCY:

1.4 **A vacancy in a position caused by the regular assigned occupant being absent from duty** (including on vacation but excluding preretirement vacation) or temporarily assigned to other duties. (emphasis added)

In my view, Mr. Bay's "booking off" resulted in "the regular occupant (of the General Clerk's position) being absent from duty" and thereby constituted "a temporary vacancy" for purposes of article 12.7 of the collective agreement. Accordingly, irrespective of article 21.1 of the collective agreement, the Company was duty-bound to fill "the temporary vacancy" caused by Mr. Bay's absence by approaching the senior qualified employee who was available to occupy the position. In that sense, the Company violated the collective agreement by by-passing article 12.7.

Quite frankly, if article 1.4 of the collective agreement was not part of the collective agreement I would have accepted the Employer's submissions and would have characterized the assignment to Mr. McCrindle for the tour of duty in question as a "temporary assignment" for purposes of article 21.1. But because of the agreement's definition of what constitutes a "temporary vacancy" I am constrained to accept the Trade Union's argument that a "temporary assignment" presupposes a temporary assignment of duties at a higher rated position of one hour or more provided that the assigned employee retains his regular position.

Because Mr. McCrindle suffered no harm (but indeed secured a financial advantage) I will confine the remedy to a declaration that the Employer, in the circumstances, violated article 12.7 of the collective agreement.

**(signed) DAVID H. KATES**  
ARBITRATOR