CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3418

Heard in Montreal, Thursday, April 15, 2004

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Interpretation and application of section 14.4(a) of Wage Agreement No. 41.

BROTHERHOOD'S STATEMENT OF ISSUE:

In July of 2003 a dispute arose between the parties concerning the Company's new policy concerning the implementation of section 14.4(a) of Agreement No. 41. This new policy consisted of the Company's belief that it can force employees to accept positions of less than 45 days. The Brotherhood disagreed with this and, as a result, a grievance was filed.

The Union contends that: **(1.)** Section 14/4(a) of Agreement No. 41 provides that "an employee who does not exercise his seniority to a temporary positions of less than forty-five days will not forfeit seniority." This principle is repeated at section 15.2(d) of Agreement No. 41; **(2.)** Section 14.4(a) has been in the collective agreement for generations. Never, through all those many years, has the Brotherhood been aware that employees have been forced to accept positions of less than 45 days; **(3.)** The Company's present position is in violation of section 14.4(a) of Agreement No. 41.

The Union requests that it be declared that the Brotherhood's interpretation of section 14.4(a) is correct. In addition, the Brotherhood requests that any employee adversely affected by the Company's interpretation be made whole for all losses including but not limited to wages, mileage, travel time, etc.

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

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. E. Guérin	– Labour Relations Officer, Calgary
Karen Fleming	– Counsel, Calgary
E. MacIsaac	– Manager, Labour Relations, Calgary
C. Beaudry	– Constable, CPR Police Service
A. M. Paton	– Assistant Track Program Supervisor

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
D. W. Brown	– Senior Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. McCracken	– Federation General Chairman, Ottawa

AWARD OF THE ARBITRATOR

At issue is the application of clause 14.4(a) of the collective agreement. It reads as follows:

> **14.4 (a)** Except as otherwise provided below, temporary vacancies of less than forty-five calendar days required by the Company to be filled, in positions subject to being bulletined in accordance with Clause 14.1, shall be filled by the senior qualified employee immediately available, subject to the provisions of clause 21.9.
>
> An employee who does not exercise his seniority to such a temporary vacancy of less than forty-five days will not forfeit any seniority.

The Brotherhood maintains that the purpose of the above provision is to confirm that where employees desire the opportunity to fill temporary vacancies of less than forty-five days they may claim them, on the basis of seniority. Additionally, the article makes it clear that there is no penalty in respect of the loss of seniority for an employee who declines to exercise his or her seniority to fill such temporary vacancy. According to the Brotherhood the provision was never intended as an instrument whereby the

Company could compel senior employees to fill temporary vacancies. It submits that the Company has effectively attempted to apply a new policy of interpretation which was never intended.

The Company asserts a radically different view. Firstly, it notes that it is only on rare occasions when there will be a need to compel a senior employee to fill a temporary vacancy. Often temporary vacancies become an opportunity for a short term promotion into work at higher rates of pay, with no difficulty in finding individuals willing to assume such positions, on the basis of their seniority. The Company relates, however, that on some occasions there may be difficulty in filling a temporary vacancy, and submits that in that rare circumstance the provisions of clause 14.4(a) must be viewed as available to the employer, in the management of its enterprise, to ensure that qualified employees are made available to perform the work which must be done.

The Company submits that the scheme of the collective agreement supports its interpretation of the article. It draws to the Arbitrator's attention the fact that the principle of "senior may – junior must" is expressly adopted in the provisions of the collective agreement which govern the bulletining of permanent positions. That is reflected, for example, in Appendix B-23 of the collective agreement. The Company also notes to the attention of the Arbitrator that clause 15.2(d) of the collective agreement expressly relieves laid off employees against the burden of exercising seniority to a position of less than forty-five calendar days in duration. The Company also notes that jurisprudence, both inside and outside the CROA, has confirmed, absent contrary

language in the collective agreement, the right reserved to management to compel employees to fill temporary vacancies as determined in the exercise of management's rights. In that regard reference is made to **SHP 268, CROA 1885** and the decision of a board of arbitration chaired by Judge W. Little in **Re Sudbury Mine, Mill & Smelter Workers, Local 598 and Falconbridge Nickel Mines Ltd.** (1959) 10 L.A.C. 189.

Upon a review of the materials filed the Arbitrator is compelled to agree with the interpretation advanced by the Company. From a purposive standpoint the logic of the Brotherhood's position leaves much to be desired. With respect to temporary vacancies there is no provision to be found in the collective agreement similar to the "senior may – junior must" principle which expressly governs the filling of permanent bulletined positions, as reflected in the language of Appendix B-23 of the collective agreement. Can it be that the parties contemplated or intended in an urgent situation that the Company would be virtually unable to temporarily transfer employees from one endeavour to another to cover off a temporary vacancy? That question becomes all the more difficult to the extent that the collective agreement expressly relieves laid off employees of any obligation to exercise their seniority to fill temporary vacancies. The position of the Brotherhood would lead to an implausible or counter-intuitive result.

The Arbitrator must also agree that clause 26.9 lends support to the employer's position. It provides as follows:

> **26.9** Employees temporarily assigned to lower rated positions shall not have their rates reduced.

Employees will not normally volunteer to assume lower paid duties. At a minimum, the foregoing provision, and in particular the use of the word “assigned”, clearly reflects the understanding of the parties that individuals may be compelled, against their wishes, to work a temporary assignment, including an assignment in a lower rated position. While individuals so treated do not suffer a loss in pay, they are obviously obliged to take the forced assignment.

The only language in the collective agreement which appears to deal with the forcing of employees to temporary vacancies is to be found in clause 14.4(a). It expressly provides that where temporary vacancies of less than forty-five days are to be filled, in positions which are subject to being bulletined in accordance with clause 14.1 of the collective agreement, those positions “shall be filled by the senior qualified employee immediately available”. It is difficult to conclude, on the language so fashioned, that the Company does not have the right to force senior employees to fill temporary vacancies, as it has purported to do, notwithstanding the contrary position of the Brotherhood.

The Brotherhood may well prefer that the filling of temporary vacancies be accomplished, as with permanent bulletins, on a “senior may – junior must” basis. Such an arrangement , however, can only be predicated on clear and unequivocal language in the collective agreement which supports it. In the case at hand, the only language in

the collective agreement governing the filling of temporary vacancies is entirely to the contrary. Clause 14.4(a) cannot fairly be read as other than vesting in the employer the right to select the senior available qualified employee to fill a temporary vacancy of less than forty-five calendar days. The language may also be interpreted, as the Brotherhood stresses, to make clear that senior qualified available employees may have the preferential right to fill temporary vacancies and are not required to bid on such vacancies. However, that does not detract from its broader meaning, which must be found to include the right of the employer, consistent with established principles relating to management rights, to transfer employees to fill temporary vacancies as needed.

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

May 17, 2004

(signed) MICHEL G. PICHER
ARBITRATOR