CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3533

Heard in Montreal Wednesday, 14 December 2005

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Interpretation and application of the "Temporary Positions (over or under 45 days)" provisions of Appendix B-23 of Agreement No. 41.

JOINT STATEMENT OF ISSUE:

On September 23, 2005, the Union filed a grievance concerning the above noted provisions of the collective agreement. The Union's position is that the provisions in question which set out the obligations of employees when they are displaced or laid off from temporary positions, apply to all employees who hold temporary positions regardless of whether those positions were for more or less than 45 days. The Company's position is that the provisions apply only to employees who held bulletined temporary positions. The Company maintains that employees filling vacancies of less than 45 calendar days continue to be governed by article 14.4(c) of agreement no. 41.

The Union contends that: **(1.)** Appendix B-23 provides that its terms prevail over the language of agreement no. 41; **(2.)** Article 14.4(c) is superceded by Appendix B-23; **(3.)** The Company's position is in violation of the clear wording of Appendix B-23 of agreement no. 41.

The Union requests that it be declared that the Union's position is correct and that the Company's position is in violation of Appendix B-23.

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

FOR THE UNION:

(SGD.) Wm. BREHL
PRESIDENT

FOR THE COMPANY:

(SGD.) S. SEENEY
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

E. J. MacIsaac	– Manager, Labour Relations, Calgary
M. G. DeGirolamo	– Assistant Vice-President, Industrial Relations, Calgary
G. Pozzobon	– General Manager – Track
K. Hodges	– Coordinator, Machine Operator Qualifications
G. Fairweather	– Coordinator, Machine Operator Qualifications
D. Turner	– Manager, Track Programs
D, Curtis	– Manager, TP&E East
B. Rota	– Machine Operator Qualifications

And on behalf of the Union:

D. Brown	– Counsel, Ottawa
Wm. Brehl	– President, Ottawa
H. L. Helfenbein	– Director, Pacific Region
L. G. Wilson	– Secretary/Treasurer,
T. Diakon	– Group 2, Maintainer
R. Tirelli	– Vice-President

AWARD OF THE ARBITRATOR

The parties dispute the application of that portion of the "senior may – junior must" seniority rules contained in Appendix B-23 which governs temporary positions. The language of the Appendix reads as follows:

> **Temporary Positions (over or under 45 days)**
> In the event of displacement or lay off from a temporary position or at the conclusion of a temporary vacancy, an employee may do any of the following:
>
> 1. Displace a junior employee working a temporary position in any classification or group in which he holds seniority, or
> 2. revert to his permanent position, or
> 3. may fill a vacancy in any class or group in which he holds seniority.
>
> In the event of displacement or lay off from a temporary position or at the conclusion of a temporary vacancy employees, who hold a permanent position, will not be allowed to displace to other permanent positions in the circumstances where he/she can exercise any of the 3 options listed immediately above. However, in situations where the employee does not own a permanent position and does not wish to exercise options 1 or 3 above, such employee will be allowed to exercise his established seniority to displace a junior employee in a permanent position.

The Union submits that an employee who emerges from any temporary position is entitled to exercise the options described in the foregoing provisions. For example, as the Company stresses, under the Union's interpretation an employee assigned to cover a two hour period of work by reason of the illness of another employee would thereafter become a "free agent" entitled to exercise his or her seniority in accordance with the options provided, including the ability to displace a junior employee, causing a chain of displacements.

The Union's representative argues that in fact there is no evidence to suggest that employees would pursue such an option, and that in all likelihood they would generally revert to their own permanent position. The Company maintains that the "senior may – junior must" seniority rules were never intended to have so far reaching an effect as to vest displacement rights by reason of having covered an non-bulletined temporary assignment, for example a relief assignment in the event of illness, for an extremely short assignment. The Company maintains that in fact the intention of the parties, from the outset, has been that the "senior may – junior must" seniority rules are to apply to bulletined positions only.

After a careful review of the materials, including the history of the development of the "senior may – junior must" rules, the Arbitrator is compelled to sustain the position of the Company. Firstly, if the Union is correct in its interpretation, by executing Appendix B-23 the parties would have effectively abolished a clear provision of the collective agreement. As reflected in **CROA 3418**, clause 14.4(a) of the collective agreement vests in the Company the right to select the senior available employee to fill a temporary vacancy of less than forty-five calendar days. Clauses 14.4(a) and 14.4(c) provide 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 article 21.9.
>
> Any employee who does not exercise his seniority to such temporary vacancy of less than forty-five days will not forfeit seniority.
>
> **14.4 (c)** An employee will only establish seniority in a higher classification by being awarded a bulletined vacancy in such higher classification. **An employee filling a temporary vacancy under Clause 14.4 other than by bid will, at the conclusion of such temporary vacancy, revert to his former vacancy.**
>
> (emphasis added)

It is not disputed that if the Union's interpretation is successful, the second sentence of clause 14.4(c) of the collective agreement is effectively repealed. The Union's representative submits that that is precisely the intention of Appendix B-23. In that regard he refers the Arbitrator to the following portion of the general provisions of the appendix:

- Except as otherwise provided above, wage agreement no. 41 applies.

With respect, the Arbitrator has some difficulty with that submission. A review of the history of the "senior may – junior must" seniority rules clearly confirms that from its inception the concept was intended to apply to bulletined positions. That is evident, for example, in the operation of the initial pilot project for the "senior may – junior must" concept, which was initiated on the Schreiber Basic Seniority Territory in the fall of 1998. The communication to the employees describing the pilot project and the applicable rules expressly stated that the pilot would commence with the November 12, 1998 bulletin and that the awarded positions advertised in the bulletin would be based on the new "senior may – junior must" seniority rules. From the time of that pilot project through to the present there has never been any recorded deviation from that concept. Following the successful completion of the pilot project in Northern

Ontario, employees were notified by bulletin of the rules for the general roll out of the "senior may – junior must" concept. The bulletin issued to employees at that time stated, in part:

> The pilot project was successful and as a result the Company and the BMWE are prepared to extend the "senior may – junior must" concept, for the above classifications, across the System.
>
> The attached "senior may – junior must" rules will be applied when awarding positions for bulletins issued on or after April 3, 2000. Any displacements that occur on or after April 3, 2000 will also be based on these new "senior may – junior must" seniority rules.

The position which the Union argues in the case at hand is one of enormous consequence. As the Company's representatives submit, should the Union be successful, the concept of "free agency" to trigger displacements of junior employees would be readily available to any employee by virtue of little more than his or her assignment for a few hours in relief of another employee. Such a concept is virtually unknown to the Canadian industrial relations system, insofar as the Arbitrator is aware. The exercise of seniority rights, a cornerstone principle in collective bargaining in Canada, is generally circumscribed by clear and unequivocal language within the terms of a collective agreement, in recognition of the importance of such rights and obligations to both employees and employers alike. (See **Re Tungsol of Canada**, (1964) 15 L.A.C. 161 (Reville).) It should not be easily inferred that the Union agreed to a seniority arrangement by which its members would have substantially reduced security in their own bulletined positions, being vulnerable to unpredictable displacements.

The conclusion that the parties to a collective agreement effectively decided to depart from the traditional controls over the rights and obligations of employees in respect of displacements is not lightly to be made, and should be based on clear and unequivocal language. That language does not appear in the materials before the Arbitrator in the case at

hand so as to support the position of the Union. On the contrary, the Arbitrator has some difficulty in concluding that the general reference to the application of the collective agreement found in Appendix B-23 "… except as otherwise provided above", confirms that the parties intended to depart entirely from the well-established operation of clause 14.4(c) of their collective agreement. When regard is had to the history of the development of the "senior may – junior must" rules, I am satisfied that there can be little doubt that these rules were intended, from the outset, to apply to bulletined positions.

For the foregoing reasons the Arbitrator is compelled to sustain the interpretation of the Company, and the grievance must be dismissed.

December 19, 2005

(signed) MICHEL G. PICHER
ARBITRATOR