

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1514

Heard at Montreal, Tuesday, May 13, 1986

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim of Mr. Bruce C. Robinson that he should have been awarded one of the Assistant Extra Gang Foreman positions which were advertised on the 1985 Rail Change Out Machine bulletin as Job S-07.

JOINT STATEMENT OF ISSUE:

The Assistant Extra Gang Foreman positions on the RCO Machines are open to two classification groups, that being the Assistant Extra Gang Foreman and Extra Gang Foreman classifications.

Three Assistant Extra Gang Foreman positions were advertised as Job S-07 and two of these positions were filled by Messrs. H. Buchanan and G. Rodier who were Great Lakes and St. Lawrence Region employees respectively.

The remaining Assistant Extra Gang Foreman position was awarded to Extra Gang Foreman R. Lesway, a Great Lakes Region employee.

The Brotherhood contends that the Company violated Clause 4(b)(i) of Appendix XIII of Agreement 10.1 by not awarding the position to Assistant Extra Gang Foreman Bruce Robinson, an Atlantic Region employee.

The Company denies the Brotherhood's contention.

FOR THE BROTHERHOOD:

(SGD.) PAUL A LEGROS
System Federation
General Chairman

FOR THE COMPANY:

(SGD.) JUNE PATRICIA JUNE
For: Assistant Vice-President
Labour Relations

There appeared on behalf of the Company:

T. D. Ferens	- Manager Labour Relations, CNR, Montreal
J. Russell	- Assistant Labour Relations Officer, CNR, Montreal
R. Gregory	- System Engineer Productions, CNR, Montreal
R. Dobbie	- System Supervisor Production, CNR, Montreal

And on behalf of the Brotherhood:

Paul A. Legros	- System Federation General Chairman, BMW, Ottawa
L. Boland	- Federation General Chairman, BMW, London
A. Toupin	- General Chairman, BMW, Montreal

AWARD OF THE ARBITRATOR

In the circumstances that were described in the parties' briefs the company posted three Assistant Extra Gang Foreman positions on the RCO Machine No. 1 pursuant to the terms of Appendix XIII of Agreement 1.

Two of the appointments were properly made pursuant to Clause 4 (a) of that provision. That is to say two incumbents from the previous season fell into the preference that is contained in the Appendix.

The third appointment is the subject matter of the instant dispute. And, the parties agree that that appointment should have been governed by Clause 4 (b) (i) of Appendix XIII. That provision reads as follows:

"4. The positions listed in Clause 2 above shall be bulletined on a system basis to all five (5) Regions in accordance with the terms of the applicable Agreement except that they will include the following order of preference:

(a) Employees who were awarded a position identified in Clause 2 above in the previous operating season will be given first preference for such positions in the next operating season.

(b) Should there be no applicants for a position from employees who held such positions in the previous operating season, consideration will be given in the following order of preference:

(i) Applicants from the Eastern Regions will have preference on RCO machine No. 1.

(ii) Applicants from the Western Regions will have preference on RCO machine No. 2.

Where several positions in the same classification are required to be filled in accordance with Clauses (b) (i) or (b) (ii) above, they will be awarded to the senior qualified applicants, except that such awards will be equalized between the Regions to the extent possible. (emphasis added)"

It is common ground that the company appointed Extra Gang Foreman R. Lesway, a Great Lakes Region Employee, to the Assistant Extra Gang Foreman's position. Moreover, there is also no dispute that the grievor held greater seniority in the Assistant Extra Gang Foreman's job than did Mr. Lesway while he served the company in that capacity. The employer does not contest that the grievor was qualified to perform the duties in question.

The trade union's position is straightforward. It argued that the employer breached Clause 4 (b) (i) for two reasons.

Firstly, because of Mr. Lesway's appointment the company had two Representatives from the Great Lakes Region. It was argued that the company was duty-bound to make an appointment from the Atlantic Region under the regional equalization factor contained in Clause 4 (b) (i). Since the grievor qualified on that basis he should not have been by-passed.

Secondly, in any event, the grievor held greater seniority in the Assistant Extra Gang Foreman's position than Mr. Lesway held while he was employed by the company in that capacity. Accordingly, the employer violated the seniority requirement of Clause 4 (b) (i) on that count as well.

In disposing of this case, I have resolved, for prudence sake, to base my decision on the trade union's second ground.

The employer argued that Clause 7 of Appendix XIII exempted the company from recognizing the grievor's superior seniority in the Assistant Extra Gang Foreman's position. Before detailing that argument it is appropriate to make reference to Clause 7:

"7. An Extra Gang Foreman who could hold work as such shall not forfeit his seniority as an Extra Gang Foreman if for training purposes, he bids in a position as an Assistant Extra Gang Foreman under the terms of this Memorandum of Agreement. (emphasis added)."

Succinctly put, the company submitted that an Extra Gang Foreman, when appointed "for training purposes" to an Assistant Extra Gang Foreman's position under the Memorandum of Agreement, such persons are given a preference that supercedes the superior seniority of an otherwise qualified incumbent Assistant Extra Gang Foreman. The company, accordingly requested that I impute (where the language quite frankly did not support this notion) that Mr. Lesway's seniority as both an Extra Gang Foreman and as an Assistant Extra Gang Foreman be calculated together to establish his legitimacy of his appointment. It was suggested that any other interpretation would be contrary to the parties past practice and might have the result of undermining the training programme reserved for Extra Gang Foremen while operating under Appendix XIII.

Of course, in order to balance the employer's submissions, the trade union's overriding concern, as expressed in its brief, was to preserve "seniority", given the grievor's qualifications, as a meaningful factor, as provided in Article 4 (b) (i), in the selection process.

As indicated at the hearing, it is my view that Clause 7 is intended to preserve the seniority of an Extra Gang Foreman for the period he occupies the lower rated Assistant's position. In other words, he does not forfeit his continued seniority rights as an Extra Gang Foreman, where for training purposes, he successfully bids on the Assistant Extra Gang Foreman's position. This presumably is intended as an incentive to encourage Extra Gang Foremen to bid on these lower

rated jobs.

This does not mean, however, that the Extra Gang Foreman is not intended to compete on the same basis as any other eligible candid for the Assistant Extra Gang Foreman's position. There is no express exemption releasing the Extra Gang Foreman from establishing his entitlement to the position as Article 4 (b) (i) prescribes. Moreover, the Extra Gang Foreman is extended no preference under Clause 7 that is analagous, for example, to the preferences extended past incumbents of the position under Clause 4 (a) of Appendix XIII.

As a result, because I am of the opinion that the grievor was improperly by-passed by the company for selection to the Assistant Gang Foreman's position he should be appropriately compensated.

I shall remain seized.

DAVID H. KATES,
ARBITRATOR.