

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 347

Heard at Montreal, Tuesday, April 11th, 1972

Concerning

CANADIAN PACIFIC RAILWAY COMPANY (CP TRANSPORT)

and

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

DISPUTE:

Claim by the Brotherhood that employees on excepted or official positions must have their positions abolished or be disqualified by the Company in order to take advantage of their rights under the Collective Agreement. The Brotherhood is further claiming that T.W. Smith should be returned to his former supervisory position.

JOINT STATEMENT OF ISSUE:

T.W. Smith, Dock Supervisor, Calgary, relinquished his position as Dock Supervisor and reverted to the scheduled ranks.

Article 11.9 states: "Employees who accept official or excepted positions shall retain their seniority rights and continue to accumulate seniority in the group from which appointed."

The seniority rights of employees are in Articles 11, 13, 14 and 15 of the Agreement.

Scheduled employees cannot relinquish bulletined positions. They can only get off their positions by bulletin, by having their position abolished, by being displaced, or by being removed from the position by the Company for cause.

Employees on official or excepted positions are not covered by the provisions of the Collective Agreement.

The Company has denied the claim on the basis that a supervisor retains his seniority rights and can return to the scheduled ranks should he so desire.

FOR THE EMPLOYEES:

(SGD.) R. WELCH
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) C. C. BAKER
DIRECTOR, LABOUR RELATIONS AND SAFETY

There appeared on behalf of the Company:

C. C. Baker – Director, Labour Relations & Safety, Vancouver

And on behalf of the Brotherhood:

R. Welch – General Chairman, Vancouver

W. C. Y. McGregor – International Vice-President, Montreal

M. Peloquin – Administrative Assistant to International Vice-President, Montreal

AWARD OF THE ARBITRATOR

Article 11 of the collective agreement sets out certain general provisions with respect to seniority. Article 13 provides for bulletining of positions, Article 14 for promotions and Article 15 for reduction and increase in staff. In the instant case, Mr. Smith was promoted from a position in the bargaining unit to the position of Dock Supervisor, which was not, it would seem, a position covered by another collective agreement. It was an “official or excepted” position, and Mr. Smith therefore retained his seniority rights and continued to accumulate seniority in the group from which he was appointed as Article 11.9 provides. Reference should be made as well, however, to Articles 11.10 and 11.11 which also deal with employees transferred out of the bargaining unit:

- 11.10** Employees who accept positions not covered by another wage agreement shall retain their seniority rights and continue to accumulate seniority in the group from which transferred for a period not exceeding six months except as may otherwise be mutually agreed between the General Chairman and the appropriate officer of the Company.
- 11.11** Employees who accept transfer to positions covered by another wage agreement shall lose their seniority rights; but this provision shall not apply if service is not required in the position vacated. When a full-time position becomes available in the seniority group from which an employee has transferred, failure to exercise seniority in that group will result in loss of seniority in that group.

By Article 11.10, there would appear to be a limitation on the general rights enjoyed by Mr. Smith pursuant to Article 11.09. That question however, was not raised at the hearing and need not be dealt with in this case. More difficult is the question as to the extent of the “seniority rights” retained by persons who accept transfers to supervisory or other positions outside of the bargaining unit. The notion that such persons may apply, for example, on jobs bulletined within the bargaining unit strikes me as surprising but again, that is not a matter which need be determined here. What is at least clear is that in the event of a supervisor being returned to the bargaining unit, he would be entitled to exercise his accumulated seniority, whatever this may be under Article 11.9 or 11.10. The collective agreement thus deals expressly with the problem of the seniority entitlement of supervisors who are returned to the bargaining unit, the cases dealing with the question were analyzed in the **Gabriel of Canada case**, 18 LAC 373.

In the instant case the question which arises is that of the right of supervisors to exercise, on their own motion, seniority rights in the bargaining unit. Some collective agreements contain provisions allowing persons transferred to new positions (sometimes in, sometimes out of the bargaining unit) to return to their old jobs if they wish, usually within a specified period of time. If the Company’s position is correct in this case, a person who is transferred out of the bargaining unit to a supervisory position may, at any time and according to his own whim, go back to the bargaining unit, displacing a Junior employee in order to do so.

Mr. Smith entered the service of the Company in 1963 as a Warehouseman–Driver. From April 1966 until October 10, 1966, he was employed as a mileage-rated driver. On October 10, 1969, he was promoted to Dock Supervisor. On May 31, 1971, for personal reasons, he returned to the scheduled ranks as a Warehouseman–Driver. Subsequently, he bid successfully on a posted Job as Warehouseman–Driver (Tractor). This subsequent promotion is, in my view, not relevant to the issue before me, which is the propriety of Mr. Smith’s return to the bargaining unit in the first place.

Where a supervisor, having been promoted from the bargaining unit, does not prove satisfactory, or is by reason of shortage of work redundant, then it seems clear he may be returned to the bargaining unit and may exercise his accumulated seniority therein. It is doubtful if this right would extend to a supervisor discharged for cause, whose status as an employee would appear to be entirely terminated. There appears to me to be no good reason, and certainly no support in the collective agreement, for the proposition that a supervisor who has come from the bargaining unit may at any time and to suit his own preferences, return thereto and displace some junior employee. This would be to give to “seniority rights” a meaning far greater than that which the phrase has for an ordinary employee, who may rely on those rights only in the particular circumstances provided for by the collective agreement. An employee in the bargaining unit who has seniority rights is not permitted simply to pick and choose among whatever jobs may be held by employee junior to him, even where he may be well qualified to perform them. An employee assigned to a particular Job is entitled to some degree of security in it, and to the assurance that he is

only subject to displacement by senior employees in the particular sorts of circumstances for which the agreement provides. The collective agreement simply does not provide that supervisors may “voluntarily return” to the bargaining unit as their fancy – or even their needs may dictate.

Certainly the parties may properly make arrangements to deal with particular cases, and in some circumstances the Company would be entitled to transfer a supervisor back to the bargaining unit, where he could then exercise his seniority. There is, however, a certain risk involved in becoming a supervisor, a risk balanced perhaps by the rewards and privileges of the position, but not one from which the collective agreement completely protects the person accepting the position. The same may be said, generally, of any person accepting a promotion, even within the bargaining unit. The mere fact that he may not enjoy his new job does not of itself entitle him to displace a junior employee whose job he may prefer.

For the foregoing reasons, it is my conclusion that, under the collective agreement in question, a supervisor does not have a general right to return to the bargaining unit on his own motion. The retention of seniority rights under Article 11.9 does not confer such a special right upon a promoted employee. The matter of the remedy to which the Union or displaced employee may be entitled raises other difficulties, which were not fully argued at the hearing. It would appear that to take a former member back into the bargaining unit would be a violation of the collective agreement only if this involved the displacement of another employee in circumstances not contemplated by the agreement. If, in the instant case, there was such a displacement (or a series of consequential displacements), the employees so affected would be entitled to compensation, and I would reserve Jurisdiction with respect to that matter. The exercise of seniority rights by Mr. Smith once he had returned to the bargaining unit would, in itself, seem to be quite proper. As to the Union’s request that there be a direction that Mr. Smith be returned to his supervisor position, that, in my view, would be in excess of my Jurisdiction.

To the extent indicated above, the grievance is allowed.

(signed) J. F. W. WEATHERILL
ARBITRATOR