CANADlAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 604

Heard at Montreal, Wednesday, March 9, 1977

Concerning

CANADIAN NATIONAL RAlLWAY COMPANY

and

BROTHERHOOD OF RAILWAY, AIRLlNE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATlON EMPLOYEES

DlSPUTE:

Claim by Mr. George Allen for appointment to Area Bulletin No. 10/1. June 2, 1976 and all lost earnings because of the non-appointment.

JOINT STATEMENT OF ISSUE:

The position advertised in Area Bulletin No. 10/1, June 2, 1976 was for Chief Rate Clerk. Mr. Allen, with seniority at October 17,1953 applied for the position and was denied as the Company claimed he did not possess the necessary qualifications.

The Company also claimed that none of the applicants possessed the necessary qualifications and therefore appointed a non-applicant, Mr. L. Lewis, that the Company claimed was qualified, although he is Junior in seniority to Mr. Allen.

The Brotherhood claims Mr. Allen has the qualifications in that he has a continued service record of clerical positions.

The Brotherhood claims violation of Article 6 in the agreement and that Mr. Allen be awarded the position and reimbursed for all loss wages.

The Company denied the claim.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(SGD.) E. E. THOMS General Chairman	(Sgd.) S. T. COOKE Assistant Vice-President Labour Relations

There appeared on behalf of the Company:

A. D. Andrew	System Labour Relations Officer, C.N.R., Montreal
E. C. Pitcher	Chief Accountant, C.N.R., St. John's, Nfld.
N. B. Price	Labour Relations Assistant, C.N.R., Moncton, N.B.

And on behalf of the Brotherhood:

E. E. Thoms — General Chairman, B.R.A.C., Freshwater, P.B., Nfld.

AWARD OF THE ARBlTRATOR

The job for which the grievor applied, that of Chief Rate Clerk is described in the job bulletin as follows:

> "Investigates local and interline waybill variances by verifying rates, process claims where required. Apply closings to C.N. and C.D. Files. Check for late reporting and unreported waybills. Prepare monthly unreported lists for unreported waybills. Apply file number and register A.R.C.'s and corrections. Other duties as required by Supervisor."

The qualifications for the Job were set out as follows:

> "Good knowledge of local and interline freight tariffs. Knowledge of revenue accounting and overcharge claim procedures. The ability to correspond tactfully with customers."

Article 6.7 of the collective agreement, which governs this matter, is as follows:

> "6.7 When a vacancy or a new position is to be filled, it shall be awarded to the senior applicant who has the qualifications required to perform the work. Management will be the Judge of qualifications subject to the right of appeal by the employee and/or the Brotherhood. The name of the appointee and his seniority date will be shown on the next bulletin."

The grievor was the senior applicant. Under Article 6.7, then he would be entitled to the Job in question if he had the qualifications to perform the work. That is, as was indicated in Case No. 582, the question is whether the applicant has the qualifications necessary (subject to familiarization) to perform the work without training. Whether or not an applicant has such qualifications is a matter for the Company to determine, although the Company's judgment in such a case is not unfettered, and can be appealed. ln Case No. 545 it is said, referring to earlier cases, that "...an arbitrator could not, except on the clearest evidence, substitute his opinion for that of management. lf management's judgment were exercised unfairly or according to a wrong principle, then it could be set aside". This proposition should be qualified somewhat. The issue before an arbitrator in such a case is not simply whether management has acted unfairly or according to a wrong principle (although such questions may arise) but is whether the Company's Judgment as to the applicant's qualifications was erroneous. A decison as to qualifications is a managerial decision, and while an arbitrator should not lightly substitute his Judgment for that of the Company, he must do so where the evidence requires it. That, I think, is the effect of recent Judicial determinations of this question.

The fundamental question which arises under Article 6.7, then is:

was the grievor qualified to perform the work of Chief Rate Clerk? He did not, it seems, set out any qualification in his application. He has, however, had twenty years of experience in clerical work, and has held positions as General Clerk (on various occasions), 0.S.&D Clerk, Claims lnspector and Statistical Clerk. These Jobs required an understandlng of Gulf and Coastal marine operations, express freight procedures, and merchandising and express claims procedures. It has not been demonstrated that this background, while it would no doubt be helpful, would in fact qualify the grievor to perform the work of Chief Rate Clerk as set out above. The Company made the determination that the grievor would not be so qualified. The material before me certainly does not establish that that decision was wrong. lt has not, therefore, been shown that the grievor was the senior qualified applicant for the job. He was, accordingly, not entitled to be appointed ot it under Artic|e 6.7.

The Company determined that there were in fact no qualified applicants for the Job, and that determination is not seriously contested. It is argued, however, that in appointing a junior employee to the job, as it subsequently did, the Company somehow discriminated against the grievor. A number of instances were cited in which senior employees were appointed to certain jobs even although they were not qualified.

Where indeed there are no qualified employees for a job, the Company, it seems to me, has three choices: 1) it can search for a qualified person and appoint him to the job (subject to the provision of the collective agreement); 2) it can appoint an unqualified person to the job, and provide the necessary training; 3) it can simply give up, and let the job go undone. The third alternative may be dismissed from consideration. As to the second it would appear that many of the examples given by the Union relate to cases of this sort. Where it is necessary to choose between a number of employees and no other criterion appears, seniority may well be the best method of selection. Whether or not the Company is obliged to apply seniority in such a case is not a question which need be determined here. lt may be observed, however, that merely appointing someone to a job in these circumstances does not involve the implication that he is qualified for it. An unqualified person may be appointed if there are no qualified people available; a qualified person, however, is entitled to an appointment, subject to any superior rights of other qualified people.

ln the instant case, having determined, apparently correctly, that there were no qualified applicants for the job in question, the Company then followed the first of the three courses described above: it sought out a qualified employee, and appointed him to the job. As between two qualified employees, seniority governs, under Article 6.7. As between a qualified and an unqualified employee, however, seniority is not relevant. Clearly, under Article 6.7, the Company is under no obligation to appoint an unqualified employee. In the instant case, it has not been shown that the grievor was qualified for the job, and he therefore has no entitlement to it. The Company did not violate the collective agreement in appointing a qualified person, regardless of his seniority. Accordingly, the grievance must be dismissed.

J.F.W. WEATHERILL
ARBITRATOR