

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1158

Heard at Montreal, Thursday, November 17, 1983
Concerning

CANADIAN PACIFIC EXPRESS & TRANSPORT LTD.
CP TRANSPORT (WESTERN DIVISION)
and

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

DISPUTE:

Claim that Mr. K. Sargent entitled to protection of rate due to Article 8 notice.

JOINT STATEMENT OF FACT:

By letter of August 23rd, 1982, the Company advised that due to a change recognized as coming within the scope of Article 8 of the Job Security Agreement, four positions of highway driver would be abolished.

One of the positions located at Calgary, Alberta, incumbent K. Sargent.

K. Sargent did not exercise seniority to displace a junior driver, senior driver on sleeper team.

K. Sargent did exercise seniority to next junior employee and suffered loss of earnings.

The Union claimed Mr. K. Sargent protected by Article 8.9 of the Job Security Agreement.

The Company declined claim.

FOR THE BROTHERHOOD:

(SGD.) R. WELCH
System General Chairman

FOR THE COMPANY:

(SGD.) N. W. FOSBERY
Director Labour Relations

There appeared on behalf of the Company:

N. W. Fosbery - Director, Labour Relations, CPE, Toronto

And on behalf of the Brotherhood:

Matt Krystofiak - System General Chairman, BRAC, Calgary
G. A. Gilligan - Vice-General Chairman, BRAC, Montreal

AWARD OF THE ARBITRATOR

As a result of a notice issued under Article 8.1 of the "Job Security" Collective Agreement the company abolished one Linehaul

position at its Calgary terminal. The incumbent, Mr. W. C. Mattson, exercised his seniority privileges under Article 15.2 of the Collective Agreement by "bumping" the grievor, Mr. K. Sargent, from his regular position. Mr. K. Sargent then became entitled to exercise like seniority privileges with respect to the preservation of his job security. Accordingly the grievor "bumped" into a "highway spare board" position.

Article 8.9 of the Collective Agreement enables an employee who has been displaced by "a technological, operational or organizational change" to maintain his basic weekly salary provided, in the exercise of his seniority privileges he, as paragraph (a) of Article 8.9 stipulates:

"(a) first accepts the highest rated position at his location to which his seniority and qualifications entitle him."

In the grievor's situation the employer advised, upon Mr. Sargent's request for information, that the "highest rated position at his location" was the position of senior driver on a sleeper team "on the Calgary from Trail-Vancouver run". The grievor elected to take the less senior job, as aforesaid, of the "highway spare board" position. Accordingly, the employer has submitted that the grievor was not entitled to receive the Maintenance of Basic Salary protection afforded under Article 8.9 of the "Job Security" Collective Agreement. That is to say, the grievor is alleged to have knowingly renounced that benefit by accepting, contrary to Article 8.9 (a), a lower rated position.

The trade union argues that, had the grievor elected to "bump" the highest rated position that his seniority and qualifications permitted, he would have displaced, in contravention of Article 35.5 of the Collective Agreement, the senior member of "a driver team". According the grievor elected to exercise his bumping privileges to the next higher rated position as contemplated by Article 8.9 of the job security agreement Article 35.5 of the Collective Agreement reads as follows:

"35.5 Once driver teams are established, it is understood that they are not to be separated unless mutually agreed to by the company, the union and the driver team involved, except in the case of emergency, or reduction in forces, or temporary training."
(Emphasis added)

The trade union submitted that the grievor's case falls squarely within the ambit of the decision in C.R.O.A. 1055 in that the agreement of the company, the trade union and the driver team involved were not secured. The company submitted, on the other hand, that such agreement was not required because, unlike the case in C.R.O.A. 1055, the circumstance described in the grievor's situation resulted in "a reduction in forces". Appendix "C" to the company's brief indicates the following:

"Referring to our various telephone conversations and

previous correspondence relative to grievance filed by Calgary Line-haul Driver K. Sargent for loss of wages on Article VIII notice of August 23rd, 1982 under the Job Security Agreement. You have the original file. In clarification of Mr. Sargent's position, he was bumped from his position by W. C. Mattson. He, in turn, bumped to a highway spareboard position at Calgary #1H held at the time by L. E. Rush. Mr. Rush, in turn, bumped City Tractor Driver D. Bujold who was performing vacation relief and eventually replaced Roger Beatty who resigned December 20th, 1982. Advise if you require further information."

It is common ground that the grievor's entitlement to the Maintenance of Basic Salary protection afforded by Article 8.9 of the "Job Security" agreement turns on whether "a reduction of forces" was triggered by the employer's "organizational change" that resulted in successive "bumps" culminating in a loss of jobs. More particularly, the employer argued that the grievor could have elected to exercise his seniority privileges with respect to "the highest rated position" in that Article 35.5 of the Collective Agreement, to the extent that there occurred a reduction in forces, did not present any barrier to his complying with the stipulation under paragraph (a) to Article 8.9 of the "Job Security" agreement. In this regard, C.R.O.A. case 1055, relied upon by the trade union, is entirely distinguishable. In that case there was no reduction in forces that would have enabled the exercise of displacement privileges without the consent of "the driving team".

In this particular case, I am not entirely convinced by the employer's evidence that a reduction in forces occurred as alleged. In examining Appendix "C" to the employer's brief (relied upon by the employer to demonstrate the occurrence of a reduction in the work force), it is clear that following the successive "bumps" that was triggered by the employer's "organizational change" one, "D. Bujold who was performing vacation relief and eventually replaced Roger Beatty who resigned December 20, 1982". It is not entirely apparent from Appendix C whether Mr. Beatty's separation from the work force was occasioned by his being "bumped" as alleged by the employer or by virtue of his "resignation" for any number of reasons that could be unrelated to the employer's organizational change. Surely, if Mr. Beatty was laid off because he became redundant after several successive "bumps" then the use of the term "resignation" makes absolutely no sense in describing his ultimate employment situation. On the other hand, if he did resign then his separation may have had no causal connection with the prior exercise of the seniority privileges under Article 15.02 of the Collective Agreement. In other words, the last employee bumped, namely Mr. Bujold, may have simply elected to fill a vacancy that was occasioned by Mr. Beatty's "resignation".

In having regard to the nature of this dispute I am simply prepared to give the grievor the benefit of his entitlement to the protection under Article 8.9 of "the Job Security" agreement. That is to say, given that the grievor has established a presumptive right to the benefits afforded under Article 8.9 as a result of the employer's "organizational change", it thereby was incumbent upon the company to

establish by clear and persuasive evidence a legitimate reason for depriving him of that benefit. In the circumstances of this case, I have not been satisfied that a reduction of the work force took place that would have enabled the grievor to displace the "highest rated" incumbent. It therefore follows that his grievance must succeed.

The employer is directed to continue to pay the grievor his basic weekly salary as contemplated under Article 8.9 of the "Job Security" agreement. I shall remain seized in the event of difficulty in the implementation of this award.

DAVID H. KATES,
ARBITRATOR.