CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1287

Heard at Montreal, Wednesday, October 10, 1984

Concerning

CANADIAN NATIONAL RAILWAY COMPANY
(CN Rail Division)

and

CANADIAN BROTHERHOOD OF RAILWAY
TRANSPORT AND GENERAL WORKERS

DISPUTE:

Policy grievance concerning the Company's decision not to fill the position of Senior Engineering Clerk at Montreal, Quebec.

JOINT STATEMENT OF ISSUE:

On April 11, 1983, Mr. D. Girard was promoted to a non-schedule position outside of' the Brotherhood bargaining unit. The duties of his former Senior Engineering Clerk position were distributed to other schedule employees in the same office. The position remained vacant until filled by the Company on January 8, 1984.

The Brotherhood contends that the Company was required to fill Mr. Girard's position by the provisions of the NOTE to Article 11.9 of Agreement 5.01. The Company disagrees.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) TOM McGRATH National Vice-President	(SGD.) D. C. FRALEIGH Assistant Vice-President Labour Relations

There appeared on behalf of the Company:

W. W. Wilson	- System Manager Labour Relations, CNR, Montreal
S. A. MacDougald	- System Labour Relations Officer, CNR, Montreal
M. Lamarche	- Labour Relations Officer, CNR, Montreal
R. St. Hilaire	- Supervisor Administration, CNR, Montreal

And on behalf of the Brotherhood:

G. Thivierge	- Regional Vice-President, CBRT&GW, Montreal
J. Brown	- Local Chairman, Local 295, CBRT&GW, Montreal

AWARD OF THE ARBITRATOR

The issue in this case is whether the Note attached to Article 11.9 of Agreement 5.1 obliges the company to fill a vacant position occasioned by the temporary assignment (less than ninety days) of an employee in the bargaining unit to an unscheduled position. The Note

reads as follows:

> "NOTE When an employee is temporarily promoted to an excepted position for less than ninety (90) days, his position will be filled in accordance with Article 12.6. When released from the excepted position he must return to his regular assignment."

The company's position is simply that the Note dictates the procedure that must be followed in filling vacancies in the bargaining unit created by temporary assignments. It does not impose a positive obligation, unless the company is acting in bad faith, to fill the vacancy. In this particular case, the uncontradicted evidence demonstrated that owing to the recession the downturn in business rendered the position in question redundant.

This notion was not challenged by the trade union. The trade union insisted, irrespective of business exigencies, the language contained in the Note, having regard to the use of the words "will" and "must", imposed upon the company the obligation to fill the vacancies. The fact that the company did not require the position to be filled is an extraneous consideration. No discretion was left to the employer in the exercise of its management prerogative.

In resolving this dispute, I am of the view that the company's interpretation must prevail. The Note simply directs the company to fill a vacancy created by a temporary assignment "in accordance with Article 12.6". Its design is to facilitate the bidding procedure by restricting candidates for a temporary vacancy in accordance with that provision "at the station or terminal affected". Otherwise the company would be compelled in accordance with Article 12.1 to bulletin such temporary vacancies "on a regional basis".

I can discern nothing in the N?te that is designed to usurp the company's discretion to determine that a position is redundant by virtue of a business decline. Or, from another perspective there would have to be very clear language to compel me to conclude that the employer must fill a position in circumstances were there is no job to be performed.

Accordingly, it is my conclusion, that the Note directs the manner in which a temporary vacancy is to be filled. It does not direct the employer to fill such a vacancy.

For all the foregoing reasons the grievance is rejected.

DAVID H. KATES,
ARBITRATOR.