

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

CASE NO. 4645

Heard in Montreal, July 10, 2018

Concerning

CANPAR COURIER

And

UNITED STEELWORKERS – LOCAL 1976

DISPUTES

- A.** The Company's refusal to allow Mr. Scervo to displace a junior employee under article 5.3 of the collective agreement.
- B.** The disqualification of Mr. Scervo from a P&D position in the Boisbriand terminal.
- C.** Mr. Scervo and age discrimination.
- D.** The inaction of the Company following Mr. Scervo's comments regarding safety issues.

JOINT STATEMENT OF ISSUE

- A.** **The Company's refusal to allow Mr. Scervo to displace a junior employee under article 5.3 of the collective agreement.**

Following the conversion of his old route to an owner operator, Mr. Scervo exercised his seniority and bumped a junior employee on route 46605 at the Boisbriand terminal.

On October 27th, after thirty days at the Boisbriand terminal, Mr. Scervo received a notice of disqualification due to the fact that his performance was not reaching the Company's objective.

The same day Mr. Scervo exercised his right to displace a junior employee on route 46603 at the Boisbriand terminal. The Company refused the request claiming that he was banned from all positions in Boisbriand since he failed to meet the Company's objective on route 46605.

Mr. Scervo filed a Step 1 grievance claiming the Company has violated his rights to displace a junior employee based on article 5.3.1 of the collective agreement.

The Company did not reply to Step 1 grievance.

The Union filed a Step 2 grievance on December 13th, 2017 stating the Company has misguidedly used Article 5.1.2 when they disqualified Mr. Scervo. He did not bid on a position but rather he displaced another under Article 5.3.1. The Union demanded that Mr. Scervo be allowed to displace any junior employee as per his qualification and request the Company to assist this request in a positive manner.

The Union further claimed all loss wages and damages on behalf of Mr. Scrivo.
The Company denied the Step 2 grievance.

B. The disqualification of Mr. Scrivo from a P&D position in the Boisbriand terminal.

After being displaced by a senior P&D driver on his Montreal route 11108, Mr. Scrivo exercised his seniority and bumped a junior employee at the Boisbriand terminal.

He started to work at the Boisbriand terminal on September 27, 2017. On that day, he was informed of the objectives of 9.8.

On October 12, the Company met with Mr. Scrivo and informed him that his performance was below the Company expectations. He was told that if his performance did not reach the established target of 9.8 stops per hour he will be disqualified from the position.

On October 27th, after thirty days at the Boisbriand terminal, Mr. Scrivo received a notice of disqualification due to the fact that his performance had not reached the Company's objectives.

Following the disqualification, Mr. Scrivo attempted to displace another junior employee at the Boisbriand terminal. The Company refused his request claiming he could not displace another employee at the Boisbriand terminal.

Mr. Scrivo filed a Step 1 grievance claiming that a probation period is not applicable in his case.

The Company did not reply to the Step 1 grievance.

The Union filed a Step 2 grievance on December 5th, 2017 with the Company stating Mr. Scrivo is being pushed out of the door from Canpar and constructively dismissed. The Union also grieved that Mr. Scrivo was discriminated against on one of the prohibited grounds, that the Company acted in an unsafe manner and that they did not have the right to ban him from all the positions in Boisbriand.

The Union requested that Mr. Scrivo be reinstated in his position on route 46605 at the Boisbriand Terminal or alternatively on another route with proper assistance to meet the standards. The Unions also request all back wages, overtime and benefits lost since the disqualification.

The Union also claimed damages on behalf of Mr. Scrivo.

The Company denied the Step 2 grievance.

C. Mr. Scrivo and age discrimination.

After being displaced by a senior P&D driver on his Montreal route 11108, Mr. Scrivo exercised his seniority and displaced a junior employee into the Boisbriand terminal.

The Company informed Mr. Scrivo after a brief period that his performance was below the company expectations and advised him that if his performance did not reach the established target of 9.8 stops per hour, he would be disqualified from the position.

On October 27th, after thirty days at the Boisbriand terminal, Mr. Scrivo received a notice of disqualification due to the fact that his performance was not reaching the Company's objectives.

On November 14th, 2017, Mr. Scrivo filed a Step 1 grievance stating the Company violated the *Human Rights Act* and that he considered that he was being a victim of discrimination related to his age.

The Company did not reply to the Step 1 grievance.

The Union filed a Step 2 grievance on December 14th, 2017 with the Company affirming Mr. Scrivo had been treated unfairly and subject to discrimination related to his age. The Union claimed the Company is trying to establish a new trend of practices that will conduct to disqualify and humiliate senior employees.

The Union request that Mr. Scrivo be reinstated immediately in his position on route 46605 or alternatively on another route with proper assistance from the Company to help Mr. Scrivo meet the standards.

The Union also request all back wages, overtime and benefits lost since the disqualification.

The Union further claimed damages on behalf of Mr. Scrivo.

The Company denied the Step 2 grievance.

D. The inaction of the Company following Mr. Scrivo's comments regarding safety issues

After being displaced by a senior P&D driver on his Montreal route 11108, Mr. Scrivo exercised his seniority and displaced a junior employee in the Boisbriand terminal.

On October 12, the Company informed Mr. Scrivo that his performance was below the Company expectations and advised him that if his performance did not reach the established target of 9.8 stops per hour, he would be disqualified from the position.

On various occasions Mr. Scrivo had raised some questions regarding safety issues to his supervisor in relation to the achievement of the set performance objectives.

On October 27th, after thirty days at the Boisbriand terminal, Mr. Scrivo received a notice of disqualification due to the fact that his performance was not reaching the Company's objectives.

On November 5th, 2017, Mr. Scrivo filed a Step 1 grievance stating the Company violated his right to work in a safe environment under article 7.4 of the Collective agreement.

The Company did not reply to the Step 1 grievance.

The Union filed a Step 2 grievance on December 14th, 2017 with the Company affirming that by not taking the necessary measures to ensure a safe working environment, the Company acted in an unsafe manner in regards to employee safety and public security.

The Union also requests all back wages, overtime and benefits lost since the disqualification.

The Union further claims all lost wages and damages on behalf of Mr. Scrivo.

The Company denied the Step 2 grievance.

FOR THE UNION:
(SGD.) N. Lapointe
Staff Representative

FOR THE COMPANY:
(SGD.) C. S. Perron (for) **B. Neill**
Vice President Human Resources

There appeared on behalf of the Company:

C. S. Perron	– Human Resources Representative, St. Laurent
S. Lanthier	– Supervisor, Boisbriand
Y. Dulong	– P&D Manager, Lachine

And on behalf of the Union:

N. Lapointe	– Staff Representative, Montreal
D. Neale	– Vice President Local 1976, Hamilton
A. Daigneault	– Business Agent, Montreal
N. Lapointe	– Vice President District 5, Montreal
J. Rochemont	– Local Chairperson, Montreal
F. Scrivo	– Grievor, Montreal

AWARD OF THE ARBITRATOR

Nature of case

1. Mr. Francis Scrivo, an employee with 33 years' service at Canpar Courier (Canpar), filed four grievances, all of which had their genesis in a bumping exercise. TC Local 1976, United Steelworkers (Steelworkers) alleged, among other things, that Canpar had imposed new conditions on bumping employees which it had never negotiated. For example, Canpar evaluated bumping drivers for 30 days during which they had to demonstrate their ability to meet performance standards for the new route.

2. For the reasons below, the arbitrator has concluded that Canpar conflated the rights it negotiated for employees who applied for a new or different position, with the applicable wording for bumping employees who exercised their seniority. The collective agreement does not contain a 30-day probationary period for bumping employees.

Facts

3. Mr. Scrivo has worked at Canpar as a P&D (parcel and delivery) driver. A senior employee bumped him from his route 11108 at the Montreal terminal in Lachine, Quebec. Mr. Scrivo inquired about bumping a more junior employee at the Montreal terminal, but was advised that that route would be abolished.

4. As a result, Mr. Scrivo bumped a junior employee at the Boisbriand terminal effective September 27, 2017. Canpar advised Mr. Scrivo that he had to meet a

threshold of 9.8 Stops Per Hour (SPH). A Canpar supervisor had set this target based on how other employees had performed on the route in the past. That Canpar supervisor also advised Mr. Scrivo that he would have a 30-day probation period to prove that he could meet the SPH objectives.

5. On October 27, 2017, which was 30 calendar days after Mr. Scrivo had started at Boisbriand terminal and covered 19 actual work days, Canpar advised him he had not met its 9.8 SPH standard. Canpar denied Mr. Scrivo's request to bump another employee at Boisbriand and returned him to his original Montreal terminal.

6. Since returning, Mr. Scrivo has not driven a permanent route, but has been doing differing tasks at the Montreal terminal. The route about which he had inquired before bumping someone in Boisbriand, and which Canpar said would be abolished, was still being done by the same more junior employee (Union Exhibit 2). However, Canpar did modify that route so that it now only did pickups. The more junior driver of that route has had mostly regular working hours since Mr. Scrivo's bumping exercise.

7. The Steelworkers filed four grievances on behalf of Mr. Scrivo contesting Canpar's: i) decision to remove Mr. Scrivo as a driver at Boisbriand terminal; ii) refusal to allow Mr. Scrivo to bump another more junior employee at Boisbriand; iii) failure to follow up on Mr. Scrivo's alleged raising of safety concerns and iv) alleged age discrimination.

Analysis and Decision

8. Section 9.2 of the parties' collective agreement notes that a rights arbitrator cannot modify their negotiated wording. Section 14 of the [Memorandum of Agreement Establishing the CROA&DR](#) also emphasizes this well-known principle: "The decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement".

9. The parties dispute which articles in the collective agreement apply to this case. Canpar referenced both articles 5.1 and 5.3 when describing Mr. Scrivo's bumping rights. The Steelworkers rely solely on the displacement language found at article 5.3. The arbitrator agrees with the latter view.

Collective Agreement¹ Provisions

10. Canpar's negotiated rights for dealing with promotions and assignments could not be grafted onto the collective agreement's bumping process. An analysis of the parties' negotiated wording illustrates this point.

11. Article 5 of the collective agreement is entitled "Promotions, Assignments, Displacements, ETC."

¹ The parties advised that their English collective agreement constitutes the official version. They further advised that the wording of the articles in dispute remained the same in both the 2012 and 2017 versions of their collective agreement.

12. Article 5.1 is entitled “Promotion and Assignment”. Article 5.1.1 emphasizes the importance of “seniority and ability”:

5.1.1 The promotion and assignment of employees will be governed by seniority and ability, senior qualified applicant to be given preference. The Officer of the Company in charge shall be the judge, subject to appeal which must be made in writing within 14 calendar days of the appointment.

(emphasis added)

13. This article allows Canpar to consider an employee’s “ability” in the new position. Article 5.1.2 establishes a 30-day probation period during which Canpar can evaluate the employee’s “ability”. A failure to perform could result in the employee being returned to his/her former position:

5.1.2 An employee who is assigned to a position by bulletin will receive a full explanation of the duties and reasonable assistance and must demonstrate the ability to perform the work within a reasonable probationary period of up to 30 calendar days, the length of time to be dependent upon the character of the work. Failing to demonstrate the ability to do the work within the probationary period allowed, employee shall be returned to former position without loss of seniority.

(Emphasis added)

14. This language is inconsistent with the concept of bumping (displacement). Firstly, one does not bump via job bulletin. Secondly, bumped employees do not have a probationary period in the absence of clear language to that effect. Thirdly, an employee who has been bumped cannot return to his/her “former position without loss of seniority”, since the position either no longer exists or a more senior employee now occupies it. Mr. Scrivo would no doubt have welcomed a return to his old position, but that was no longer possible due to the displacement exercise Canpar initiated.

15. Article 5.2.1 clarifies the types of positions to which the article 5.1.1 “promotion and assignment” process applies:

5.2.1 New positions and temporary and permanent vacancies (except temporary vacancies of expected duration of 14 calendar days or less and annual vacation) will be promptly bulletined for a period of 7 calendar days to the local seniority group concerned, and will be awarded in accordance with Article 5.1.1.

16. The parties have agreed that article 5.1.1 applies to “new positions and temporary and permanent vacancies” which are bulletined.

17. The parties negotiated a distinct bumping process at article 5.3 entitled “Reduction in Staff”. Article 5.3.1 describes the initial procedure:

5.3.1 An employee whose position is abolished or who is displaced from his position must displace, within two (2) working days, any full-time junior employee in his local seniority group or, within five (5) working days, any full time junior employee in his district or region for which he is qualified. An employee who fails to comply with said time limit shall not have the right to return to service by displacing a junior employee.

18. The parties agreed that Mr. Scrivo respected the short time limits found in this provision.

19. Article 5.3.4 adds further clarity to the bumping process for drivers like Mr. Scrivo who have “routes”. The article covers both the permanent abolishment of a route or a

junior employee's displacement. When Canpar decided to abolish Mr. Scrivo's route, the collective agreement gave him bumping rights based on his seniority:

5.3.4 Whenever there is a permanent abolishment of an employee's route, the following procedure shall apply:

a) the employee on the route shall be entitled to select any route of his choice provided that the route is being done by a junior employee;

b) the new route becomes the senior employee's regular Numbered route to which he is assigned under 5.2.14;

c) this process shall be repeated for the junior employee who has lost his route until all routes in the terminal are assigned;

d) if an employee displaces another junior employee in another terminal under Article 5.3.2 or 5.3.3, then the procedure set out in paragraphs (a) to (c) shall be followed in that terminal as well.

Permanent abolishment shall include a suspension or elimination of a route for any period exceeding two months but does not include the addition or deletion of stops on a route.

(Emphasis added)

20. A couple of observations arise from these articles.

21. First, these collective agreement provisions provide no support for Canpar's refusal to allow Mr. Scrivo to bump a more junior driver at the Montreal terminal. Contrary to Canpar's representation at the time Mr. Scrivo had to make his bumping decision, it appears that a junior employee has continued to drive his route at the Montreal terminal, albeit one which may have been modified or reduced. Had Canpar provided Mr. Scrivo with the full details of the changes to this junior employee's route, then all the subsequent troubles which occurred at the Boisbriand terminal might well have never occurred. An employee has a very short time period in which to exercise

his/her bumping rights. Canpar must ensure that that employee has accurate information in order to make a reasoned decision.

22. As it turned out, Canpar returned Mr. Scrivo to the Montreal terminal to perform various odd jobs, including occasional driving, while the junior employee continued to drive his modified numbered route, seemingly on a daily basis.

23. Second, the collective agreement does not support Canpar's decision to impose a 30-day probationary period at Boisbriand. The collective agreement does not contain either a probationary period or an "ability test" for drivers bumping into another driver position at a different location. The addition of these types of conditions would have to be negotiated at the bargaining table.

24. Nothing in this award impacts Canpar's traditional management rights to establish and enforce performance standards: [CROA&DR 1864](#). But that analysis differs significantly from one associated with a probationary period. Canpar cannot avoid undertaking the usual employee performance analysis by disqualifying an employee with 33 years service during a short 30-day probationary period.

25. Mr. Scrivo had driven various P&D routes from the Montreal terminal in Lachine throughout his 33 years of employment. As Canpar noted in its Brief, routes served by the Boisbriand terminal differ significantly in terms of territory and clientele from those Mr. Scrivo had driven for 33 years on the island of Montreal.

26. The Steelworkers did not persuade the arbitrator that what occurred to Mr. Scrivo constituted retaliation for his comments about safety or due to his age. The raising of safety concerns requires more particulars and concrete steps on Mr. Scrivo's part. Depending on those particulars, the Canada Industrial Relations Board may have exclusive jurisdiction over any alleged reprisals pursuant to section 133(4) of the [Canada Labour Code](#)².

27. Canpar imposed its probation and performance analysis on other employees who also had exercised their bumping rights. This satisfies the arbitrator that it was not Mr. Scrivo's age which motivated Canpar, in whole or in part, to adopt its probationary practice for recent bumping exercises.

28. Nonetheless, the bumping exercise, which did not respect the negotiated terms of the collective agreement, entitles Mr. Scrivo to a remedy.

Remedy

29. Canpar violated the collective agreement and specifically Mr. Scrivo's bumping rights. The appropriate remedy is to award Mr. Scrivo compensation and order a fresh bumping process.

² See also [Cahoon, 2010 CIRB 548](#)

30. It was only in hindsight that the Steelworkers realized that the Montreal terminal route Mr. Scrivo had originally asked to bump into had continued to exist, albeit in a modified form. The same junior employee who had held that route when Mr. Scrivo had bumped to the Boisbriand terminal continues to drive it.

31. The purpose of a remedy is to put Mr. Scrivo in the position he would have been in had Canpar not violated his collective agreement rights. Therefore, Mr. Scrivo is entitled to decide whether to bump the more junior employee at the Montreal terminal who continues to drive a numbered route. Canpar is ordered to disclose to the Steelworkers the number of hours that employee has worked on a daily, weekly and monthly basis, so that Mr. Scrivo can make an informed decision.

32. Alternatively, Mr. Scrivo can decide to bump into another route at a different terminal, provided he has the requisite seniority. Regardless of Mr. Scrivo's choice, there will be no probationary period attached to the new route. Canpar never negotiated this condition for bumping situations.

33. The arbitrator awards Mr. Scrivo compensation for any difference between the sums he earned and what he would have earned had he been driving a regular route. This compensation includes reasonable overtime which will be calculated based on the overtime Mr. Scrivo earned during the last two full years when driving his own route. The period covered by this compensation starts from the date of his displacement to Boisbriand terminal to the date he bumps into a new position.

34. The arbitrator reserves jurisdiction for any question which arises under this award, including for the calculation of the compensation owed to Mr. Scivo.

July 19, 2018



GRAHAM J. CLARKE
ARBITRATOR