

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2151

Heard at Montreal, Thursday, 16 May 1991

concerning

CANADIAN PACIFIC LIMITED

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

Arbitrability of grievance concerning Ms. M.M. Larochelle's right to displace a Clerk/Storeman position in Sudbury.

JOINT STATEMENT OF ISSUE:

Ms. M.M. Larochelle of Sudbury, Ontario was displaced due to the notice served by the Company, dated January 22, 1990, pursuant to Article 8.1 of the Job Security Agreement.

On July 11, 1990, Ms. Larochelle advised of her intention to exercise her seniority to displace an employee with less seniority in the position of Clerk/Storeman in Materials, Sudbury, Ontario. It is the Union's position that this case is arbitrable and that Ms. Larochelle is eligible for training to enable her to work the position.

The Company contends the issue of Ms. Larochelle's right to displace into the position of Clerk/Storeman is not arbitrable inasmuch as it had previously been progressed by the Union through the grievance procedure and was subsequently withdrawn. Therefore the Company considers that the issue has been dropped in accordance with Article 28.3 of the Collective Agreement, and is not subject to further appeal.

FOR THE UNION:

(SGD.) J. MANCHIP
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) C. GRAHAM
FOR: DIRECTOR OF MATERIALS

There appeared on behalf of the Company:

D. J. David	– Labour Relations Officer, Montreal
C. Graham	– Supervisor, Training & Accident Prevention, Materials Department, Montreal
R. A. Hamilton	– Personnel Manager, Finance & Accounting, Montreal

And on behalf of the Union:

J. Manchip	– General Chairman, Montreal
D. J. Bujold	– National Secretary/Treasurer, Ottawa
C. Pinard	– G.S.T., Vice-General Chairman, Montreal
W. Cleveland	– Local Chairman, Montreal
M. Prebinski	– Staff Assistant, Ottawa

PRELIMINARY AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that upon being disqualified from displacing to a position of clerk/storeperson in the Materials Department at Sudbury on February 12, 1990 the employee, M.M. Larochelle,

proceeded to progress a grievance claiming, in part, that she be afforded the opportunity to train and qualify for the position in question.

The Union submits that the grievance ceased to be pursued because in the meantime, in February and March of 1990, Ms. Larochelle was successful in obtaining training for a position in the Calling Bureau, which position she assumed on April 1, 1990. It appears that she remained employed accordingly until she was displaced by another employee effective October 18, 1990.

The record, so viewed, does appear to support the Union's submission that the grievor's initial claim for the clerk/storeperson's position was no longer pursued after she found alternative employment. In the summer of 1990, when it appeared that she would again be displaced, she once more sought to exercise her seniority to the position of clerk/storeperson. When that opportunity was denied to her she again grieved the position in a second grievance filed July 23, 1990.

In these circumstances the Arbitrator has difficulty with the position of the Company to the effect that Ms. Larochelle's second claim is not arbitrable by virtue of the fact that her first claim was not pursued past Step Three. While the Arbitrator accepts the general principle that a party cannot avoid the consequences of an untimely grievance by merely refiled a second grievance in respect of the same subject matter (*see Re Canadian Union of Public Employees, Local 207 and City of Sudbury, (1965) 15 L.A.C. 403 (Reville)*), that is not what has transpired in the instant case. The record before the Arbitrator reveals that Ms. Larochelle has made two separate claims in two separate and independent circumstances. It is, in my view, understandable that she would have ceased to pursue her initial grievance in respect of the clerk/storeperson position when she found adequate alternate employment within the Company in April of 1990. That was in her own interest, as well as the Company's, since her claim for the clerk/storeperson position had become academic.

The claim which she then decided to forego was in relation to her displacement from her prior position as an Assistant Chief Clerk at Sudbury. The second claim is different in nature, and involves an attempt to protect herself against the subsequent loss of her position in the Calling Bureau. While it may be true that she is claiming the same position in both grievances, the claims involve different events and not the effective relitigation of the same claim. In the circumstances, even if I were to accept that Ms. Larochelle's first grievance must be deemed to have been dropped, I am not satisfied that it would constitute a bar to the second grievance, which is the issue at hand.

For the foregoing reasons the Arbitrator must find that the grievance is arbitrable. It shall therefore be docketed to be heard on its merits.

May 17, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR

On Tuesday, 12 November 1991, there appeared on behalf of the Company:

C. Graham	– Supervisor, Training and Accident Prevention, Materials, Montreal
J. C. Provain	– Area Supervisor, Angus Stores, Montreal
D. J. David	– Labour Relations Officer, Montreal
R. A. Hamilton	– Personnel Manager, Finance & Accounting, Montreal
K. E. Webb	– Labour Relations Officer, Vancouver

And on behalf of the Union:

J. Manchip	– General Chairman, Montreal
D. Deveau	– Executive Vice-President, Calgary
C. Pinard	– G.S.T., Vice-General Chairman, Montreal
H. Holmes	– Assistant Division Vice-President, Windsor
E. K. McIntosh	– Assistant Division Vice-President, McAdam
D. J. Kent	– Assistant Division Vice-President, Vancouver
J. Covey	– Assistant Division Vice-President, Medicine Hat
R. Pagé	– Local Chairman, Montreal
C. Naud	– Local Chairman, Montreal

AWARD OF THE ARBITRATOR

The Union's claim is based on the application of articles 25.2 and 39 of the collective agreement, as well as on clauses relating to employment security training and Appendix E of the Job Security Agreement. Article 25.2 is clear in requiring that an employee seeking to displace into a given position must be qualified to perform the work therein. Similarly, article 39.1 of the collective agreement, which entitles employees to received training, stipulates that training is to be provided only to employees who may become qualified for the new position within a period of ten working days.

The material before the Arbitrator establishes that the Company views six months' experience as necessary for the operation of the heavy fork lifts utilized in the clerk/storeperson position in Sudbury. It also stipulates that the employee must be able to perform typing a the rate of twenty-five words per minutes. The grievor has neither of those qualifications, it being agreed that her typing skills are inferior to the standard required, and that she has no prior experience in the operation of the forklift utilized in the moving of heavy materials and equipment. There is, moreover, some substantial doubt as to the grievor's physical capacity to perform substantial tasks of heavy lifting associated with the position.

On the whole, bearing in mind that the Union bears the onus of proof in the instant case, the Arbitrator is satisfied that the grievor has not brought herself within the entitlements contemplated within articles 25.2 and 39.1 of the collective agreement. The Arbitrator is also satisfied that article 5.1 of the Job Security Agreement does not apply to the grievor, as the condition precedent to its operation is that she is unable to hold work on her employment security seniority territory. Further, her entitlement to training under article 5.2, in the event that she does not have employment security, is discretionary, and depends on the suitability and adaptability to perform the duties of the position sought For the reasons related above, the Arbitrator accepts the position of the Company that the grievor does not satisfy those conditions.

For the foregoing reasons, the grievance is dismissed.

November 15, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR