

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2810

Heard in Montreal, Tuesday, 14 January 1997, and Thursday, 13 February 1997

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

Claim by Mr. Sylvain Debellefeuille for reimbursement by the Company of all wages, overtime and interest due to him if he had held bulletin no. 421.567.

EX PARTE STATEMENT OF ISSUE:

According to the rule of CSST, Mr. Debellefeuille came back to work on December 5, 1995.

Mr. Debellefeuille took annual vacation and restarted work on January 3, 1996.

On January 5, 1996 he sent a message to Mr. Dupuis asking him to see all bulletins since September 13, 1991.

On several occasions, Mr. Debellefeuille, with his Union representative, asked management to see all bulletins, without success.

Therefore, Mr. Debellefeuille claims all wages, overtime and interest due to him if he had held bulletin no. 421-567.

The Company declined the Union's request.

FOR THE UNION:

(SGD.) R. NADEAU
VICE-PRESIDENT

There appeared on behalf of the Company:

C. LeCorré	– Counsel, Montreal
R. Dupuis	– Regional Manager, Montreal
D. Case	– Vice-President, Human Resources, Toronto

And on behalf of the Union:

K. Cahill	– Counsel, Montreal
R. Nadeau	– Vice-President, Quebec
S. Debellefeuille	– Grievor

AWARD OF THE ARBITRATOR

The Union claims on behalf of the grievor that he be awarded the position of city tractor-trailer driver held by Mr. Agostino Marchetta, an employee who is junior to Mr. Debellefeuille, with damages for loss of wages and benefits.

It appears from the file that the grievor suffered a work related injury on April 23, 1985. He returned to work on August 10, 1987. Thereafter, he suffered another work related injury on September 12, 1991, followed by a relapse on March 24, 1992. On November 29, 1993, the CALP concluded that the grievor could return to work. However, when he presented himself at work on December 9, 1993 the Company claimed that he had lost his seniority because he was absent for more than one year. Following a grievance filed under article 32 of the *Loi sur les accidents du travail et les maladies professionnelles [LATMP]*, on November 9, 1995 the CALP ordered the reinstatement of the grievor retroactive to December 10, 1993, with compensation for his loss of wages as a long distance driver. However, Mr. Debellefeuille claims that the refusal of the Company to reinstate him in December of 1993 denied him the possibility of bidding on more lucrative positions, such as the position awarded to Mr. Marchetta. Therefore, he requests that the Arbitrator order that he be reinstated into that position, and that he be compensated for the difference in the higher salary which he could have earned and the compensation which he had been paid in accordance with the decision of the CALP.

The Arbitrator cannot allow the grievance, as it pertains to the totality of the damages claimed. It seems to the Arbitrator that the grievor could have availed himself of his right to return to work through the grievance and arbitration procedure, rather than having recourse to the Commission, as the collective agreement contains the appropriate provisions, in accordance with article 244 of the *LATMP*. However, if an employee takes the route of the Commission in order to claim his right to return to work, his compensation at the time of his reinstatement must be a function of the jurisdiction of the CALP Commission. (**Fédération des infirmières et infirmiers du Québec et Centre hospitalier St. Mary, D.T.E. 96-T-412 (T.A.)**). In the instant case, that is to say that the damages is in the first place at the rate of the salary which the grievor earned at the time of his work related injury, payable at the moment of his reinstatement, in accordance with the CALP order.

However, that conclusion does not put an end to the grievance. In the instant case, it seems to me undeniable that as an employee who has returned to work, for what for whatever reason must be seen as an authorized leave, Mr. Debellefeuille could avail himself of his rights under article 5.2.3 of the collective agreement, which reads, in part, as follows:

5.2.3 ... Employees returning from vacation or authorized leave of absence as outlined in articles 3 and 11 will be permitted to apply, upon return or within five (5) calendar days thereafter, for any bulletin which was posted during the employee's absence.

Notwithstanding the arguments of Counsel for the Company, I cannot conclude that the right of the grievor to apply for positions bulletined during his absence was something covered by the decision of the CALP. The rights of the employee under article 5.2.3 of the collective agreement was clearly not before the Commission, nor before the CALP. The CALP, it appears, did not have the jurisdiction to reinstate the grievor into a position other than that which he held at the time of his work related injury. But that limited jurisdiction of the CALP cannot amend the collective agreement, nor restrict the rights of the grievor which arose upon his return to work.

There is nothing in the evidence before the Arbitrator which puts in questions the ability of Mr. Debellefeuille to assume the duties of bulletin number 421-567 held by Mr. Marchetta, which consists of driving a city tractor-trailer during the day. That position is clearly more advantageous than that which he had occupied, a long distance tractor-trailer driver, at night between Montreal and Kingston. It was clearly the right of the grievor to claim and to be awarded that position upon his return to work in January of 1996. He is therefore entitled to be awarded that position immediately, with compensation for his loss of wages and benefits, if any, for the period calculated from the date of his return to work in January of 1996 until the date of his occupying the position held by Mr. Marchetta. However, for the reason noted above, Mr. Debellefeuille is not entitled to compensation for the period between December 1993 and his return to work in January 1996, the period for which his compensation was exclusively under the jurisdiction of the CALP.

The grievance is therefore allowed, in part. The Arbitrator orders that Mr. Debellefeuille be awarded the position of bulletin no. 421-567 forthwith, with compensation for his loss of wages and benefits since the time of his return to work in January of 1996.

March 5, 1997

(signed) MICHEL G. PICHER
ARBITRATOR