

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1641

Heard at Montreal, Thursday, April 16, 1987

Concerning

CANADIAN PACIFIC LIMITED

and

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

DISPUTE:

The Union claims a temporary position should have been bulletined from the date it became vacant until December 1, 1986.

JOINT STATEMENT OF ISSUE

The Company originally bulletined the position Division Clerk, Smith Falls, as temporary from January 21st to December 1, 1986.

The position became vacant effective July 21, 1986, but was not bulletined. The position was filled on August 1, 1986 by an employee who exercised seniority after her position was abolished.

The Union contends the Company violated articles 23.1 and 24.1 by not having the position bulletined, once it became vacant.

The Company denied any violation of the collective agreement.

FOR THE BROTHERHOOD:

(SGD.) J. MANCHIP

FOR: SYSTEM GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) BOOTH

FOR: ASSISTANT COMPTROLLER, EXPENSES

There appeared on behalf of the Company:

R. Caza – Chief Accountant, Chief Accountant's Officer, Toronto
H. E. Carter – Manager, Expenditure Accounting, Montreal
P. E. Timpson – Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

J. Manchip – Vice-General Chairman, Toronto
D. J. Bujold – General Chairman, Montreal

AWARD OF THE ARBITRATOR

The material establishes that the disputed position was originally bulletined as a temporary vacancy, the permanent incumbent being on maternity leave/child-care leave of absence. Mr. Whittaker, the successful bidder on the original bulletin subsequently bid to another position, vacating the Division Clerk job on July 21, 1986. On July 15, 1986, another employee, Ms. Braggan, whose position was to be abolished August 1, 1986, gave notice to the Company that she wished to exercise her seniority to claim the temporary Division Clerk position. It is not disputed that Ms. Braggan would have had the seniority to displace Mr. Whittaker had he not already vacated the position on

the effective date of Ms. Braggan's purported exercise of seniority. The Union maintains that the vacancy following the departure of Mr. Whittaker should have been bulletined for the balance of the original temporary vacancy, that is from July 29, 1986 to December 1, 1986. It relies on article 23.1 of the collective agreement which provides as follows:

Except as otherwise provided in article 5 and Clause 23.4, new positions or vacancies shall be promptly bulletined for a period of ten calendar days in the seniority group where they occur.

The Union submits that Mr. Whittaker having permanently vacated the position, the foregoing clause requires the new vacancy to be bulletined forthwith. The Company maintains that the vacancy was in fact only for 11 calendar days, Between July 21, 1986 when Mr. Whittaker vacated and August 1, 1986 when Ms. Braggan's seniority would be exercised.

On the wording of the collective agreement, the Arbitrator cannot sustain the interpretation adopted by the Company. The status of Ms. Braggan depends entirely on the application of article 25.2 of the collective agreement which provides, in part, as follows:

An employee whose position is abolished or is displaced shall exercise his seniority to displace a junior employee in his seniority group, if qualified in accordance with Clause 24.1 and 24.4; except that such employee shall not be permitted to transfer from one location to another for the purpose of displacing an Office Boy, Junior Clerk, Messenger or Call Boy, unless mutually agreed. Within five calendar days of the date his position is abolished or within ten calendar days if he is displaced, such employee shall notify the appropriate Company Officer of the position to which he will exercise his seniority and he shall fill that position within five calendar days of date of notification; except that an employee absent on leave when his position is abolished or he is displaced shall exercise his seniority within ten calendar days from date of expiry of leave.

On a plain reading of the foregoing provision, an employee in the position of Ms. Braggan is, in the event of the abolition of her position, entitled to displace a junior employee. The notice to be given by the employee is plainly within five calendar days of the date her position is abolished and the actual exercise of seniority by filling the position to which the displacement occurred is, in turn within five days of the date of notification. Those conditions plainly were not, and could not be, satisfied by the manner in which Ms. Braggan was placed in the position formerly held by Mr. Whittaker. She cannot be said to have exercised her seniority on August 1, 1986 or within five days of that date since neither Mr. Whittaker nor any other employee junior to Ms. Braggan occupied that position at the time. While it appears that the Company and the Union have evolved a practice of allowing an employee whose position is abolished to give early written notification of his or her intention to displace a junior employee, a practice which plainly advantages both parties, that is an administrative expedient whose operation cannot extend or abrogate the substantive rights of employees clearly articulated within the collective agreement. In all of the circumstances, therefore, the Company was not entitled to consider the position as having been claimed by Ms. Braggan by the exercise of her seniority.

For these reasons the grievance must be allowed, but only in part. The Union seeks an order of compensation for the benefit of two employees said to have been affected by the violation of the collective agreement. The assertion of the Company, however, not challenged by the Union, is that by virtue of her seniority, on August 1, 1986, Ms. Braggan would have nevertheless successfully bumped into the position in question. In these circumstances the Arbitrator must agree with the Company that there is no basis for an order for compensation, and the recovery of the Union must be limited to a declaration. For these reasons the Arbitrator declares that the Company violated article 23.1 by failing to bulletin the vacant position of Division Clerk, Smith Falls from the date of the departure of Mr. Whittaker to December 1, 1986.

(signed) MICHEL G. PICHER
ARBITRATOR