CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2127

Heard at Montreal, Thursday, 14 March 1991

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Denial of ESE Training - S.L. Aitken, Toronto.

UNION'S STATEMENT OF ISSUE:

The grievor made application for SLE Course – Bulletin No. JT 139 on 2 October 1989. The Company declined to consider the application, as Company policy does not permit a repeat attendance for employees who fail to meet the required standards either at Gimli or during the on-the-job training.

Further it is the Company's position that the dispute is not arbitrable solely because it was not progressed through all proper steps of the grievance procedure.

It is the Union's position that the dispute is in fact arbitrable as the Company's decision to ignore the appellant's application is equal to a Step 1 declination. As well the denial by System Master Mechanic L.G. Finnerty satisfies the Step 2 declination. The Company's refusal to accept the grievor's application is in direct violation of Article 66.2 of Agreement 4.16.

FOR THE UNION:

(SGD.) W. G. SCARROW
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

J. B. Bart	– Manager, Labour Relations, Montreal
M. S. Hughes	– Labour Relations Officer, Montreal

And on behalf of the Union:

W. G. Scarrow	– General Chairperson, Sarnia
F. Garant	– Vice-General Chairperson, Montreal

At the request of the parties, the hearing was adjourned sine die.

On Tuesday, 8 October 1991, there appeared on behalf of the Company:

D. L. Brodie	– Labour Relations Officer, Montreal
J. B. Bart	– Manager, Labour Relations, Montreal
M. S. Hughes	– Labour Relations Officer, Montreal
L. G. Finnerty	– System Master Mechanic, Montreal

J. Vaasjo – Labour Relations Officer, Toronto

And on behalf of the Union:

W. G. Scarrow – General Chairperson, Sarnia
F. Garant – Vice-General Chairperson, Montreal
R. Long – Secretary, G.C.A., Hamilton

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that Mr. Aitken was accepted for training as a locomotive engineer in 1987 and had successfully completed the formal segment of the training course at Gimli. It also appears that he had completed his on-the-job training in yard service and in Go-Train service, although he had not completed his practical training in road freight service when he was dismissed from the course because of certain deficiencies in his performance when he was evaluated by Master Mechanic D.J. Nunns on January 19, 1988. The reasons for his discharge from the course were elaborated in a letter dated April 18, 1988 signed Master Mechanic Nunns.

When Mr. Aitken sought to reapply for entrance into the training program in October of 1989 he received the following reply from System Master Mechanic L.G. Finnerty:

> Regarding your application for E.S.E. training as per Notice J.T. 139.
>
> The application cannot be entertained as Company policy does not permit a repeat attendance for employees who fail to meet the required standards either at Gimli or during on-the-job training.

The grievance turns on the application of article 66.2 of the collective agreement which provides as follows:

> **66.2** Subject to the provisions of paragraph 66.4, senior qualified conductors and yard foremen will be given full and unprejudiced consideration in the selection by the Company of candidates to accept training under the terms of this Article.

The Union submits that the Company's policy of refusing to consider the application of a person in the circumstances of Mr. Aitken contravenes the requirements of article 66.2. The Arbitrator finds that argument compelling. It appears clear from the language of the provision that if Mr. Aitken is a senior qualified conductor or yard foreman, he is entitled to receive consideration in the selection of candidates to training as engine service employees under the terms of article 66. There is nothing expressed in the language of the provision, or to be implied from its terms, that would justify the Company adopting a policy of non-consideration of applicants in the position of Mr. Aitken solely because he was unsuccessful on a prior attempt. It would appear that such a blanket approach could, in its application, have arbitrary consequences where, for example, it could be shown that an employee's prior failure of the course was for medical reasons or due to some other cause beyond his or her control. The purpose of the article is plainly to require the Company to turn its mind to the merits of an individual's application. In the case of Mr. Aitken, as indicated in the letter of January 9, 1990 that was not done.

The above conclusion, and the finding that the Company did not comply with the requirements of article 66.2 of the collective agreement does not, however, automatically lead to the result sought by the Union, which appears to be a direction that Mr. Aitken's application be accepted. As is clear from the terms of the provision, Mr. Aitken is entitled to have his application considered. He is, in other words, entitled to have his request evaluated on its merits. This does not preclude the Company from taking into account the performance of the grievor during his previous on-the-job training in deciding whether he should be permitted to return to the training course. The circumstances of his prior failure are matters which may legitimately be considered by the Company, along with any other relevant facts, in deciding whether he should be permitted to return to the training program. So long as the process is pursued in good faith, and without arbitrariness or discrimination, the ultimate decision remains that of the Company.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator finds that the Company did not observe the requirements of article 66.2 in that it failed to give specific consideration to the application of Mr. Aitken, in contravention of the requirements of article 66.2 of the collective agreement. The matter is therefore referred back to the parties on the understanding that the Company is directed to comply with the article, and that the decision of the Company with respect to disposition of his request cannot be based upon an automatic or blanket decision which disregards his individual circumstances.

11 October, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR