

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 785

Heard at Montreal, Tuesday, November 11, 1980

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

A claim by the Union that Track Maintenance Foreman J.L.Harris be allowed all wage loss suffered and related expenses beginning January 16, 1980 at which time he was not allowed to displace Mr. J. Panchyshyn, temporary Track Maintenance Foreman (Section 34) Regina, Sask.

JOINT STATEMENT OF ISSUE:

1. On June 2, 1977, Mr. J. Panchyshyn was appointed by Bulletin No. 15 as temporary Track Maintenance Foreman (Section 34) Regina, Sask. Subsequently, the employee did not exercise his seniority, pursuant to Section 14.6(a), on the first permanent vacancy that became available in the Track Maintenance Foreman classification.
2. On June 18, 1979, Mr. J. Harris was appointed by Bulletin No. 09a/79 as temporary Track Maintenance Foreman (Section 35) Regina, Sask.
3. On January 16, 1980, when the temporary position occupied by Mr.Harris was concluded the employee signified his intention to displace Mr. J. Panchyshyn, the occupant of the temporary Track Maintenance Foreman's position (Section 34) Regina. The Company did not permit this displacement.
4. The Union contends that because Mr. Panchyshyn did not protect his foreman's seniority by allowing junior employees to be awarded permanent foreman's positions, he forfeited same in accordance with Section 14.6(b) of Wage Agreement No. 17 and, therefore, the grievor, having established seniority in that class, was senior and entitled to displace Mr. Panchyshyn in accordance with Section 14.6(a).
5. The Company contends that Mr. Panchyshyn, until he forfeits his seniority in the classification of Track Maintenance Foreman at the conclusion of the temporary position on Section 34, pursuant to Section 14.7, is senior in that classification and therefore not subject to displacement by Mr. Harris.

FOR THE EMPLOYEE:

(SGD.) A. PASSARETTI

FOR THE COMPANY:

(SGD.) R. J. SHEPP

SYSTEM FEDERATION -
GENERAL CHAIRMAN

GENERAL MANAGER, O &M.

There appeared on behalf of the Company:

I. J. Waddell	-	Labour Relations Officer, CP Rail, Montreal
F. B. Reynolds	-	Assistant Supervisor, Labour Relations, CP Rail, Wpg

And on behalf of the Brotherhood:

H. J. Thiessen	-	System Fed. Gen. Chairman, BMWE, Ottawa
A. Passaretti	-	Vice-President, BMWE, Ottawa
R. Wyrostock	-	System Fed. Secy. Treas., BMWE, Regina
E. J. Smith	-	General Chairman, BMWE, London

AWARD OF THE ARBITRATOR

Articles 14.6 and 14.7 of the collective agreement are as follows:

"14.6 (a) An employee obtaining a temporary vacancy of forty-five days or more by bid in a higher classification must exercise his seniority on the first permanent vacancy that becomes available in the higher classification and fill such vacancy at the conclusion of the temporary position. If no such permanent vacancy becomes available he must exercise his seniority to displace a junior employee holding a bulletined temporary position in the higher classification provided such temporary position is expected to be in existence for forty-five days or more.

(b) An employee who does not bid on the first permanent vacancy in the higher group or who fails to displace in a bulletined temporary position of forty-five days or more as provided for in Clause 14.6(a), shall only be permitted to use his seniority in his former lower classification to bid on future positions bulletined in the higher classification.

14.7 An employee who declines to exercise his seniority to fill another position in such higher classification in accordance with Clause 14.6(a) shall revert to his former permanent position at the conclusion of the temporary position and forfeit all seniority rights in the higher classification."

Mr. Panchyshyn obtained a temporary vacancy of more than forty-five days by bid in a higher classification in June, 1977. He then, by virtue of Article 14.10, was accorded a seniority date in that classification. Subsequently, although a permanent vacancy became available in the classification, Mr. Panchyshyn declined to exercise his seniority to fill it. The question in issue in this case is as to the effect of that refusal on Mr. Panchyshyn's seniority status.

Article 14.6(a) sets out the requirement of exercising seniority on

the first permanent vacancy in a classification in which an employee holds a temporary vacancy. Mr. Panchyshyn failed to meet that requirement. Article 14.6(b) sets out one consequence of such failure: in bidding on future positions in the classification, the employee who did not protect his seniority therein may only rely on his seniority in his former, lower, classification. Certainly Mr. Panchyshyn would be subject to that limitation. That situation, however, is not the one involved in the present case.

Another consequence of failure to protect seniority in a higher classification is set out in Article 14.7: at the conclusion of the temporary position, the employee reverts to his former permanent position and forfeits all seniority rights in the higher classification. There appear to be no other consequences - material to this grievance - of failure to exercise seniority.

It is noteworthy that the collective agreement does not provide that seniority in the higher classification, accorded on appointment thereto by virtue of Article 14.10, is forfeited upon failure to exercise seniority on the first permanent vacancy which becomes available in the classification. Such failure does affect such seniority to this extent: it may no longer be relied on to bid on future positions in the higher classification (Article 14.6(b)). The effect is not greater than that, however, and does not amount to complete forfeiture at the time of the failure. The seniority accorded by Article 14.10 is, on the contrary, forfeited at the conclusion of the temporary position, when, as Article 14.7 makes clear, the employee reverts to his former permanent position.

It may be, as the Union argued, that some "temporary" positions last a long time. An employee who, promoted to such a position, fails later to exercise his seniority to the first permanent vacancy in the higher classification may, in this way, be expressing a preference for the position he then holds. He of course thus renounces his right to exercise his seniority in that classification, but it does not follow that he thereby makes himself liable to displacement by an employee who acquired seniority in that classification after he did. He may of course be displaced by an employee having greater seniority rights, but while his own seniority is limited in that it cannot be used to bid, it has not been forfeited, and can still be relied on to enable him to resist displacement by an employee having less service in the classification. He would have this degree of protection until the conclusion of his temporary position.

In the instant case, while Mr. Panchyshyn was subject to the operation of Articles 14.6 and 14.7, he was not, at the material times, subject to displacement by the grievor. His seniority was still that accorded by Article 14.10, even if its exercise was limited. The grievor was not in a position to displace him. Accordingly, the grievance must be dismissed.

J. F. W. WEATHERILL
ARBITRATOR