

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 3208

Heard in Montreal, Wednesday, 10 October 2001

concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS  
(UNITED TRANSPORTATION UNION)**

**EX PARTE**

### **DISPUTE:**

The issue in dispute involves the interpretation and application of Article 37 and related provisions of the collective agreement as they relate to Mr. C.A. Brudz of London, Ontario and his removal from Company service after failing his first attempt to qualify as a conductor.

### **COUNCIL'S STATEMENT OF ISSUE:**

Mr. Brudz applied for and was accepted into the trainperson's training program in London, Ontario. Mr. Brudz was removed from the training program on November d, 1998 for failing to meet the requisite 80% passing grade on a Conductor Qualification examination. This was Mr. Brudz's first attempt at qualifying as a conductor.

The Union initiated a grievance claiming article 37 of the UTU-CP. Ltd. collective agreement had been violated. Article 37, clause (a) states, in part:

"A trainman employed after April 28, 1957 will, within 5 years from his initial date of employment as a Brakeman, be required to pass his examinations for promotion to Conductor in turn. Trainmen failing to pass their examinations **will be given a second trial** not less than 2 months or more than 6 months later." (emphasis added)

The Union has requested that Mr. Brudz be immediately reinstated into company service. Further that he be compensated for all loss of earnings and benefits.

The Company has declined the Union's request.

### **FOR THE COUNCIL:**

**(SGD.) D. A. WARREN**  
**GENERAL CHAIRPERSON**

There appeared on behalf of the Company:

D. E. Freeborn	– Labour Relations Officer, Calgary
E. J. MacIsaac	– Manager, Labour Relations, Calgary
F. Peters	– Service Area Manager, Toronto

And on behalf of the Council:

D. A. Warren	– General Chairperson, Toronto
R. S. McKenna	– General Chairman, BLE, Calgary
D. G. Colasimone	– Vice-General Chairperson
N. E. Morden	– Local Chairperson

### **AWARD OF THE ARBITRATOR**

The instant grievance turns on the application of the following provisions of the collective agreement:

**37 (a)** Promotion on each seniority district will be made according to seniority of trainmen on that district and will be governed by merit, fitness and ability. Trainmen not promoted in their turn will be advised the reason in writing with a copy to the Local Chairman. Senior trainmen will be required to pass their examinations for Conductor in turn. Trainmen who have refused promotion to Conductor are permanently restricted to freight service. A trainman employed after April 28, 1957 will, within 5 years from his initial date of employment as a Brakeman, be required to pass his examinations for promotion to Conductor in turn. Trainmen failing to pass their examinations will be given a second trial not less than 2 months or more than 6 months later. Trainmen failing to pass on second examination will have their names placed at the foot of the master seniority list, or their services dispensed with after investigation subject to Article 33, Investigation and Discipline, of this collective agreement.

...

**(d)** A new Brakeman shall not be regarded as permanently employed until after six months cumulative compensated service from the date of making first pay trip, and, if retained, shall then rank on the master seniority list from the date and time he commenced his first pay trip. In the meantime, unless removed for cause, which, in the opinion of the Company renders him undesirable for its service, the Brakeman shall be regarded as coming within the terms of this collective agreement.

The facts are not in dispute. The grievor, Mr. C. Brudz, commenced employment with the Company and his training for qualification as a conductor on August 24, 1998 at London. The training program in which he was involved is comprised of thirteen modules, each of which involves an interim examination. Upon completion of one module the candidate progresses to the next. When each is successfully completed in turn the candidate writes a culminating thirteenth module, described as the final conductor's examination. It appears that candidates are required to achieve a grade of 80% on all interim module examinations and a final grade of 85% on the final conductor's examination.

The grievor achieved a grade of 72.6% on the eighth training module examination. It appears that that triggered the Company's decision to terminate his employment as a probationary employee, in accordance the provisions of article 37(d) of the collective agreement. In other words, the Company formed the opinion that the grievor's failure at the stage of the eighth module rendered him undesirable for its service.

The Company's position is predicated on its view that article 37 makes a distinction between what it characterizes as "existing trainpersons", whom it maintains are entitled to the protections of article 37(a) and a new or probationary brakeperson, whose employment security is subject to the less protective provisions of article 37(d) of the collective agreement.

The Arbitrator has some difficulty with the Company's rationalization of these two provisions. There is, very simply, nothing within the language of article 37(a) to suggest that it is not to apply to a person in the grievor's circumstance. As is evident from the fourth sentence of sub-paragraph (a), the protections of that article are to be extended to a trainperson employed after April 28, 1957. The individual who falls within that category is compelled to pass his conductor's examination within five years from the initial date of employment. I fail to see how the grievor cannot be characterized as falling within those conditions, albeit his attempt at qualification was contiguous with his initial date of hire, in accordance with what appears to be the Company's new policy concerning the requirement of conductor qualifications for all newly hired employees. By any characterization of the facts, Mr. Brudz must be viewed as a trainman who failed to pass his examination. Article 37(a) categorically states that a trainperson in that circumstance are entitled to a second attempt at the examinations, within the time frame

contemplated under the article. Failure to successfully pass on the second attempt can, of course, result in the employee's termination of employment.

Sub-paragraph (d) of article 37 establishes what can be described as the probationary period of a newly hired trainperson or brakeperson. Not surprisingly, that provision preserves to the Company the discretion to conclude that an individual is undesirable for its service, which amounts to a removal for cause. In my view, however, the concept of a brakeperson being viewed as undesirable for its service must be interpreted in a manner consistent with other provisions of article 37. By the language of article 37(a) the Company has effectively agreed with the Council that the failure of a brakeperson to qualify as a conductor is not, on a first occasion, fatal to his or her employability. The fact that brakepersons are given a second chance at qualifying as a conductor, as agreed within the language of article 37(a), is in my view evidence of the parties' own agreement that an initial failure to qualify does not, of itself, constitute cause for the removal of a brakeperson as undesirable for its service within the meaning of sub-paragraph (d) of article 37. It is difficult to see how these two provisions can otherwise be rationally read to operate together. Were it otherwise the position of the Company would render the protections of article 37(a) virtually meaningless, as it now appears undisputed that brakepersons who are being trained for conductor qualification are, almost without exception, newly hired individuals. While it might be open to the parties to amend these provisions to remove the second chance protection, they have not done so and the Arbitrator must assume that these provisions were intended to have some ongoing operation and meaning.

I am therefore satisfied that the Company did violate the provisions of article 37(a) of the collective agreement in its termination of Mr. Brudz. That conclusion does not, of itself, however, deal with the remedial aspects of this grievance. It is not clear whether Mr. Brudz would, if given a second chance, have successfully completed the conductor qualification process. In all of the circumstances it does not appear to the Arbitrator that it is appropriate, at least at this time, to make any order with respect to compensation. Rather, I remit the matter back to the parties, with the directive that the grievor be reinstated for the purpose of being allowed a second attempt at qualification, as contemplated within article 37(a). Beyond that I remain seized of this matter for the purposes of compensation, should it become necessary for that matter to be dealt with.

October 12, 2001

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