

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1243

Heard at Montreal, Thursday, May 10, 1984

Concerning

CANADIAN NATIONAL RAILWAY COMPANY  
(CN Rail Division)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim that Welder Trainee R. A. Bevan be compensated for all time worked by Welder Trainee G. Mathews at Cornwall, Ontario from 11 January, 1983 to 6 February, 1983.

JOINT STATEMENT OF ISSUE:

Mr. Bevan was displaced from his position as Welder Trainee at Hornepayne, Ontario, effective 7 January, 1983. Prior to being displaced, Mr. Bevan called Engineering Clerk W. Bell and inquired as to where junior welder trainees were still working. Following his discussion he decided to proceed to Cornwall on 10 January, 1983 where he had intended to displace Junior Welder Trainee Mathews.

On arrival at Cornwall on 10 January, 1983 Mr. Bevan held discussions with Mr. Mathews and decided for compassionate reasons not to displace him and returned home to Cobourg.

The Brotherhood contends that Mr. Bevan was subsequently laid off due to erroneous information which was conveyed to him by Clerk Bell and that as a result the Company violated Article 4.3 of Agreement 10.5.

The Company maintains that Mr. Bevan was the author of his own misfortune and has declined the claim.

FOR THE BROTHERHOOD:

(SGD.) PAUL A. LEGROS  
System Federation  
General Chairman

FOR THE COMPANY:

(SGD.) D. C. FRALEIGH  
Assistant Vice-President  
Labour Relations

There appeared on behalf of the Company:

|                |   |
|----------------|---|
| T. D. Ferens   | - Manager Labour Relations, CNR, Montreal           |
| P. E. Scheerle | - System Labour Relations Officer, CNR,<br>Montreal |
| G. L. Edwards  | - Labour Relations Assistant, CNR, Toronto          |

And on behalf of the Brotherhood:

|                |   |
|----------------|---|
| P. A. Legros   | - System Federation General Chairman, BMW, Ottawa |
| L. Boland      | - Federation General Chairman, BMW, London        |
| W. Montgomery  | - General Chairman, BMW, Belleville               |
| R. Y. Gaudreau | - Vice-President, BMW, Ottawa                     |

#### AWARD OF THE ARBITRATOR

The sole issue in this case is whether the grievor was misled with respect to his "bumping" privileges after he was informed that the position selected at Longlac was not available to him. The grievor charges that Engineering Clerk W. Bell misinformed him when he advised that Welder Trainer G. Mathews at Cornwall, Ontario, had been laid off and his position had thereby been abolished.

The parties agree that at no time was the position held by G. Mathews at Cornwall, a less senior employee, abolished. It is therefore claimed that the grievor's seniority rights were violated pursuant to Article 4.3 of Agreement 10.5.

The company contends that the grievor at all times was advised of his bumping privileges with respect to Mr. Mathews' position at Cornwall. It is further submitted that the grievor awaited the fifteen day period permitted under the collective agreement to determine if a more preferred position would emerge to which his seniority privileges could attach. When no such position became available he thereby went on voluntary lay-off.

The evidence relied upon by the Company in support of its submission were the admissions contained in a letter dated May 18, 1983, where the grievor disclosed as early as February 7, 1983, that he knew "Mr. Mathews worked the four weeks less a day that I was out of service". At that time both the grievor and Mr. Mathews were attending a training session together and since only employees who are working (or not on recall) may attend training sessions the grievor must be concluded to have known the position at Cornwall was occupied. At that particular time no grievance was filed.

Moreover, it was argued that the sole reason the grievor decided to grieve the employer's alleged violation of the agreement is because of his disappointed expectation with respect to the receipt of Unemployment Insurance Benefits. In his letter of May 18, 1983, the grievor writes:

"Since it doesn't look like I get unemployment  
I have only one choice to file a grievance  
for the same pay Gord earned at Cornwall from  
January 11, 1983 till February 6, 1983 incl."

As a result of these admissions the employer argues that the grievor's motivation in filing a grievance was attributable to his disappointed expectation in not receiving Unemployment Insurance Benefit.

Although the scenario of events delineated by the company certainly would raise a serious suspicion with respect to the bona fides of the grievor's grievance I am satisfied that this grievance may be

disposed of on alternative grounds.

The trade union has not submitted any reason as to why Engineering Clerk Bell would purposely mislead the grievor with respect to his bumping privileges. It must be stressed that when his position was abolished Mr. Bell initially advised the grievor with respect to his bumping privileges at Cornwall. The grievor for the compassionate reasons given in the brief waived these rights. Mr. Bell then advised Mr. Bevan of his bumping privileges with respect to the position at Longlac. When a more senior employee cancelled the grievor's entitlement to that position, I can see no reason why Mr. Bell would then falsely mislead the grievor with respect to his continued entitlement to bump into the position occupied by Mr. Mathews.

Indeed, it is a more reasonable inference that Mr. Bevan took his chances and awaited the fifteen day period to see if a more convenient position "opened up". The grievor gambled and he lost. He cannot be permitted "to cry foul" three months after the event when he finds he may be out of pocket monies that he was not entitled to receive.

In short, I prefer the company's version of the circumstances leading to the grievor's lay off where a conflict exists with the version advanced by Mr. Bevan. Accordingly, I have not been satisfied of a violation of Article 4.3 of Agreement 10.5. The grievance is denied.

DAVID H. KATES  
ARBITRATOR.