CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 695

Heard at Montreal, Tuesday, February 13,1979

Concerning

CANADlAN NATIONAL RAlLWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Appeal on behalf of Mr. R. Skakle, against the Company's decision when, in the application of Article 12.17 of Agreement 5.1 he was not allowed to demonstrate his qualifications after the appeal.

JOINT STATEMENT OF lSSUE:

On January 18, 1978 the Company bulletined a position of Investigator in the Express Claims Department as item 8 on regional bulletin number 1. Mr. Skakle was one of a number of applicants. All applicants were interviewed and given a test before appointment of successful applicants. The results of the test and the employees' prior experience showed that Mr. Skakle did not possess the minimum qualifications required for the position and a junior applicant was appointed. Mr. Skakle appealed the decision under the provisions of Article 12.17 and requested that he be allowed to demonstrate his qualifications. The Company denied the request on the basis that the employee's lack of qualifications had been established.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(SGD.) J. A. PELLETlER	(SGD.) S. T. COOKE
NATTONAL VICE-PRESIDENT	ASSlSTANT VICE-PRESIDENT
	LABOUR RELATIONS

There appeared on behalf of the Company:

- G. A. Carra - Assistant Director, Employee Relations, Express Division, C.N.R., Montreal
- C. L. LaRoche - System Labour Relations Officer, C.N.R., Montreal
- J. F. Johnson - System Claims Officer, Express Division, CNR, Montreal
- E. Ponzi - Claims Analyst, Express Division, CNR, Montreal

And on behalf of the Brotherhood:

- G. Thivierge - Regional Vice President, C.B.R.T., Montreal

AWARD OF THE ARBlTRATOR

Article 12.17 of the collective agreement is as follows:

> "12.17 When a senior applicant is not awarded a bulletined position, he may appeal the appointment, in writing, within 14 calendar days of such appointment through the grievance procedure. After making an appeal, he may be required or with the concurrence of the Local Chairman be allowed to demonstrate his qualifications for the position. The Local Chairman may be present at such demonstration."

The grievor was a senior applicant for the job in question, and he was not awarded it. He has, as he is entitled to do, appealed the appointment. The issue in such an appeal will be, essentially, whether or not the Company, in making the appointment, was in violation of Article 12.12, which is as follows:

> "12.12 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 will be shown on the next bulletin."

In the instant case, the Company did in fact conduct a test of all applicants for the job who wished it, including the grievor. There is no issue before me as to the validity or fairness of the test. Whether or not any test was given to applicants prior to the Company's awarding the position, the grievor or any other senior employee not awarded the job would still be entitled to appeal. Further, an employee making such an appeal could still request that he be allowed to demonstrate his qualifications, as Article 12.17 contemplates. The issue for decision here is whether or not the Company must necessarily grant such request.

Article 12.17 does four distinct things. First, it allows a senior applicant for a job to appeal, when it is awarded to someone else. That is an option open to the employee, and no one may deny it to him. The grievor has exercised that option in this case. Second, Article 12.17 allows the Company to require that an employee who has made such an appeal demonstrate his qualifications. The Company does not make such a requirement in this case, being satisfied, it seems, with the earlier test. Third, Article 12.17 provides that an employee who has made an appeal may, with the concurrence of his Local Chairman, be allowed to demonstrate his qualifications. It is this aspect of the article which is in issue here. Fourth, Article 12.17 provides that, where there is such a demonstration, the Local Chairman may be present. No issue arises as to that in the instant case.

The issue in the instant case, then, is as to the alternative set out in the second sentence of Article 12.17. "After making an appeal, he may be required or with the concurrence of the Local Chairman be allowed to demonstrate his qualifications for the position". There

is a difference of course between being required to do something and being allowed to do it. In each case, there is a difference between what is mandatory and what is optional. The requirement that an employee demonstrate his qualifications is one which may be imposed, at its option, by the Company. lt does not exercise that option in this case, as has been noted. Here, instead, the grievor seeks to be allowed to take the case. A condition of such a request is the there be the concurrence of the Local Chairman. That concurrence no doubt has been given. What remains to be determined is whether the Company must allow this request or whether it may refuse it.

On the face of it, Article 12.17, in its second sentence provides clearly that an employee "may be required" to demonstrate qualifications or, and this is what is relied on, that he "May --be allowed" to do so. This language is clearly permissive, in the sense that the Company may or may not allow the demonstration of qualifications. lt does not confer a right on the employee to demonstrate his qualifications. It would, indeed, be somewhat surprising if such a right were established, when Article 12 is read as a whole. The Company is under an obligation to award bulletined jobs to the senior qualified applicant. Where a senior applicant is not awarded a job, and appeals, it may well be in everyone's interest to have the employee demonstrate his qualifications, thus making it more likely that the appeal will be resolved one way or the other. The Company always runs a certain risk in not selecting the senior applicant, or in refusing a demonstration when he appeals. On the other hand, there is also a price to be paid in permitting a demonstration by any employee who requests one in connection with an appeal. In dealing with the matter as it does, Article 12.17 permits a degree of balance between these two. Such at any rate is a possible rationale for the article. Whatever the true rationale may be, it remains that the article as it stands does not permit the employee or the Union to require that there be a demonstration in these circumstances.

The fact that the Company has allowed senior employees to demonstrate qualifications in some cases in the past does not affect the plain language of Article 12.17. lndeed, of the two cases presented by the Union, one was a case in which the Company granted the request ("Nous avons acquiesce a cette demande"), and the other was one where the employee refused to undergo a test. If anything, these instances would tend to support the Company's position. I do not, however, rely on any past practice, but simply on the language of Article 12.17 as it stands.

What is before me is not the appeal of the grievor as such, but simply his request to be allowed to demonstrate his qualifications, pursuant to Article 12.17. That is a request which the Company had the right to refuse. Accordingly, the grievance must be dismissed.

J. F. W. WEATHERILL
ARBITRATOR