CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 422

Heard at Montreal, Wednesday, October 1Oth, 1973

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

EXPARTE

DISPUTE:

Whether Mr. T. Pumphrey is entitled to bumping rights under the 6.1 Agreement, Article 8.

EMPLOYEES' STATEMENT OF ISSUE:

Canadian Railway Office of Arbitration Case No. 403 stated in part that Mr. Pumphrey "was denied on improper grounds" position listed on bulletin 18/1 and afforded him reimbursement for loss of earnings.

Prior to decision by Case No. 403, Mr. Pumphrey did not have a regular assigned position, and therefore did not have bumping rights.

The Brotherhood claims that because of the decision given in Case No. 403, Mr. Pumphrey did now have bumping rights.

The Company disagrees.

FOR THE EMPLOYEES:

(SGD.) E. E. THOMS
GENERAL CHAIRMAN

There appeared on behalf of the Company:

| | |
|---|---|
| G. J. James | Labour Relations Assistant, C.N.R., Montreal |
| J. D. Pelrine | Labour Relations Assistant, C.N.R., Moncton |

And on behalf of the Brotherhood:

| | |
|---|---|
| E. E. Thoms | General Chairman, B.R.A.C., Freshwater, P.B., Nfld. |
| P. J. Lamond | Local Chairman, Lo.551, BRAC, Port aux Basques, Nfld. |

# AWARD OF THE ARBITRATOR

The issue in this case relates to the effect of the decision in Case No. 403 on the employment status of the grievor. It was held in that case that, at the time of the Job posting there in question, the grievor was improperly denied the job and that his grievance should succeed. In the normal course, an award would be made to the effect that the grievor be appointed to the job and compensated for loss of earnings and other benefits.

In Case No. 403 that sort of award was not made, because the job to which it was held the grievor had been entitled was no longer in existence. It had been cancelled, and another one, for which the grievor was not qualified, substituted for it. As was said in the award, where the Job claimed no longer exists in its original form, then the employee's recovery must be limited to the loss in respect of the work to which he was entitled. In that case, the grievor's financial loss related only to the period between October 2 and December 15, 1972, and he has received compensation with respect to his loss of earnings for that period.

The reasoning set out in the award in Case No. 403 relates only to the questions of the right of the grievor to be assigned to the job, and of his recovery for loss of earnings. The general principle of compensation is that a person is to be put, as nearly as may be, in the position he would have been in had it not been for the wrong done him by the other party. With respect to the assignment of the grievor to the posted Job, that principle is reflected in the award in that case since, in any event, the grievor was not qualified to perform the job which existed after December 15, 1972. However, had it not be for the Company's improper denial to the grievor of the Job posted on October 1972, then the grievor would have been the incumbent of that Job as long as it existed. As such, he would have certain rights, including the right to a certain rate of pay and also the rights of an employee with a permanent position that is, displacement rights.

The Company has considered that the grievor did not have displacement rights because he had not been assigned to the position in question, and so it was not his position when it was abolished. Of course the reason it was not his position was that the Company had improperly failed to award it to him. The effect of the award was to redress this wrong and make the grievor whole; this is done by treating him as though he had received the appointment to which he was entitled. As it happened, making the grievor whole in Case No. 403 did not involve an award of appointment to the position, since the position had ceased to exist. There is no reason, however, to regard the award as limiting in any other way the relief to which the grievor was entitled. The grievor, by reason of the success of the grievance in Case No. 403, was entitled to be made whole in respect of compensation and other benefits in respect of the position to which he ought to have been appointed, including displacement rights, and it is accordingly so declared.

J. F. W.  WEATHERILL
ARBITRATOR