

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

CASE NO. 3837

Heard in Montreal on Wednesday, 9 December 2009

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

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

DISPUTE:

Claim on behalf of Mr. S. Bayley.

JOINT STATEMENT OF ISSUE:

The grievor, Mr. S. Bayley, bid for and was awarded the TMF position on the Dunmore Mobile Crew on Bulletin MH-03. He reported for work but was subsequently informed that he was not qualified to work the position and was removed therefrom. A grievance was filed.

The Union contends that: (1.) The grievor was the senior applicant for the position; (2.) The grievor was not given a reasonable amount of time to qualify fully; (3.) The Company's actions violated section 9.13, 9.14, 10.9, 14.10 and Appendix B-14 of the collective agreement.

The Union requests that the grievor be reinstated into his bid position as TMF Dunmore Mobile immediately and that he be made whole for all wages, benefits and seniority 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
LABOUR RELATIONS OFFICER

There appeared on behalf of the Company:

K. Hein	– Labour Relations Officer, Calgary
D. Freeborn	– Manager, Labour Relations, Calgary
H. Rubert	– Service Area Manager
M. Goldsmith	– Labour Research & Budget Specialist, Calgary

And on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. Brown	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

The Union grieves the Company's refusal to allow employee Scott Bayley to bid successfully on a vacant position as Track Maintenance Foreman (TMF) on the Dunmore Mobile crew. It is not disputed that the grievor was the senior applicant. The point of contention concerns the ability of Mr. Bayley to perform the work in question in the sense of being able to qualify through training within a reasonable period of time.

It is common ground that Mr. Bayley has not worked in the Track Department. His entire service as essentially been through TP&E or extra gang crews in which he has gained seniority in such classifications as machine operator, extra gang labourer and thermite welder.

The Union submits that in ultimately declining to award the bulletin to Mr. Bayley the Company violated the provisions of section 10.10 of the collective agreement as well as Appendix A-3. Those provisions read as follows:

10.10 An awards bulletin will be issued seven (7) days following the closing date informing employees of the successful applicants to the positions advertised. Appointments shall be made by the officer issuing the bulletin to the senior qualified applicant in each classification or group. ...

NOTE: Employees who already possess some of the qualifications required to a particular position or could be qualified in a reasonable period of time will be considered in accordance with Appendix A-3 (previous Appendix B-14).

Appendix A-3 (previous Appendix B-14)

This has reference to one of the Article III demands submitted by the Brotherhood of Maintenance of Way Employees concerning the appointment of an employee to a position he/she "can be qualified for in a reasonable period of time".

During negotiations the Union expressed concerns that, in instances, the Company is not choosing senior employees who already possess some of the qualifications required for a particular position or could in a reasonable amount of time be qualified.

In resolving this issue we undertook to remind you to appoint, where practicable, the senior employee in the manner outlined above.

Would you, therefore, please see that this matter is brought to the attention of all supervisors and that every effort is made to consider senior employees when filling such vacancies.

(signed) I.J. Waddell
Manager, Labour Relations

The Union stresses that in the past Mr. Bayley has worked on Utility Crews in Alberta, noting that certain of the work done by Utility Crews is similar to the work of Track Maintenance Forces. It submits that the Company should have allowed the grievor a reasonable period of time to become qualified. While the Union acknowledges that the grievor did not have certain of the qualifications for the position such as the RTSR 1 and the RTSR 2 certification, it submits that those could have been obtained by the grievor after relatively brief classroom sessions.

The Company submits that it would have been unsafe and inappropriate to grant the posting to Mr. Bayley given his substantial lack of practical experience in the work of the Track Department. It stresses that the crew to which he would have been assigned was itself comprised of two recently hired employees with very limited experience, as well as a Track Maintainer / Truck Driver who would have been the only person on the crew with the knowledge, experience and qualifications of a Leading Track Maintainer. The Company maintains that for the truck driver to expend substantial time orienting the grievor in the functions of the Foreman would have been unduly burdensome and would have constituted a risk to the safety of the crew itself. The Company stresses that the ranks of progression for the track forces are entirely different from those which govern extra gangs.

The Arbitrator is compelled to conclude that the Company's position is correct. In my view it is not insignificant that the grievor had virtually no experience whatsoever as a Track Maintainer or as a Leading Track Maintainer. He was, in other words, substantially unfamiliar with much of the work of the employees he would be responsible for assigning and overseeing. From the standpoint of safety, it is also not insignificant that he had no prior exposure to the holding and administering of Track Occupancy Permits, legal compliance with the Railway Track Safety Rules or the various forms of track protection under the CROR, including the routines of

communicating properly with the RTC as well as with train crews. The Track Maintenance Foreman must also be familiar with completing various forms of reports to which, it is not disputed, Mr. Bayley had never been exposed.

I am satisfied that the Company is correct in its view that although Mr. Bayley has extensive experience in the functions of TP&E crews, he had virtually no practical experience to qualify him to work on, much less be in charge of, a section crew. More significantly, while the Union is correct in suggesting that employees are entitled to a reasonable period of training where they might only have part of the qualifications for a posted position, that must in contemplation of the training being relatively accessible and also predicated on the fact that the individual's existing qualifications are sufficient for him or her to undertake the job, including the training, in a responsible way. In the Arbitrator's view that standard simply could not be met with respect to the appointment of Mr. Bayley, with virtually no Track Department experience, into the position of a Track Maintenance Foreman primarily responsible for a territory and for the work of a Track Maintenance Crew.

In the result, I am satisfied that the Company did give the grievor proper consideration, that it came to its decision, in good faith, with respect to the fact that he could not gain the knowledge necessary to handle all of the safety and efficiency responsibilities of the Track Maintenance Foreman's job within a reasonable period, and that he was therefore not qualified for the posted position. For these reasons the grievance must be denied.

December 16, 2009

(signed) MICHEL G. PICHER
ARBITRATOR