

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3729

Heard in Montreal, Thursday, 12 February 2009

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

**TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION**

DISPUTE:

Claim on behalf of Mr. H. Deol.

JOINT STATEMENT OF ISSUE:

The grievor, Mr. H.S. Deol, bid for and was awarded a temporary flagging position. When the position concluded he expressed a desire to displace a junior employee, Mr. M.S. Grewal, who was working a temporary Track Maintenance Foreman (TMF) position in Coquitlam. However, the grievor was advised by the Company that he would not be permitted to displace Mr. Grewal because he did not possess all the required qualifications, specifically an air brake endorsement. Instead, the grievor was required to return to, and to occupy, his permanent TMF position. A grievance was filed.

The Union contends that: (1) The Company's actions are in violation of section 11.3(a) of Agreement No. 41. (2) The grievor entered Company service in 1976 and established TMF seniority in 1986. He has worked as a TMF for more than 20 years and is number two on the Vancouver Division TMF seniority list. He is a long experienced and full qualified TMF who should have been permitted to displace Mr. Grewal. (3) Appendix A, Item 2 of Agreement No. 41 (section 9.9 of the current collective agreement) provides that the Track Maintainer/ Truck Driver, and not the TMF, has the primary responsibility for the operation of the section vehicle. This includes the "regular driving and daily inspection" of the vehicle. The position of the TM/TD is filled by Track Maintainers not by Track Maintenance Foremen. Appendix A, Item 2 provides that where no Track Maintainer on the section crew is available to drive the truck, the Leading Track Maintainer may do so.

The Union requests that it be declared that the grievor should properly have been permitted to displace into the TMF position held by Mr. Grewal. The Union further requests that the Company be ordered (1) to permit the displacement now and (2) to compensate the grievor for any and all regular and overtime wages lost as a result of this matter.

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

FOR THE UNION:

(SGD.) WM. BREHL
PRESIDENT

FOR THE COMPANY

(SGD.) K. HEIN
FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

K. Hein – Labour Relations Officer, Calgary
D. Freeborn – Manager, Labour Relations, Calgary
M. Foot – Service Area Manager, Toronto

And on behalf of the Union:

Wm. Brehl – President, Ottawa
D. W. Brown – Legal Counsel, Ottawa
H. Deol – Grievor

AWARD OF THE ARBITRATOR

The main issue in this case is whether the grievor can displace a junior employee without possessing an operator's license with an air brake endorsement. The grievor claims he has the right to displace the junior employee on the basis of section 11.3 (a)(1) of the Wage Agreement.

The Port Coquitlam crew, like the Vancouver crew, operates a section vehicle designed to perform a number of functions from carrying materials and equipment to the transportation of section workers. There are two kinds of section vehicles: a smaller vehicle first introduced in 1993 which does not have air brakes and a larger version introduced in 1999 which is equipped with air brakes.

One of the minimum qualifications for the TMF position is a class DZ license, a qualification which the grievor does not currently hold. The grievor has been provided with opportunities in the past to attain this qualification but so far has been unsuccessful. The Company, as noted, will not permit the grievor to displace the junior employee because he has been unable to obtain the required air brake qualification. It has, however, "accommodated" the grievor by allowing him to remain in his TMF position at the Vancouver location even though he is not technically qualified to fill the position. The Company maintains this to be a fair manner to balance both its operational interests and those of the grievor.

The Union first submits that it recognizes the Company's right to establish qualifications for any particular position. That right, however, is subject to the requirement that the qualifications must be reasonable and for *bona fide* business reasons, as explained in **CROA 2649**:

In the Arbitrator's view this grievance must be resolved by recourse to certain basic principles. As a general matter, it is within the prerogatives of the Company to establish qualifications for particular job assignments, subject only to limitations negotiated by the Union within the terms of the collective agreement. It is generally considered by boards of arbitration that an implied term of any collective agreement is that qualifications for a given position must be established by the employer in good faith, and for *bona fide* business purposes having regard to the nature of the work in question, subject always to any specific restrictions found within the language of the collective agreement.

The Union further submits that there is no *bona fide* business purpose that can justify the Company's decision to allow the grievor to work as a TMF on the Vancouver crew but not on the Port Coquitlam crew. The Union points out in that regard that the duties being performed by the Vancouver crew and the Port Coquitlam crew are the same. The TM/TDs and the LTMs on both crews possess licences with air brake endorsements. Accordingly, from the Union's perspective, to make a distinction between TMFs working in adjacent areas, but nevertheless performing the same kind of work, can only be considered as arbitrary and a violation of the collective agreement.

The Union further points out that the 1993 section vehicles were not equipped with air brakes. The introduction of this multi-purpose section vehicle in 1993 led to the creation of a new position, the TM/TD, which in turn led to the parties bargaining section 9.9(b), as found in the current collective agreement, which reads:

9.9(b) The Track Maintainer/Section Driver shall have the primary responsibility for the operation of the BTMF Section Vehicle. This operation will consist of the regular driving and daily inspection of the Section Vehicle. The principal duties of an employee working in the position of Track Maintenance/Section Truck Driver shall be that of a Track Maintainer.

In 1999, as noted, a newer and larger version of the BTMF vehicle was introduced with air brakes. The Union has since been able to negotiate a higher rate of pay for a TM/TD driver operating a section vehicle with air brakes compared with the rate of a TM/TD who operates one without air brakes. The Union argues that this recognizes that the section vehicles with air brakes are specialized machines with operators deserving of a higher rate of pay. It also underlines the common practice between the parties that not every employee can be expected to operate each and every kind of machine. Accordingly, the Union submits that a TMF does not need to be qualified with an air brake endorsement, as this is the primary responsibility of the TM/TD.

The Union, in its brief before the Arbitrator, recognized that the Company would argue that the collective agreement explicitly provides that either the LTM or the TMF will fill in for an absent track maintainer as cited in Appendix, A, item 2 (g) [now section 9.9 (c) of the collective agreement] which states:

- 2 (g) If for any reason a Track Maintainer on the section is unable to drive the Section Vehicle, that duty will be performed by the Leading Track Maintainer or the Track Maintenance Foreman.

Bearing in mind the history of the section vehicle, the Union submits that the above language, which was originally bargained in 1993, cannot have been intended to apply to section vehicles with air brakes because such a vehicle did not even exist at the time the provision was adopted as part of the collective agreement. Further, the possession of specialized licences has never been a general requirement of the maintenance of way service. The Union therefore submits that LTMs and TMFs, under the above provision, will only be required to drive the section vehicles equipped with air brakes if, through their own choice, they possess the proper license. There is nothing in Appendix A, specifically item 2(g), which requires an LTM or a TMF to acquire such licensing. Finally, the Union cites Section 11.3 of Wage Agreement No. 41 which provides in part as follows:

- 11.3 (a) ... in the event of displacement or lay off from a temporary position or at the conclusion of a temporary vacancy (over or under 45 days), an employee must, 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.

The Union submits that the Company is forcing the grievor to revert to his permanent position under subsection (2) and forfeit his right to displace a junior employee under subsection (1). This is a case where the job classification is not only the same but the working conditions and crew complements associated with each option are also the same. The Union underlines that there is no language in the collective agreement which forces the grievor to elect one section 11.3 (a) option over another.

The Arbitrator has sympathy for the grievor and his predicament. He is a long-serving employee who has provided dedicated service to the Company over a lengthy career.

The Union has also provided creative arguments to support their case that the grievor does not have to hold an air brake endorsement on his licence in order to fulfill the duties of a TMF, whether those duties are being performed in Vancouver or in the Port Coquitlam environment. The underlying difficulty with the Union's position is that the newer section vehicles are all equipped with air brakes. Significantly, there are also specialized licensing requirements for vehicles with this kind of equipment.

The Company, in my view, is correct that there is no language in the collective agreement that suggests that it cannot implement new qualifications that are put in place for valid business purposes. The fact that the Company has adopted the air brake endorsement as part of its current requirements for section vehicle drivers is not arbitrary, but rather consistent with the legal licensing requirements for operators of vehicles equipped with air brakes.

It is evident, in turn, from a plain reading of Item 2(g) that an LTM **or** TMF must be able to step into the shoes of an absent TM/TD and perform their duties as required. The grievor, regrettably, does not have the ability to perform those specified duties as a result of his lack of qualifications of the air brake licence endorsement. The requirement for an air brake licence endorsement, in my view, is a reasonable qualification without which the grievor is unable to bid or displace a junior employee of his choice under article 11.3(a)(1). The fact that the old section vehicles did not have air brakes at the time item 2(g) was negotiated does not alter the implicit requirement for only qualified employees to perform the work. A variation in wages between the holders of an air brake endorsement and those without is insufficient basis to alter the plain meaning of the item 2(g).

For the above reasons, the Arbitrator dismisses the grievance.

February 17, 2009

(signed) JOHN M. MOREAU, O.C.
ARBITRATOR