CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 394

Heard at Montreal, Tuesday, February 13th, 1973

Concerning

BURLINGTON NORTHERN (MANITOBA) LTD.

and

UNITED TRANSPORTATION UNION (E)

EXPARTE

DISPUTE:

Omission to Bulletin Fireman/Helper's vacant position Trains 123 and 124.

EMPLOYEES' STATEMENT OF ISSUE:

Burlington Northern (Manitoba) Ltd.'s refusal to Bulletin the vacant position constitutes a violation of Part 1 of the Agreement dated November 10, 1912, which reads as follows:

> "(1) The Midland Railway Company of Manitoba will take into its employ a sufficient number of Canadian Northern Engineers, Firemen, Conductors and Brakemen to handle all business done by it over the lines of the Canadian Northern Railway between Winnipeg and the lnternational Boundary."

The Union contends that the refusal to Bulletin the vacant position constitutes a violation of part 1 of that Agreement dated November 1, 1912, as well as Rule 32 (a), Paragraph 1 of the schedule covering Firemen/Helpers and Hostlers, dated July 1, 1945.

FOR THE EMPLOYEES:

(SGD.) A. J. ROY
GENERAL CHAIRMAN

There appeared on behalf of the Company..

W. G. Percy	Counsel, Winnipeg
J. A. Lowry	Superintendent, B.N.(M) Ltd., Winnipeg

And on behalf of the Brotherhood:

A. J. Roy	General Chairman, U.T.U.(E) - Prince George, B.C.
0. W. Miles	General Chairman, U.T.U.(E) - Lucerne, Que.
D. V. McDuffe	Asst. Can. Leg. Rep., U.T.U.(E) Ottawa

AWARD OF THE ARBITRATOR

The question in the instant case is whether the Company was required to bulletin a position of fireman/helper on trains 123 and 124. By an agreement made between a predecessor Company and predecessor trade Unions to the present parties, and whose terms appear to be accepted as binding (except as amended) on the present parties, provision was made (Rule 32 (a) of an agreement dated June 30, 1945) for the bulletining of vacancies for firemen to the "Seventh Seniority District". This was a reference to a group of employee of another Company, the present Company, or its predecessor, having agreed to bulletin certain Jobs to such persons.

In August, 1971, Fireman C. A. R. Buchanan, who had been employed on trains 123 and 124, left the Company's employ in order to exercise certain rights which he retained pursuant to a collective agreement to which another Company was a party. It is, essentially, the Union's position that this created a vacancy which Burlington Northern was required to bulletin. Although there were apparently no Burlington Northern employees not presently so assigned who would have been entitled to the Job, it may well be that if the Company were required to bulletin the Job, then it would be required to do so pursuant to the agreement above referred to, to persons on the "Seventh Seniority District". The real issue before me, however, is whether the Company was required to bulletin the Job at all.

It is clear that the Company did not consider that it was necessary for it to employ a fireman/helper on trains 123 and 124. Employment of firemen (helpers) on diesel locomotives in other than passenger service (and that is what is involved here) is governed particularly by the provisions of an agreement dated October 20, 1959 which, again, appears to have been adopted by the present parties as binding upon them. The rule there agreed to cancelled any previous conflicting rule. It was provided that certain work would be available for firemen having a certain seniority date, and that their rights of promotion to enginemen would be preserved. It was also provided as follows.

> "RULE 46
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> D. In the application of this rule, the parties hereto shall be governed by the principles set forth in the Memorandum of Agreement made by and between the Canadian National Railway Company and the Brotherhood of Locomotive Firemen and Enginemen at Ottawa on April 28, 1959, as follows.
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> "5. The Company shall be under no obligation to hire new employees for service as firemen or helpers on diesel locomotives in freight or yard service in accordance with the reconmendations of the Board. When in the sole discretion of the management the requirements of the service are such that a helper is required in the operation of a diesel locomotive in freight or yard service such helper shall be taken from the existing seniority ranks of firemen helpers.

"5a. Firemen presently employed as shown on existing seniority lists of firemen in diesel operations in freight or yard service will be retained as firemen/ helpers until death, retirement or promotion, subject to all customary rules and regulations covering the running trades and in particular those rules relating to physical fitness and discipline."

It would seem that Fireman Buchanan had been employed pursuant to rule 46, which gave him certain rights of employment by virtue of his seniority Whether his leaving created a "vacancy" or not is a question to be determined having regard to the circumstances and the applicable collective agreement provisions. Generally, a "vacancy" may be said to occur when there is a job of work which is required to be performed. In the past, there had been a Job for Fireman Buchanan because, it seems, the collective agreement required it. Apart from its obligations to particular individuals, however (and the instant case does not involve an assertion by a fireman with the requisite seniority to be given work pursuant to the agreement above mentioned), it is clear that, by Rule 46 (D) (5) above set out the company has a discretion to determine whether or not it requires a helper in the operation of trains such as those in question The Company has decided that it does not require a helper. That is a decision which it is open to the Company to make, and there is no ground for concluding that the Company has in any way violated the collective agreement in making it.

Fireman Buchanan was entitled to be retained, by virtue: of Rule 46(D)(5a), even though the Company might have felt his work was not required. He was in fact retained until he was promoted, and this was in compliance with the rule. Under Rule 46(D)(5), however, the Company was not then under any obligation to hire a new employee (as, it seems, would have been the case had the position in question been bulletined), nor indeed to make any assignment to a job which it then determined was not required.

For the foregoing reasons, it must be concluded that there was no vacancy requiring to be bulletined in the instant case. The grievance is accordingly dismissed.

J. F. W. WEATHERILL
ARBITRATOR