

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 3193

Heard in Calgary, Wednesday, 9 May 2001

concerning

**CANPAR**

and

**UNITED STEELWORKERS OF AMERICA (LOCAL 1976)  
(TRANSPORTATION COMMUNICATIONS UNION)**

### **DISPUTE:**

Grievances of Winnipeg employee Mr. Gary Stevenson for hours worked January 09 & 15, and February 06, 2001.

### **JOINT STATEMENT OF ISSUE:**

On the dates in question Mr. Stevenson was on a layoff. The Union contends that a employee junior to Mr. Stevenson, Mr. Marvin Schellenberg, worked 8.5 hours on January 09, 2001, 8 hours on January 15, 2001, and 8 hours on February 06, 2001.

The Company has maintained that Mr. Schellenberg does not receive lay off notices because he holds a different bulletin than Mr. Stevenson; that Mr. Schellenberg holds a bulletin as a driver/relief linehaul driver with a requirement for an air brake endorsed driver's licence. Further, the Company contends that Mr. Stevenson does not hold a driver representative position but does perform those duties on a regular basis.

The Union contends that Mr. Schellenberg is used as a driver/linehaul only when required for reasons of vacation, illness or leaves of absence. All other times he does normal P&D work.

The Union argues there is no provision in the collective agreement that allows the Company to retain a junior employee while senior employees are laid-off.

Further, that the collective agreement does not contemplate recall due to speculative circumstances nor does it give super-seniority to any employees based on qualifications.

The Union requested Mr. Stevenson is paid for all earnings on January 09 & 15 and February 06, 2001 at the applicable hourly rate. The Union further requested that the Company comply with the terms of the collective agreement in the future.

### **FOR THE UNION:**

**(SGD.) D. NEALE**  
**VICE-PRESIDENT/FST**

There appeared on behalf of the Company:

P. D. MacLeod

Vice-President Operations, Mississauga

And on behalf of the Union:

D. Neale

– Vice-President, Secretary/Treasurer, Hamilton

A. Kane

– Governing Board Representative Western Canada, Vancouver

### **FOR THE COMPANY:**

**(SGD.) P. D. MACLEOD**  
**VICE-PRESIDENT OPERATIONS**

### **AWARD OF THE ARBITRATOR**

The facts in relation to this grievance disclose that the grievor was on layoff on the three separate dates which are the subject of this dispute, January 9, 15 and February 6, 2001. It appears that following a reorganization of the terminal Mr. Stevenson assumed a working status whereby he occasionally had days without work, and remained subject to being called in by the Company when P&D work was available for him.

The employee assigned to P&D deliveries on the three days in question is Mr. Marvin Schellenberg, of the Winnipeg Terminal. It is not disputed that he holds a bulletined position as a "Driver/Linehaul Driver Relief", a position upon which he successfully bid in September of 1997. That job involves performing P&D work, with responsibilities for also working linehaul runs on a relief basis. It requires the appropriate driver's licence, with an air break endorsement, as well as the successful passing of a Company test on linehaul equipment. It does not appear disputed that in fact Mr. Schellenberg was not on layoff on the days in question, and that he is junior to the grievor.

The grievance must succeed on the basis of the language of article 5 of the collective agreement, which governs promotions, assignments and displacements, and in particular article 5.3 which relates to reductions in staff and recall. In that regard article 5.3.9 reads as follows:

**5.3.9** Laid off employees will be recalled in seniority order. A recalled employee shall be notified by the Company by telephone, registered letter or by hand when required (copy to Local Protective Chairman and Division Vice-President). An employee who fails to report for duty or give satisfactory reason within 3 calendar days from date of notification shall forfeit his seniority and his name shall be removed from the seniority list.

In essence, by the instant grievance the Union in fact raises a different protest. It is common ground that Mr. Schellenberg was not laid off. Any relative right of himself and Mr. Stevenson to be recalled, within the parameters of article 5.3.9 therefore does not come into play. The true nature of the Union's grievance is to assert that the Company wrongfully failed to lay off Mr. Schellenberg on the dates in question, and recall Mr. Stevenson to work, as he was the senior employee qualified to perform P&D work.

Even assuming that this Office should look behind the grievance to the real substance of the dispute, the Arbitrator has some difficulty with that issue, on the specific facts of this case. It does not appear disputed that the Company has, generally by agreement with the Union, established a number of composite job classifications, sometimes within the language of the collective agreement. One example, cited without dispute, of such a position would involve a Lead Hand/P&D Driver. The submission of the Company, substantially unchallenged by the Union, is that when layoffs are implemented they are imposed within specific classifications, and that recalls are accordingly made within the same employee groups. In that circumstance, for example, where a senior P&D driver is on layoff, the Company would nevertheless retain the services of a lead hand/P&D driver who might be junior.

The Union, which bears the onus of proof in this matter, has directed the Arbitrator to no provision of the collective agreement which would compel the Company to lay off employees without regard to their classifications. While it may be that in some circumstances the Union might challenge the establishing of new combined positions which have the indirect effect of undermining seniority rights, it is clear on the material before me that no challenge was taken to the posting of the position of "Driver/Linehaul Driver Relief" established at Winnipeg in 1997, and successfully bid by Mr. Schellenberg. In that circumstance it cannot now indirectly attack the same bulletin, nor can it compel the Company to lay off an employee within that classification in the circumstances disclosed.

For all of the foregoing reasons the grievance must be dismissed.

May 22, 2001

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**