

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2942

Heard in Montreal, Tuesday, 14 April 1998

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim on behalf of Mr. B.S. Saini.

JOINT STATEMENT OF ISSUE:

In January 1995, the grievor was informed that he would not be permitted to exercise his consolidated seniority into a Utility Grinder's position that he wished to occupy. He was told that he was not qualified for the job. The grievor requested training but was denied it.

The Union contends that: The Company is in violation of articles 5.1, 7.3 and Appendix G of the Employment Security and Income Maintenance Agreement.

The Union requests that the grievor be allowed to occupy the position desired, that he be provided training and that he be made whole for any and all losses sustained as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) R. F. LIBERTY
SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. TORCHIA
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

S. Blackmore – Labour Relations Officer, Edmonton
J. Torchia – Manager, Labour Relations, Edmonton

And on behalf of the Brotherhood:

R. F. Liberty – System Federation General Chairman, Winnipeg
R. A. Bowden – System Federation General Chairman, Ottawa
D. W. Brown – Sr. Counsel, Ottawa

AWARD OF THE ARBITRATOR

At the argument of this matter before the Arbitrator it became apparent that the parties are not in fact apart on the process of application of the collective agreement provisions, and the Employment Security and Income Maintenance Agreement (ESIMA), in the circumstances of the grievor. It appears to be common ground that as a first matter, as an employee adversely impacted by an article 8 notice, Mr. Saini would first be called upon to exercise his seniority rights under article 7.3(a) of the ESIMA which reads as follows:

7.3 (a) An employee who has Employment Security under the provisions of this Article and who is affected by a notice of change issued pursuant to Article 8.1 of The Plan, will be required to exercise his maximum seniority right(s), e.g., location, area and region, in accordance with the terms of the collective agreement applicable to the employee who has Employment Security. (See Appendix "F" for CBRT&GW, See Appendix "G" for BMW, See Appendix "H" for RCTC)

Paragraph 7 of Appendix G referred to above provides as follows:

7. An employee identified in Items 1 through 5 may exercise his consolidated seniority rights for displacement purposes, including the filling of an unfilled permanent vacancy, if he has exhausted his seniority pursuant to Article 7.3(a) of the Plan and is still unable to hold work. Failure to do so will result in forfeiture of consolidated seniority and Employment Security.

Article 5.1 of the ESIMA provides as follows:

5.1 An employee who has Employment Security under the provisions of Article 7 of The Plan who has his position abolished and is unable to hold work due to a lack of qualifications, will be trained for another position within his seniority group and, failing that, will be trained (if necessary) in order to fill a position in keeping with the provisions of Article 7. Training (if necessary) will be provided for a position for which he has suitability and adaptability to perform the duties of that position. Such employee will received the 40-hour straight time pay associated with his last railway classification during his period of training (hourly rated employees, 40 x the basic hourly rate; seasonal and spare employees, 40 x the average hourly earnings over the eight weeks preceding lay-off).

Before the Arbitrator the parties did not dispute that Mr. Saini was unable to hold work by the exercise of seniority pursuant to article 7.3(a), of the ESIMA, including the application of paragraph 7 of Appendix G, by the exercise of his consolidated seniority rights. They are also agreed that he would then be entitled to the application of article 5.1 of the ESIMA, which would provide training for him, if he were unable to hold work due to a lack of qualifications. It is at that point where the parties begin to differ.

The Company submits that the grievor was not qualified to perform the utility grinder's position at Thornton Yard in Vancouver, but that he was fully qualified to undertake a permanent work equipment shop helper's position in Edmonton. The position of the Brotherhood is that Mr. Saini was not in fact qualified for either position, but had the suitability and adaptability to be trained for either position. The Brotherhood submits that in the circumstances the grievor was entitled to exercise his own choice as to displacement, and should have been allowed to displace into his preference for the position of utility grinder at Thornton Yard. The Brotherhood submits that the job of work equipment shop helper at Edmonton would have compelled the grievor to involve himself in the operation of equipment with which he was entirely unfamiliar, by reason of his prior work experience, all of which was within the track department.

I am satisfied, on the evidence presented to me, that the Brotherhood has established a *prima facie* case that Mr. Saini was not qualified for either position, and that he needed training for either the utility grinder's position at Thornton Yard or the work equipment shop helper's position in Edmonton. In face of that *prima facie* evidence the Company advanced no detailed evidence to established that in fact Mr. Saini was qualified for the job in Edmonton, and that it was therefore a position which he could in fact claim by reason of his qualifications. The Company's theory, which would have it that the grievor could exercise his seniority to hold work at Edmonton without training is therefore not made out on the evidence before me.

On balance, therefore, the Arbitrator is compelled to conclude that the grievor was in fact unable to hold work, in the sense contemplated within article 5.1 of the ESIMA, and that he was therefore entitled to be trained to fill a position to which he had a right to displace into in keeping with the provisions of article 7.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the grievor be allowed to displace into the position of utility grinder at Thornton Yard, with appropriate training to be provided. He shall also be compensated for any wages and benefits lost, if any, a matter which may be spoken to in the event of any further disagreement.

April 17, 1998

(signed) MICHEL G. PICHER
ARBITRATOR