

CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY AWARD TO

CASE NO. 3208

Heard in Montreal, Thursday, 14 March, 2002

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

There appeared on behalf of the Company:

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| D. E. Guérin | – Labour Relations Officer, Calgary |
| S. Munt | – Associate Instructor, Toronto |
| C. Carroll | – Director, Labour Relations, Calgary |
| R. Wilson | – General Manager, Field Operations, Calgary |
| S. Seeney | – Manager, Labour Relations, Calgary |

And on behalf of the Council:

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| M. Russell | – Counsel, Toronto |
| D. A. Warren | – General Chairperson, Toronto |
| D. Colasimone | – Vice-General Chairperson, Sudbury |

SUPPLEMENTARY AWARD OF THE ARBITRATOR

This dispute has been returned to the Arbitrator by reason of the parties' inability to agree on the implementation of the award, and further because the employment file of the grievor, Mr. Brudz, was closed when he declined to return to work when directed to do so by the Company. It is common ground that the issues raised in this dispute concern matters of principle which extend beyond the circumstances of Mr. Brudz, as several other employees found themselves in the same circumstances. While the Arbitrator does not have jurisdiction with respect to the other employees, it appears that the parties wish to have clarification of the manner in which a person in the position of Mr. Brudz should be offered a remedial opportunity to again qualify as a conductor.

The final paragraph of the initial award herein, dated October 12, 2001, reads as follows:

I am therefore satisfied that the Company did violate the provisions of article 37(a) of the collective agreement at 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.

The record discloses that the parties exchanged positions following the Arbitrator's award with respect to the manner in which it should be implemented. The position of the Company was that the employee should be returned to square one, in the sense that he should not be placed back in the training process at some point in mid-process, but should rather be given the full course of training and testing, as would a new employee. In the Company's view that approach, including a medical fitness assessment, would be more in keeping with the safe return to work of the employee, assuming he should qualify. The Company's view is also that should the grievor fail at any point during the course of the retraining and re-examination he would then have exhausted his second opportunity. It is the latter position which raised a point of disagreement on the part of the Council.

The Council takes the position, and asks the Arbitrator to effectively award, that, as the Company suggests, the grievor should be returned to the commencement of the hiring and training process, and taken through all steps of it to establish his qualification. However, in the Council's view the grievor should be given the full array of protections contemplated under the collective agreement, including all of the provisions of article 37(a) which provides that a trainman failing to pass his or her examination is to be given a second trial not less than two months or more than six months later. Counsel for the Council argues that the framework of clause (a) of article 37 contemplates that in the normal circumstance an employee should be brought back for another attempt at the examinations within a reasonable period of time from his or her initial failure, and in any event no more than six months after that event. He submits that the circumstances of the grievor are obviously different, as a considerably greater period of time elapsed between his removal from the training program in November of 1998 and the Arbitrator's order of reinstatement in October of 2001. In that circumstance the Council takes the position that the grievor should be entitled to the full benefit of the two opportunities provided under that article.

As a matter of general principle the Arbitrator agrees with that initial submission of the Council. Firstly, remedies fashioned by boards of arbitration, or for that matter most tribunals, are generally intended to place the aggrieved party in the position which he or she would have enjoyed had there not been a violation of the contract or collective agreement. The language of article 37(a) of the collective agreement contemplates a second opportunity within a certain time window, the essence of the provision being to ensure that candidates who do not succeed in the examinations for conductor are given a reasonable opportunity at a second chance while their knowledge is still fresh. The application of the time window was obviously frustrated in the case at hand. Consequently, if in this matter were being presented for first consideration, the arbitrator would apply the Council's approach.

However, in the instant case there is a jurisdictional limit based on the Arbitrator's initial remedial direction. The reinstatement is expressly "... for the purpose of being allowed a second attempt at qualification,". If the position now argued by the Council, and not advanced at the initial hearing, is applied to Mr. Brudz the Arbitrator would effectively be amending and extending the award, in a manner inconsistent with the limitation upon a tribunal's retainer of jurisdiction. It is well established that a board of arbitration retains jurisdiction to either complete or clarify its decision, but not to amend it. To accede to the Council's request in this particular case would go beyond the remedy which I fashioned in the award of October 12, 2001. In answer to the first question, therefore, the Arbitrator declares that the grievor would, as the Company maintains, be entitled to only one opportunity to pass the examinations upon reinstatement into the conductors' training course. For the purposes of clarity, however, other employees could successfully argue for the broader remedy consistent with the Council's position.

The second issue raised concerns the nature of the Arbitrator's intention with respect to the issue of compensation. The Arbitrator's comments in that regard should obviously be understood within the context of the case. The Council sought the reinstatement of the grievor into employment as a trainman, with full compensation for all wages and benefits lost. As the award indicates, the Arbitrator considered it premature to make an order of compensation, as there remained the possibility that the grievor would not be successful in qualifying as a conductor, in which case he would be liable to be terminated. If the grievor should be unsuccessful at qualifying pursuant to the Arbitrator's direction, it could fairly be assumed that he would not have been successful at qualifying if he had been given a second chance on the first occasion, in 1998. If the facts should unfold in that manner it would be extremely doubtful that the grievor could fairly claim entitlement to any compensation. Alternatively, should he be successful, then it would be possible that an order of compensation for potential earnings lost would be appropriate, subject of course to the normal duty of mitigation.

The last issue to be addressed concerns the status of Mr. Brudz. For reasons which he best understands, Mr. Brudz declined to re-enrol into the conductor training course when given the opportunity to do so by the Company.

The un rebutted representations before the Arbitrator indicate that following the Arbitrator's award, in or about November of 2001, the grievor initially indicated to the Company's officers that he would attend the qualifying course. When he was directed to do so, however, on January 7, 2002 he declined to appear.

Counsel for the Council submits that his decision in that regard was prompted by his own uncertainty as to his personal circumstances, including the manner in which the Arbitrator's order for compensation might ultimately be administered. I am not impressed by that submission. The grievor and his union knew, or reasonably should have known, that the entitlement to compensation would depend on whether Mr. Brudz would be successful in the second attempt. In the circumstances it was not open to the grievor to delay his reinstatement, and the opportunity to qualify as a conductor, based on his personal concerns about the uncertain status of his compensation. The reinstatement of employees on the understanding that issues of compensation, which can sometimes be complex and require extensive data, are to be resolved at a later time is an everyday occurrence in labour relations. In the instant case it would seem obvious that the entitlement of the grievor to any compensation must ultimately depend on whether he could demonstrate the ability to pass the conductors' examination, an event which could only occur if he accepted to be reinstated, retrained and retested. For reasons which he best appreciates, which may well go to the degree of his attachment to his employment with the Company, the grievor simply refused to return to work when it was his obligation to do so. While I appreciate that the grievor may have been faced with some difficult choices, in these circumstances I am satisfied that the Company was and is justified in treating his employment file as closed.

I continue to retain jurisdiction in the event of any further dispute between the parties concerning the interpretation or implementation of the awards in this matter.

March 15, 2002

(signed) MICHEL G. PICHER
ARBITRATOR