

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2204

Heard at Montreal, Wednesday, 13 November 1991

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Mr. D. Godin should have been permitted to displace a temporary Track Maintenance Foreman's position junior to himself at Three Rivers, Quebec, in accordance with Article 7, Clause 7.3 of the Job Security Agreement and Article 15.2(a) of Wage Agreement No. 41.

BROTHERHOOD'S STATEMENT OF ISSUE:

On March 2, 1990, Track Maintenance Foreman, Mr. D. Godin's permanent position was abolished at St. Martin Junction, as a result of an Article 8 Notice. He called the Roadmaster on March 6, 1990, and said that he was going to displace a junior Foreman to himself working on evening positions. The Roadmaster refused, saying that he had to exercise his seniority to a permanent position.

The Union contends that: **1.** Mr. Godin should have been allowed to displace the junior Track Maintenance Foreman at Three Rivers. **2.** The Company violated Article 15, Clause 15.2(a) and 15.3 of Wage Agreement 41, by not allowing Mr. Godin to displace a junior employee. **3.** Article 7, Clause 7.3 of the Job Security Agreement, does not state that he has to displace a permanent position.

The Union requests that: **1.** Mr. Godin be compensated for all expenses he incurred. **2.** The Company leave the right to the employees to displace junior employees holding temporary position, without exercising their seniority to a permanent position.

The Company denies the Union's contentions and denies the Union's requests.

FOR THE BROTHERHOOD:

(SGD.) R. DELLA SERRA

FOR: SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

J. S. McLean	– Manager, Labour Relations, Toronto
D. T. Cook	– Labour Relations Officer, Montreal
R. P. Egan	– Labour Relations Officer, Toronto
J. B. Vince	– Observer

And on behalf of the Brotherhood:

L. DiMassimo	– System Federation General Chairman, Ottawa
A. Passaretti	– Vice-President, Ottawa
J. J. Kruk	– Federation General Chairman, Sudbury

AWARD OF THE ARBITRATOR

The narrow issue in this dispute is whether Mr. Godin had the right to displace into the temporary Track Maintenance Foreman's position at Trois Rivières without first declaring a claim to a permanent position. It is common ground that the collective agreement does not contain any language which would, directly or indirectly, support such an obligation.

The Company relies, in part, on clause 14.5 of Wage Agreement No. 41 which provides as follows:

14.5 An employee obtaining a temporary vacancy of forty-five days or more by bid in his own classification will, at the conclusion of such temporary vacancy, revert to his former permanent position unless in the meantime he obtained another position by bid.

The Arbitrator has some difficulty with the argument of the Company based on the foregoing provision. Clause 14.5 appears within a portion of the collective agreement dealing explicitly with vacancies and new positions and defining the relative rights of the employees and the Company with respect to the bulletining and filling of vacancies, including temporary vacancies. It is evident that the parties intended that there be some obligation upon an employee to gravitate towards a permanent position in the exercise of his or her bidding rights. That is reflected in the following provisions:

14.6 (a) An employee obtaining a temporary vacancy of forty-five days or more by bid in a higher classification must exercise his seniority on the first permanent vacancy that becomes available in the higher classification and fill such vacancy at the conclusion of the temporary position. If no such permanent vacancy becomes available he must exercise his seniority to displace a junior employee holding a bulletined temporary position in the higher classification provided such temporary position is expected to be in existence for forty-five days or more.

...

14.7 An employee who declines to exercise his seniority to fill another position in such higher classification in accordance with Clause 14.6(a) shall revert to his former permanent position at the conclusion of the temporary position and forfeit all seniority rights in the higher classification.

In the Arbitrator's view the foregoing provisions reflect a circumstance in which the parties have specifically contemplated the obligation of an employee occupying a temporary vacancy to claim a permanent vacancy in the same classification. It would suggest that where the parties intended such an obligation, they expressed it. The rights of Grievor Godin were not exercised in the context of bidding on a bulletined vacancy, either temporary or permanent. Rather, he fell under the terms of section 15 of the collective agreement which governs the rights of employees whose positions are abolished. Clause 15.2(a) provides as follows:

15.2 (a) Except as otherwise provided in Clauses 14.4, 14.10 and 15.3, in the event of a reduction in staff, an affected employee must, within 15 calendar days, displace in his own class or group, on his seniority territory. If unable to do so, if qualified, such employee must displace a junior employee in a lower class or group in which he has established seniority.

There is nothing in the foregoing provision, or anywhere else in Section 15 of the collective agreement, to indicate any agreement or understanding of the parties that an employee whose job is abolished must first declare to a permanent position before displacing into a temporary position. There is, in other words, nothing in Section 15 of the collective agreement that is comparable to clause 14.6(a) to disclose an intention of the parties to compel a displaced employee to claim a permanent position, as is the case for one who bids on a temporary vacancy.

Nor, in the Arbitrator's view, can it be said that there is a clear and sustained past practice to support any such obligation. The representations of the Brotherhood at the hearing confirm that there was no distinction between permanent and temporary positions for these purposes within the collective agreement prior to 1965, and that it is only with the more recent implementation of article 8 notices under the Job Security Agreement that the issue of the displacement rights of persons in the circumstances of Mr. Godin have arisen. In the circumstances, therefore, the Arbitrator is not persuaded that the parties can be said to have operated pursuant to a mutual practice or understanding consistent with the position advanced by the Company. Nor, in my view, can the language of article 7.3 of the Job Security Agreement, which requires an employee to exercise his or her maximum seniority rights as a

condition for the preservation of employment security be said to support the Company's position. Nowhere in the text of that document is there an indication that such rights must necessarily be exercised to claim permanent as opposed to temporary positions. Rather, the intention appears to be to require the employee who would otherwise have the benefit of employment security, to maintain himself or herself in active employment by exercising seniority maximally through the location, area and region to do so.

The Arbitrator appreciates the administrative efficiencies which prompt the position preferred by the Company. It may be that in some circumstances the ripple effect of displacements would be reduced if employees were required to declare onto a permanent position before being allowed to displace into a temporary position of their choosing. Any refinement to achieve that end, however, must be reflected in the language of the collective agreement in relatively clear and unambiguous terms, such as those found in the separate context of bidding under clause 14.6(a). In the absence of any such language the Arbitrator is unable to accede to the position of the Company. For the foregoing reasons the grievance must be allowed.

The Arbitrator finds and declares that the grievor, Mr. Godin, did have the right to displace to a temporary Track Maintenance Foreman's position at Trois Rivières and was under no collective agreement obligation to first claim or declare to a permanent position before doing so. The Arbitrator further directs that the Company compensate the grievor for losses, if any, which can be attributed to the denial of his rights under the collective agreement by the Company. That matter may be spoken to should the parties be unable to reach agreement.

November 15, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR