

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 612

Heard at Montreal, Tuesday, June 14, 1977

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS**

DISPUTE:

The Brotherhood alleges that the Company violated the provisions of Article 11.9 when it allowed non-schedule employee Mr. R.G. Doke to fill a temporary vacancy under Agreement 5.1 and subsequently exercise his seniority rights on a regular position.

JOINT STATEMENT OF ISSUE:

Mr. R. G. Doke held seniority under the provisions of Article 11.9 while employed on a non-schedule position with the Company. The employee advised the Company of his desire to leave his non-schedule position and to return to the bargaining unit. He expressed his desire to make himself available for any spare and relief work until he could secure a job by bid and so informed the Local Chairman in writing. The Company allowed this, but advised Mr. Doke that he was prohibited from exercising his seniority rights and would have to take an unfilled vacancy or protect relief and spare work. He did take an unfilled vacancy and upon termination of the vacancy, was then allowed to exercise his seniority rights.

The Brotherhood contends that under Article 11.9 as a result of his voluntary return to the bargaining unit Mr. Doke lost his seniority and also the exercise of his seniority at the termination of the temporary vacancy was a violation of Article 11.9.

The Company denied the Brotherhood's contention.

The grievance has been processed through the various steps of the grievance procedure and ultimately to arbitration.

FOR THE EMPLOYEE:

(Sgd.) J. A. PELLETIER
NATIONAL VICE-PRESIDENT

FOR THE COMPANY:

(Sgd.) S. T. COOKE
VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

C. L. LaRoche – System Labour Relations Officer, Montreal
J. A. Cameron – Regional Labour Relations Officer, Winnipeg

And on behalf of the Brotherhood:

R. D. Merrett – Representative, Regina
D. F. Martin – Local Chairman, Saskatoon

AWARD OF THE ARBITRATOR

Article 11.9 of the collective agreement, which governs this matter, is as follows:

11.9 The name of an employee who has been or is transferred from a position covered by this Agreement to an official or excepted position with the Company, or its subsidiaries, will be continued on the seniority list for the group from which transferred and shall continue to accumulate seniority while so employed. Such employee, when released from excepted employment, except at his own request or as provided in Article 12.19, may exercise his seniority rights to any position in his seniority group which he is qualified to fill. He must make his choice of a position, in writing, within ten calendar days from the date of release from excepted employment and commence work on such position within 30 calendar days from the date of release from excepted employment. Failing this, he shall forfeit his seniority and his name shall be removed from the seniority list.

Note: When an employee is temporarily promoted to an excepted position for less than sixty (60) 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.

Article 12.19, referred to in article 11.9, is as follows:

12.19 An employee, who is removed from his regular position as a disciplinary measure, will not be permitted to displace any regularly assigned employee but will be permitted to apply for any vacancies within his group.

Mr. Doke was transferred from a position covered by the collective agreement to an excepted position. He was, therefore, entitled to be continued on the seniority list for the group from which he transferred, and to continue to accumulate seniority. This was done. Mr. Doke was then released from excepted employment. He would, as a general matter, be entitled to exercise his seniority rights to a position in his seniority group which he was qualified to fill. There are, however, two exceptions to the general rule set out in article 11.9: these occur where the employee is released from excepted employment "at his own request" (as here), or "as provided in Article 12.19."

It is not the case, then, that Mr. Doke, when released from excepted employment, could then exercise his seniority rights to any position in his seniority group which he was qualified to fill. It does not follow, however, that he was deprived of seniority rights. He remained an employee of the company, and he retained the seniority rights which had continued to accumulate within his group.

The collective agreement does not deal explicitly with the way in which a person in Mr. Doke's position may have the benefit of his seniority rights. It does provide explicitly, in Article 12.19, for the case of the employee removed from his position as a disciplinary matter: such a person may not displace regularly assigned employees, he may apply on vacancies. Mr. Doke's case seems to have been dealt with by analogy to this: he did not displace any regularly assigned employee when he returned to the bargaining unit, but he did subsequently apply on a vacancy.

At the time of his release from excepted employment and return to the bargaining unit, it would appear from article 12.3 that Mr. Doke would not then have been entitled to apply on a vacancy. That article provides in part as follows:

Employees, including those laid off, other than those referred to in Article 11.9, desiring such position will submit written application showing seniority number, present classification and location, together with their qualifications. Except as provided in Article 12.4, applications must be filed to reach the designated officer not later than the eighth day after the date of bulletin. As evidence that an application has been submitted each applicant must forward a copy of his application to his Local Chairman.

It may be observed that while Article 12.3 would appear to prevent an employee such as Mr. Doke from applying on a vacancy, an employee who had been removed from his position as a disciplinary matter would not be subject to such restriction: Article 12.19. In any event Mr. Doke did not then apply on a vacancy but was assigned work, according to the Joint Statement of Issue, on an unfilled vacancy. This does not appear to have been in violation of any provision of the collective agreement to which I was referred. It did not involve the displacement of

any other employee. It was not, in my view, contrary to anything which was said in **Case No. 347**, which involved a somewhat similar case, although the collective agreement provisions were not identical with those in this case.

In **Case No. 347** an employee left an excepted position for personal reasons, and returned to the bargaining unit. Subsequently to that, he bid successfully on a posted job. The issue for determination in that case was the propriety of the employee's return to the bargaining unit in the first place. It was said that "The exercise of seniority rights by Mr. Smith once he had returned to the bargaining unit would, in itself, seem to be quite proper". It was held, however, that the return by that employee to the bargaining unit was, in the circumstances, in violation of the collective agreement.

In the instant case, I see nothing improper in Mr. Doke's return to the bargaining unit since, fortunately for him, there was an unfilled vacancy which he could fill. It does not follow, however, that on the expiry of that temporary vacancy, he was entitled to exercise seniority and displace a junior employee. It would, I think, have been open to him to apply on a job bulletin at that time, and I think it is clear that he would be entitled to the benefit of his accumulated seniority. It was by way of a job bid that the employee concerned in **Case No. 347** "exercised his seniority". In this case, however, Mr. Doke was allowed to displace a junior employee, purportedly pursuant to Article 13.4. That article is as follows:

13.4 An employee, who has signified his intention to displace a junior employee, shall forfeit his seniority and his name shall be removed from the seniority list if he fails or refuses to commence work on the regularly assigned position he has chosen within 20 calendar days of exercising his seniority to a temporary assignment.

With respect, that article does not deal with the circumstances in which an employee may exercise seniority, but rather with the consequences of failure to commence work. The general provisions allowing displacement appear in article 13.3. They allow certain displacements where an employee's position is abolished, or where he is displaced from his permanent position. Mr. Doke did not, on the expiry of his temporary assignment, come under either of those headings. He would, I think, have been entitled to apply on a bulletin, but he was not entitled simply to displace a junior employee at that time.

Accordingly, the grievance is allowed in part.

The displaced employee, and others directly affected, are entitled to reinstatement and compensation for loss of earnings, if any. Mr. Doke will be entitled to bid on job vacancies, and to have the benefit of his full accumulated seniority.

(sgd.) J. F. W. WEATHERILL
ARBITRATOR