CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2215

Heard at Montreal, Wednesday, 11 December 1991

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

EX PARTE

DISPUTE:

The removal of L.A. LeBlanc of Moncton, N.B., from Employment Security status for refusing a position of General Clerk on another region.

BROTHERHOOD'S STATEMENT OF ISSUE:

Following the posting of a regional bulletin in the VIA Quebec region, the Corporation called Ms. LeBlanc, from Employment Security status, to fill the position. She refused the permanent assignment and lost her Employment Security.

The Brotherhood contends that the position should have been awarded to the senior qualified applicant on the VIA Quebec region and that Ms. LeBlanc was not the employee to be called. Further, the Brotherhood was advised by the Corporation that Ms. LeBlanc was not removed from the Employment Security list, therefore, the Corporation is estopped from removing her from the list. Further, Ms. LeBlanc sought training as an affected employee and was not provided such training which consequently afforded work opportunities to employees junior to her in the Atlantic region. The Brotherhood alleges that the Corporation's actions are in violation of Article 12.1 of Agreement No. 1 and the Corporation's so-called calling procedures.

The Corporation denies any violation of the Collective Agreement. It argues that Ms. LeBlanc was called in accordance with the established Employment Security calling procedures, and further that Ms. LeBlanc was the most junior Employment Security employee qualified for the position on Employment Security at the time, and Ms. LeBlanc was senior to the senior qualified applicant on the VIA Quebec region.

FOR THE BROTHERHOOD:

(SGD.) T. N. STOL
NATIONAL VICE-PRESIDENT

There appeared on behalf of the Corporation:

C. Pollock	– Senior Officer, Labour Relations, Montreal
M. St-Jules	– Senior Negotiator & Advisor, Labour Relations, Montreal
D. Fisher	– Senior Officer, Labour Relations, Montreal
J. Kish	– Senior Advisor, Customer Services, Montreal

And on behalf of the Brotherhood:

T. Barron	– Representative, Moncton
G. Murray	– Regional Vice-President, Moncton
R. Dennis	– Representative, Moncton
T. N. Stol	– National Vice-President, Ottawa

W. Coolen – Local Chairperson

The hearing was adjourned by the Arbitrator to January 1992.

On Tuesday, 11 February 1992, there appeared on behalf of the Corporation:

M. St-Jules – Senior Negotiator & Advisor, Labour Relations, Montreal
C. Pollock – Senior Officer, Labour Relations, Montreal
D. Fisher – Senior Officer, Labour Relations, Montreal
J. Kish – Senior Advisor, Customer Services, Montreal
M. Morency – Section Director, Human Resources Services (East),
D. Depelteau – Supervisor, Employee Services,
C. Thomas – Officer, Human Resources, Halifax

And on behalf of the Brotherhood:

T. Barron – Representative, Moncton
G. Murray – Regional Vice-President, Moncton
R. Dennis – Local Chairperson, Moncton
T. N. Stol – National Vice-President, Ottawa
R. Storness-Bliss – Regional Vice-President, Vancouver
R. J. Stevens – Regional Vice-President, Toronto
D. Olshewski – Regional Vice-President, Winnipeg
A. Wepruck – Representative, Montreal
F. Bisson – Local Chairperson, Montreal
D. Hazlitt – Local Chairperson, Winnipeg
A. Cerilli – Witness

AWARD OF THE ARBITRATOR

The grievance has been progressed by the Brotherhood because it alleges that the Corporation violated article 12.1 of the collective agreement, as well as the understanding of the parties with respect to the operation of the Special Agreement of November 19, 1989, by requiring Ms. L.A. LeBlanc of Moncton, N.B. to transfer to a vacant bulletined position in the Quebec Region from the Atlantic Region. The Brotherhood submits that by the agreement of the parties the grievor was under no obligation to move to Quebec to assume the position when it could be filled by a qualified applicant from the VIA Quebec Region, Ms. F. Côté, the person who was ultimately awarded the position after it was declined by Ms. LeBlanc. The thrust of the Brotherhood's position is that Ms. LeBlanc was under no obligation to move out of her region to protect the assignment, as it should have been awarded to Ms. Côté by the normal operation of article 12 of the collective agreement. In the result, it submits that the Corporation violated the terms of the Supplemental Agreement, and the Special Agreement, by terminating Ms. LeBlanc's employment security status.

At issue is the appropriate calling procedure to be followed when filling bulletined positions while employees are on employment security. The evidence before the Arbitrator discloses that that issue was the subject of extensive discussion and negotiation between the parties in October, November and December of 1989, immediately prior to the implementation of the changes in service and reduction of staff effective January 15, 1990. The evidence of the Brotherhood is that its officers were given assurances by the Corporation's representatives that subsequent to January 10, 1990, after the completion of the special General Bid, newly created vacancies would be filled by the normal application of the collective agreement, save that employees who are on employment security within the region, and who are aware of the vacancy, are compelled to exercise their seniority in bidding for the position. They are not, however, required to bid on positions outside their regions, or to fill such positions where qualified employees from within the other region are available to do so. The Brotherhood submits that the foregoing is the understanding reached as part of the Memorandum of Agreement and Special Agreement which were both executed on November 19, 1989. It maintains that that understanding was further clarified in a subsequent meeting between the parties held at Montreal on November 27, 1989 and is reflected in documents provided to the Brotherhood by the Corporation shortly thereafter. The Corporation denies that any such understanding was reached.

On a careful review of the material filed and the evidence adduced the Arbitrator finds the position of the Brotherhood to be the more compelling. In coming to that conclusion I am of the view that written documents produced by the parties, and particularly those produced by the Corporation immediately after the agreements of

November 19 and the meeting of November 27, 1989 are the best evidence with respect to the mutual intention of the parties as agreed at that time.

The record discloses, beyond controversy, that on Friday, December 15, 1989 the Corporation provided to the Brotherhood, in the VIA West Region, an outline of the procedures for the General Bid to take place under Agreement No. 1, pursuant to the Memorandum of Agreement of November 19, 1989. One section of that notice is entitled "Positions Available After January 10, 1990". The final paragraph under that section reads as follows:

> When a position is posted and an employee not on Employment Security bids for and could be awarded the position, the position will be offered to the next senior employee (qualified or could be qualified), on the Regional Employment Security List. If that employee refuses the position the Corporation will continue to offer the position to the next most senior employee (qualified or could be qualified), until all employees on this Region have been offered, who are senior to the employee who originally bid for the position. Those employees that refuse, will lose their employment security but would be eligible for layoff benefits. **The employee who originally bid will be awarded the position.**
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> (emphasis added)

Several days following the above communication, on December 19, 1989 Mr. André Léger, then the Manager of Labour Relations for the Corporation, wrote to Mr. T. McGrath, National Vice-President of the Brotherhood, as follows:

> Dear Mr. McGrath
>
> As requested and in accordance with the Memorandum of Agreement concerning the implementation changes effective January 15, 1990, I prepared a procedure to follow when filling bulletined positions while employees are on Employment Security.
>
> If you have any questions on the issue, do not hesitate to call. Yours truly,
>
> (sgd) André Léger
> Manager, Labour Relations

Attached to the letter was a model scenario described by the Corporation's Manager of Labour Relations to deal with the filling of bulletined positions that might arise after the General Special Bid, as it would apply to employees who would then be on employment security. That communication, which was copied to a number of the Corporation's managers, is as follows:

FILLING BULLETINED POSITIONS WHILE
EMPLOYEES ARE ON EMPLOYMENT SECURITY

> **SCENARIO**: – Collective Agreement No. 1. A permanent position is bulletined in Moncton on a regional bulletin as provided by Article 12.1. Several employees bid this job. Of all the employees at work who bid the position, employee #65, on the VIA Atlantic Agreement No. 1 seniority list, is the one with most seniority. Also, of the laid off employees who bid the same position, employee #52 is the senior. No bids were received from employees on Employment Security.

At work	On lay-off	**On employment security**	**Regional list of employees on Employment Security**
#65	#52	no bids	#29 Halifax 32 Campbellton 39 Moncton 46 Halifax 50 Moncton 53 Moncton 56 Halifax

> The senior employee who bid the position (number 52 on the seniority list) is on lay-off and may be allotted the position. However, because there are employees on Employment Security (ES), #52 is put on hold. The senior employee on ES, at that location, #39, must first be approached and offered the position. If he refuses, he will lose his ES protection, will not be eligible for layoff benefits and may also lose his seniority. Number 50 would then be approached and the same procedure would be repeated. If #50 would also refuse, #53 could not be offered the position account of him being junior to #52 – but #52 would still be on hold – we must now revert to the regional employees on ES, but this time, in inverse seniority. Number 46 of Halifax is approached. If he refuses, he will lose his ES protection but would maintain eligibility for lay-off benefits from the date the position was offered to him. Moving upward to #32, the same procedure would be repeated. If these employees on ES in the Region refused, the position would then be awarded to the employee on layoff (#52) who originally bid.
>
> If on a region/seniority list a position remains unfilled (no bids from employees at work or laid-off and the regional ES list being depleted), the junior (again in inverse seniority) qualified or could-be-qualified employee on the System ES list will be offered the position. If he refuses, he will lose his ES protection, but would maintain eligibility for layoff benefits from the date the position was offered to him. The same procedure would be repeated upward on the System ES list.
>
> The same approach applies to employees covered by Collective Agreement #2.

For the sake of completeness, it should be stressed that before me the Brotherhood disputes, at least in part, the interpretation contained in the final paragraph of the communication of December 15, 1989, reproduced above. It submits that if a position can be filled by the normal operation of article 12 of the collective agreement, even by an employee who is not on employment security, the position is not to be filled by canvassing employees on employment security. In support of that position it points to a written presentation of the Corporation made at the meeting November 27, 1989 where the issue of filling vacancies after January 10, 1990 was dealt with in the following terms:

> **H.** After January 10, 1990, as vacancies arise, they will be bulletined in the usual manner. Resulting vacancies will be filled in reverse seniority order from list of Employment Security employees on the region, there being none, from the system.

In the Brotherhood's submission, the foregoing paragraph contemplates that if a position is posted and can be filled by the bid of an employee who is not on employment security, the vacancy is to be considered filled, and no further obligation can arise in respect of employees on employment security to take the position. The Arbitrator has some difficulty drawing that conclusion from the relatively ambiguous language of paragraph H, quoted above. In my view, the best evidence of the intention of the parties at the time they made the Special Agreement and the Memorandum of Agreement, is reflected in both the communication of December 15, 1989 to the Brotherhood in the VIA West Region, as well as in the letter and attachments to the Brotherhood's National Vice-President from the Corporation's Manager of Labour Relations dated December 19, 1989.

The evidence discloses that subsequently, on several occasions, the Corporation purported to revise the calling procedures to place a more onerous burden on employees on employment security to exercise their seniority in respect of vacant positions outside their region. There is, however, no evidence of any agreement between the parties with respect to those revised calling procedures. In the result, the Arbitrator is compelled to conclude that the evidence of the Brotherhood's witnesses in these proceedings with respect to the nature of the understandings reached on the filling of vacancies after January 10, 1990, buttressed by the Corporation's own written communications of December 15 and 19, 1989 represents the best evidence of the parties' agreement with respect to calling procedures which comply with the Special Agreement and the Memorandum of Agreement of November 19, 1989. In the Arbitrator's view these agreements, interpreted in the light of the parties' understanding, must plainly be taken to have modified what would otherwise be the impact of Article 7 of the Supplemental Agreement, even if the Arbitrator were to accept the position of the Corporation that that provision is not restricted to displacement circumstances (a matter on which I do not deem it necessary to make any finding for the purposes of this grievance).

The analysis and conclusions drawn in this grievance differ from those found by this Office in **CROA 2074** which also dealt with calling procedures. In that case, however, the documentary evidence, which has been reexamined in detail, did not include either the letter to the Brotherhood from the Corporation's Manager of Labour

Relations of December 19, 1989, or the December 15, 1989 communication to the Brotherhood. Those documents, coupled with the oral testimony heard in these proceedings, compel the Arbitrator to adopt a different conclusion as regards the merits of Ms. LeBlanc's claim to a violation of the collective agreement and the understanding between the parties with respect to her calling obligations to preserve her employment security. In coming to that conclusion I am persuaded by the letter of the Manager of Labour Relations which, on its very face, describes the procedure for filling bulletined positions "... in accordance with the Memorandum of Agreement ...". It should be stressed in that in so finding I make no adverse conclusion with respect to the good faith of the Corporation or its officers who, it is agreed, faced a process of some complexity and uncertainty at a time when the Corporation was forced to alternate the individuals responsible for the negotiation and implementation of the Special Agreement.

The evidence before the Arbitrator establishes that at the critical time, when the employees were required to make their selection under the Special General Bid to protect their employment as of January 15, 1990, the Corporation represented to them, and to the Brotherhood's officers, that they would not be compelled to move from one region to another to fill vacancies arising after January 10, 1990, unless such a vacancy remained unfilled following the normal bidding process and the depletion of the regional employment security list. That representation was clearly made in such a way as to be relied upon by the Brotherhood representatives in advising their members, and by employees in the position of Ms. LeBlanc seeking to protect themselves in the Special Bid. In the Arbitrator's view it would be inequitable for the Corporation to later resile from its undertaking which, as I have found, was part of its agreement with the Brotherhood. It would plainly be a violation of the Collective Agreement and the Special Agreement as agreed between the parties. On that basis the grievance of Ms. LeBlanc, filed in a timely manner, must succeed on its merits.

In dealing with the equity of the grievance, however, the Arbitrator cannot disregard the fact that the documentary and *viva voce* evidence tendered in the instant grievance was, by the exercise of due diligence, available to the Brotherhood at the time of the hearing in **CROA 2074**. In my view, however, given the nature of proceedings in the Canadian Railway Office of Arbitration, it would be overly technical and out of keeping with the purpose of the Office and the Memorandum of Agreement which has established it to disregard the newly tendered evidence on the technical basis that Ms. LeBlanc's case should have been put forward within the framework of **CROA 2074**. Under the terms of the **Canada Labour Code**, for reasons relating to the advancement of sound labour relations, the Arbitrator is not bound by the rules of evidence and procedure which would be more appropriate to a court. Moreover, the resolution of disputes in the Canadian Railway Office of Arbitration is predicated, at least in part, on the ability of the parties themselves, without resort to legal counsel, to present their cases in a manner which they deem to be most appropriate, subject to the rules of the Office. In that context, I am satisfied that it is appropriate to admit in evidence and give effect to the new evidence tendered in these proceedings, to the extent that it reflects the true nature of the understanding between the parties with respect to the issue of the filling of vacancies after January 10, 1989, as applied to the claim of Ms. LeBlanc.

The foregoing conclusion, however, does not relieve the Brotherhood of all responsibility, as regards the issue of the compensation now payable to Ms. LeBlanc. While it is not necessary to make a final determination of that matter at this time, and subject to such further submissions as the parties might wish to make, it would appear to the Arbitrator that to the extent that the Corporation would be compelled to compensate Ms. LeBlanc for any wages and benefits for a period of time which would have been avoided by the pleading of the fullest evidence in the possession of the Brotherhood at the time of the hearing in **CROA 2074**, it would be appropriate to adjust any order of compensation accordingly.

In the result, for all of the foregoing reasons, the Arbitrator finds that the Corporation violated the collective agreement, as well as the understanding of the parties with respect to the filling of vacancies after January 10, 1990 by employees on employment security under the terms of the Memorandum of Agremeent and the Special Agreement, when it terminated Ms. LeBlanc's employment security following her refusal to accept the position of General Clerk on the VIA Quebec Region. In keeping with the agreement of the parties, as reflected in the documents reproduced above, the Corporation was under an obligation to award the position to Ms. Côté, who originally bid it, there being no qualified employees on employment security in the VIA Quebec Region. In the result the employment security status of Ms. LeBlanc must be deemed never to have been forfeited. As the award disposes fully of the employment security rights of the grievor, the Arbitrator deems it unnecessary to deal with the issue of training. Insofar as compensation is concerned, for the reasons noted above, the matter may be spoken to in the event that the parties are unable to agree.

February 14, 1992

(Sgd.) MICHEL G. PICHER
ARBITRATOR