

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 258

Heard at Montreal, Tuesday, January 12th, 1971

Concerning

CANADIAN PACIFIC EXPRESS COMPANY (CP EXPRESS)

and

**BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

DISPUTE:

Claim of employee W. Belgue for the position of Clerk, Grade 11, as posted on Bulletin No. 21 at Obico Terminal, Toronto, on February 24, 1970, and for which he applied. On March 5, 1970, Award Bulletin No. 21 was posted, awarding the position to M. Currie, another applicant, who is junior in service to Belgue.

JOINT STATEMENT OF ISSUE:

The Brotherhood contends that the position should have been awarded to Belgue in accordance with Article 7.1(a) of the Agreement.

Article 7.1(a) reads as follows:

The promotion and assignment of employees will be governed by seniority and ability, senior qualified applicant to be given preference. The Officer of the Company in charge shall be the judge, subject to appeal, which must be made in writing within 14 calendar days of the appointment.

The Company contends that Article 7.1(a) of the Agreement was not violated for it was judged by the Officer of the Company in charge that Belgue did not have sufficient ability to fill the position.

FOR THE EMPLOYEES:

(SGD.) L. M. PETERSON
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. T. HARFORD
DIRECTOR, PERSONNEL

There appeared on behalf of the Company:

F. E. Adlam – Industrial Relations Representative, Toronto

And on behalf of the Brotherhood:

L. M. Peterson – General Chairman, Toronto
V. P. Grey – Grand Lodge Organizer, Toronto
R. Welch – General Chairman, Vancouver
F. Mazur – Vice-General Chairman, Thunder Bay

AWARD OF THE ARBITRATOR

There is no question of seniority in this case, the only question which arises is whether the grievor was a "qualified applicant". If he was qualified, then he was entitled to the assignment. On receiving the assignment, he would then be entitled to a reasonable probationary period of up to 30 calendar days in which to demonstrate his ability to perform the work: Article 7.1(b). The question in issue here is whether the grievor was "qualified", so as to be entitled to the probationary period in which to demonstrate his ability.

The question of qualification is one to be determined by the Officer of the Company in charge, as article 7.1(a) makes clear. The collective agreement provisions which governed **Cases 123** and **124** are of similar effect. In **Case No. 123**, I said that I could not, except on the clearest evidence, substitute my opinion of the grievor's ability for that of the person immediately concerned. That person's judgment is, however, subject to appeal. If it appears that it has been exercised unfairly, or according to a wrong principle, then it may be set aside. The question, to repeat, is simply whether the grievor was "qualified" for the job; the collective agreement does not contemplate a competition between applicants, and it would not matter if some other applicant were better qualified than the grievor.

The job in question was that of Clerk Grade 11, Accounting Department, Obico Terminal. There is nothing in the material before me as to the particular requirements of the job. The material does reveal, however that the grievor had worked as Clerk Grade 11 for many years. In my view, this would establish his qualifications, at least *prima facie*, and place the onus on the Company to show that in spite of his working in the classification for years, the grievor was not qualified for it.

The grievor was employed as a Clerk in the Toronto Region Accounting Section from November 1965 to November 1969. There is no record of any discipline or of any criticism related to the grievor's work during that period. It is said that because of the accounting system then in use it was difficult to evaluate individual performance: it is impossible, of course, to conclude from this that the grievor was incompetent, or indeed to draw any conclusion at all, except that the grievor was in the classification at the time.

His position was abolished in November 1969, and after that the grievor worked in a number of positions, in most cases unsuccessfully. He first worked in the Payroll Department, but asked to be removed from that job after a short time. He then worked in the Over Without Marks Department, but was rejected after five days by the Supervisor, who considered that he did not have the ability to cope with the job. This decision was not questioned. He then worked in the Customer Service Department, and again was rejected after approximately one week on the ground that he was not completing sufficient work. Again, there is no challenge as to this. Finally, the grievor was assigned to physical handling duties in the warehouse.

There is no issue in this case as to the grievor's rejection on the jobs just referred to. There is nothing in the material before me, however, which would relate his failure on these jobs to the requirements for the posted job in issue here. From the fact of his having held the classification for years, it can be presumed that the grievor was qualified for it: nothing in the material presented contradicts this, or relates to the question of his lack of qualification for the job in question. If it were shown that the Company had assessed the grievor in the light of the requirements of the job, then the Company's decision – unless discriminatory or based on a wrong principle – would stand. But the material before me simply shows that the grievor had failed in certain other jobs. There is nothing to connect these failures with the job in question.

The only conclusion which can be reached on the material presented to me is that the grievor was apparently qualified for the job in question. Being the senior applicant, he was therefore entitled to the assignment, and to a period of up to thirty days in which to demonstrate his ability to perform it. It is accordingly my award that the grievor be assigned to the job, and his performance evaluated over the appropriate probationary period. It need only be added that I do not, of course, make any determination as to the grievor's actual ability to do the job, and the question of his qualifications for it has been determined only on the basis of the material put before me.

(signed) J. F. W. WEATHERILL
ARBITRATOR