

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1593

Heard at Montreal, Wednesday, December 10, 1986

Concerning

CANADIAN PACIFIC LIMITED

and

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

EX PARTE

DISPUTE:

That article 21.9 of the collective agreement was violated when Mrs. B. E. Webber returned to a scheduled position and displaced Mrs. S. D. Short.

BROTHERHOOD'S STATEMENT OF ISSUE:

Mrs. Short was displaced on April 14, 1986 by Mrs. Webber who returned from the non-scheduled position of secretary to the Chief Accountant.

The Union contends that Mrs. B. E. Webber lost her seniority in 1977 as per article 21.9 of the collective agreement, and therefore, has no seniority rights.

The Union contends that Mrs. S. D. Short be returned to her former position as Assistant Maintenance of Way Clerk and compensated for lost wages.

The Company declined the claim.

FOR THE BROTHERHOOD:

(SGD.) DENNIS DEVEAU
GENERAL CHAIRMAN.

There appeared on behalf of the Company:

D. A. Lypka – Supervisor Labour Relations, Winnipeg
G. W. McBurney – Assistant Supervisor Labour Relations, Winnipeg
B. P. Scott – Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

D. Deveau – General Chairman, Calgary
J. Germain – Vice-General Chairman, Montreal

AWARD OF THE ARBITRATOR

Mrs. Webber began working for the Company on August 12, 1974. She was then a member of the bargaining unit working in the Winnipeg Division Superintendent's office. On July 26, 1976 she was moved to the position of Chief Accountant's Secretary. The Arbitrator is satisfied that that move amounted to a promotion, in that it involved an increase in wages to the employee. In that position, which was in a different department, Mrs. Webber was excluded from the bargaining unit pursuant to the certificate issued to the Union by the Canada Labour Relations Board on June 7, 1965.

It is common ground that the seniority standing of Mrs. Webber is governed by the provisions of articles 21.8 and 21.9 of the collective agreement in effect at the time of her transfer out of the bargaining unit. Those provisions are as follows:

21.8 Employees promoted to official position or to positions excepted or excluded from the terms of this agreement shall retain their rights and continue to accumulate seniority on the seniority list from which promoted.

If an employee is released from such position he must revert to the seniority list and position from which promoted, unless such position has been abolished or is held by a senior employee. In such instance employee may exercise his seniority to displace a junior employee on that seniority list.

Employees holding excepted or official or excluded positions must exercise seniority as provided in the preceding paragraph and in accordance with Clause 25.2 before being eligible to apply for a Schedule position under bulletin.

21.9 Except as otherwise provided in Clause 21.8, an employee promoted or transferred to a position not covered by another agreement shall retain his rights and continue to accumulate seniority for six months on the seniority list from which promoted or transferred, which time may be extended by mutual agreement. The position thus vacated shall be bulletined as a temporary vacancy and such employee shall return to his former position if he is removed from the position to which promoted or transferred within six months or such longer period of time as may be mutually agreed.

The Company contends that Mrs. Webber was moved in 1976 under the terms of article 21.8 and was therefore entitled to exercise her seniority upon return to the bargaining unit upon her release from the Chief Account's Secretary position on April 11, 1986. The Union maintains that her seniority is governed by the provisions of article 21.9, and that consequently her seniority was truncated six months from the date of her transfer. The Union's representative argues that article 21.9 was intended to apply whenever employees left the bargaining unit in circumstances where they also transferred out of the department in which they had performed prior bargaining unit service. The Company disagrees with that interpretation.

In this case the burden is upon the Union to establish that the circumstances of Mrs. Webber fall within the provisions of article 21.9. A prior critical issue, however, is the interpretation to be given to that provision. The Arbitrator must conclude that the language of articles 21.8 and 21.9 read together is ambiguous. Faced with ambiguity recourse may be had to extrinsic evidence as an aide to interpretation. In the instant case the practice of the parties appears to have been relatively inconsistent in the approach to these two articles. In some circumstances article 21.9 has been given the departmental interpretation asserted by the Union, while in many cases it has not. In this circumstance, in the Arbitrator's view, it is instructive to review the practice applied to Mrs. Webber herself.

It is common ground that for a number of years Mrs. Webber's name was maintained on the seniority roster of employees represented by the Union in the Winnipeg Division Superintendent's office. The roster discloses for her a seniority date of August 12, 1974. Significantly, when for reasons unexplained, Mrs. Webber's name was omitted from the roster in 1981, at the employee's instance the Local Chairman of the Union wrote the Superintendent on her behalf requesting its reinstatement.

The Company complied with the Union's request and Mrs. Webber's name was returned to the seniority roster in 1982, where it has remained to the present. In these circumstances, the Arbitrator must conclude that the position advanced by the Company is to be preferred to that now asserted by the Union. Whatever may have been the original intention of the two articles in question, it is clear that they were consistently and consciously applied to Mrs.

Webber so as to preserve her full seniority rights. While I am satisfied that the grievance can be disposed of purely on the basis of that interpretation, having regard to the practice of both parties regarding Mrs. Webber, if it were necessary to do so I would also be prepared to find that the Union must be estopped from now asserting a contrary interpretation of her rights.

For the foregoing reasons the grievance must be dismissed.

(signed) MICHEL G. PICHER
ARBITRATOR