

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1416

Heard at Montreal, Wednesday, October 9, 1985

Concerning

CANADIAN PACIFIC LIMITED (CP Rail)
(Pacific Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

On May 1, 1984, the Company assigned B&B Foreman, M. L. McInnes to flag at mile 85.7, Laggan Subdivision account Contractor erecting overpass for highway. Mr. P. D. Olson is the Track Maintenance Foreman and responsible for this trackage. The Union claims Mr. P. D. Olson should have been assigned and therefore, be paid all overtime hours paid to Mr. M. L. McInnes from May 1, 1984 and onward.

JOINT STATEMENT OF ISSUE:

The Union contends that:

1. The Company violated Section 7.1, 8.1, 14.4(a) and 32.3 of Wage Agreement 41 by assigning the flagging duties at M. 85.7, Laggan Subdivision to Mr. M. L. McInnes instead of to T.M.F., Mr. P. D. Olson who is responsible for this trackage.
2. Mr. P. D. Olson be paid all overtime hours worked by Mr. McInnes since May 1, 1984, at overtime rate of pay.

The Company denies the Union's contention and declines payment.

FOR THE BROTHERHOOD:

(SGD.) H. J. THIESSEN
System Federation
General Chairman

FOR THE COMPANY:

(SGD.) L. A. HILL
General Manager
Operation and Maintenance

There appeared on behalf of the Company:

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| F. R. Shreenan | - Supervisor, Labour Relations, CPR,
Vancouver |
| R. A. Colquhoun | - Labour Relations Officer, CPR, Montreal |
| R. T. Bay | - Asst. Supervisor, Labour Relations, CPR,
Vancouver |

And on behalf of the Brotherhood:

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| H. J. Thiessen | - System Federation General Chairman, BMW, E,
Ottawa |
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R. Y. Gaudreau - Vice-President, BMW, Ottawa
L. M. DiMassimo - Federation General Chairman, BMW, Montreal
M. L. McInnes - General Chairman, BMW, Winnipeg

AWARD OF THE ARBITRATOR

CP Rail Maintenance of Way Rules and Instruction, F-568, Rule 202, reads as follows:

"The Track Maintenance Foreman must be alert to observe and report to the Roadmaster work being performed on or adjacent to any track on his section by contractors or others who do not come under his control. When work is observed of a nature which may render the main track unsafe for the movement at normal speed, the Track Maintenance Foreman must see that proper signals to protect trains are displayed in accordance with the flagging rules, when the Railway Company engages the services of contractors to perform work which requires protection under the flagging rules. The Track Maintenance Foreman concerned will be notified and instructed as to whether he or the contractor will be held responsible for Providing the protection."
(Emphasis added)

On May 1, 1984 the Company assigned B&B Foreman M. L. McInnes to flag at Mile 85.7, Laggan Subdivision on account of a contractor erecting an overpass for a highway. The grievor, Track Maintenance Foreman Olson claimed he was improperly by-passed for the flagging duties that were assigned to B&B Foreman McInnes. The grievor relied upon Article 14.4(a) of the collective agreement which reads as follows:

"Except as otherwise provided below, temporary vacancies of less than forty-five calendar days required by the Company to be filled, in positions subject to being bulletined in accordance with Clause 14.1, shall be filled by the senior qualified employee immediately available, subject to the provisions of Clause 21.9. An employee who does not exercise his seniority to such a temporary vacancy of less than forty-five days will not forfeit any seniority."

It is common ground that the company does not view Mr. Olson as being unqualified to perform the flagging duties. Nor has any persuasive evidence been adduced that might suggest that the grievor was not "immediately available" to perform the flagging duties during the period under consideration. The issue in this case was reduced to the narrow point as to whether Mr. Olson was the senior qualified employee who was immediately available to do the flagging duties!!

The uncontradicted evidence established that Mr. McInnes was clearly the more senior employee in service with the company than the grievor. Nonetheless the trade union took the position that the

flagging work in question was normally the work of the Maintenance of Way Department. And, moreover, it was asserted that Maintenance of Way work was performed by Mr. McInnes over trackage normally under the grievor's responsibility. Or, to put it in a different context, Mr. McInnes was not entitled to perform the flagging duties because he was a B&B department employee who was improperly assigned Maintenance of Way work. The notion that a B&B employee is precluded from performing MofW work is prescribed under Article 32.3 of the collective agreement:

"Performance of Maintenance of Way Work by
Employees Outside the Department.

Except in cases of emergency or temporary urgency,
employees outside of the Maintenance of Way service
shall not be assigned to do work which properly belongs
to the Maintenance of Way Department, nor will
Maintenance of Way employees be required to do any work
except such as pertains to his division or department of
maintenance of way service."

The company did not allege that the work in issue was prompted by "an emergency or temporary urgency". Rather, the submission was made that the flagging work in question lent itself to the work jurisdiction of employees who were members of either the MofW or B&B departments. And, since Mr. McInnes was assigned other duties associated with the erection of the overpass for which he was particularly qualified, the company argued that it made practical business sense to assign him the flagging duties as well.

It seems to me that CP Rail Maintenance of Way Rules and Instructions, F-568 and Rule 202 squarely define the flagging work performed by Mr. McInnes to be the work jurisdiction of the Track Maintenance Foreman. That provision clearly states that the Track Maintenance Foreman "must be alert to observe and report to the Roadmaster work being performed on or adjacent to any track on his section by contractors....". Moreover, "the Track Maintenance Foreman must see that proper signals to protect trains are displayed in accordance with flagging rules, when the railway company engages the services of a contractor to perform work which requires protection under flagging rules". In other words, the CP Maintenance of Way Rules define the very flagging work that was assigned B&B Foreman McInnes to be the responsibility of the Track Maintenance Foreman. And since the work of a Track Maintenance Foreman is properly the work of the Maintenance of Way Department I am satisfied that the company was obliged to have assigned the flagging work in question to the most senior employee in the Maintenance of Way Department who was qualified and immediately available to perform that work.

As a result since Track Maintenance Foreman P. D. Olson was the employee who clearly met the requirements of Article 14.04(a) he should have been assigned to the temporary vacancy.

Accordingly, the company is directed to pay the grievor the overtime pay he would have otherwise have received had he been given the flagging assignment. I shall remain seized for the purposes of the implementation of this decision.

DAVID H. KATES,
ARBITRATOR.