

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 815

Heard at Montreal, Tuesday, March 10, 1981

Concerning

CANADIAN PACIFIC EXPRESS LIMITED

and

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

EX PARTE

DISPUTE:

The awarding of bulletin No. 45, to a junior employee.

EMPLOYEES' STATEMENT OF ISSUE:

On or about July 24th, 1980, employee S. Tougas, bid on posted bulletin No. 45, Clerk J-2. Employee S. Tougas was refused the bulletin and awarded to junior employee F. Ouellett.

The Brotherhood is claiming the Company failed to live up to Articles 7.1.2 and 7.1.4 of the Agreement.

The Company claims there has been no violation of the Agreement.

FOR THE EMPLOYEES:

(SGD.) J. J. BOYCE
GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. Cardi – Labour Relations Officer, CP Rail, Montreal
B. D. Neill – Manager, Labour Relations, Toronto
R. A. Colquhoun – Labour Relations Officer, CP Rail, Montreal

And on behalf of the Brotherhood:

J. J. Boyce – General Chairman, Toronto
J. Crabb – Vice-General Chairman, Toronto
F. W. McNeely – General Secretary-Treasurer, Toronto

AWARD OF THE ARBITRATOR

The job in question was one generally known as Rate Clerk. In the case of the particular position which was advertised, one of the requirements was that the successful applicant be a “qualified typist”. There is no issue in this case as to the propriety of that requirement, nor as to whether or not the amount of typing involved would affect the classification and rating of the job. It appears that the amount of typing required was substantial.

The grievor had sought, unsuccessfully, to “bump” into a position of Rate Clerk in cases of staff reduction in the past. The Union acknowledges that the grievor was not qualified, at those times, to displace junior employees, having regard to the requirement of full qualification set out in the “bumping” provisions. Since then, however, the grievor has taken a course in Rate Clerk work, in which he was successful. Further, the grievor does not here seek to displace an incumbent, but rather has applied on a job bulletin.

Entitlement to be assigned on a job bulletin is governed by Article 7.1.1 of the Collective Agreement, which is as follows:

7.1.1 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.

This provision should be read in the light of Article 7.1.2, which provides, in effect, for a trial period. That Article is as follows:

7.1.2 An employee who is assigned to a position by bulletin, will receive a full explanation of the duties and reasonable assistance and must demonstrate the ability to perform the work within a reasonable probationary period of up to 30 calendar days, the length of time to be dependent upon the character of the work. Failing to demonstrate the ability to do the work within the probationary period allowed, employee shall be returned to former position without loss of seniority.

It is not the case that the senior applicant for a bulletined job is necessarily entitled to be assigned the job and have a trial period. Rather, as was said in **Case No. 293**, “In the first instance, it is for the officer of the Company in charge to make the assessment whether or not there is a reasonable likelihood that an applicant will qualify for a particular job”. If such a likelihood appears in the case of a senior applicant, then he would be entitled to the trial period to demonstrate his ability to perform the work.

While the collective agreement does not expressly provide for the imposition of tests, it is my view – again, as set out in **Case No. 293** – that the Company could quite properly require employees to undergo tests in order to enable it to make the determination it is required to make under Article 7.1.1. In Case No. 293, it was my conclusion that the grievor had the apparent qualifications for the job, even without having shown that by means of a test (although he ought to have followed the Company’s procedure in that regard). In the instant case, however, the grievor did not have the apparent qualifications for the particular job in question, because he did not appear to have sufficient typing ability.

The Company acknowledges that the grievor had achieved apparent qualification for the job in other respects, and that he would have been assigned the job, had it been considered that he had the necessary typing ability (the standard to be met was not particularly high, it would seem). This was not, in the circumstances, an unreasonable conclusion and it was, in my view, quite proper for the Company to have required the grievor to take a test of typing ability, subject to the standard required being appropriate to the work to be done.

Since the grievor refused to take the test, and since a test was proper in the circumstances, that would normally be the end of the matter. In the instant case, however, there are two considerations which in my view call for a different result. First, it appears that the Company did not comply with the requirements of Article 7.1.4 of the Collective Agreement in this matter. That Article is as follows:

7.1.4 When a position under bulletin is to be awarded to a junior employee because of ability, the matter will be first discussed between the Company officer involved and the Local Protective Chairman or his Representative.

Had the discussions called for taken place, the Union might then have sought to persuade the grievor of the reasonableness of a test in the circumstances, and of the importance of his taking it.

Second, the grievor's position in this particular case is deserving of special understanding, since he had taken pains to prepare himself for what he understood to be the essential parts of a Rate Clerk's job. In view of these two considerations, it is my award that the grievor be given an opportunity to take a typing test, and that if he is successful, that he be assigned to the job, subject to Article 7.1.2. Because of his failure to take the test when it was first offered, he would not be entitled to compensation, if he is successful. It should be added that the grievor should have notice of the test at least equivalent to the length of time a job is bulletined. The standard to be met, again, is to be one appropriate to the job in question, and I would hope the parties could agree in that respect before the test is given.

(signed) J. F. W. WEATHERILL
ARBITRATOR