

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1695

Heard at Montreal, Tuesday, October 13, 1987

Concerning

VIA RAIL CANADA INC.,

And

CANADIAN BROTHERHOOD OF RAILWAY,  
TRANSPORT AND GENERAL WORKERS

DISPUTE:

Mr. K. Shaw and Mrs. J. Leese, who were allegedly improperly displaced contrary to Article 11.9 of Collective Agreement No. 1.

JOINT STATEMENT OF ISSUE:

As a result of an organization review the non-bargaining unit positions of Mr. Sommise and Mr. Zamaitis were abolished at Sarnia and London respectively. The employees were released from their excepted positions and exercised their seniority rights in accordance with Article 11.9 of the Agreement.

It is the Brotherhood's contention that Messrs. Sommise and Zamaitis should not have been allowed to displace back into the bargaining unit ranks, because they were released from their excepted positions at their own request by virtue of not accepting another excepted position in another location.

The Corporation maintains that the fact that other excepted positions may have been available to them in Toronto does not negate their right to exercise their seniority at their home locations under Article 11.9 of the Agreement.

FOR THE BROTHERHOOD:

(SGD.) T. McGRATH  
National Vice-President

FOR THE CORPORATION:

(SGD.) A. D. ANDREW  
Director, Labour Relations

There appeared on behalf of the Company:

M. St-Jules	- Manager, Labour Relations, Montreal
R. Klimczak	- Manager, Human Resource, VIA, Ontario
C. Pollock	- Officer, Labour Relations, Montreal
W. Wilson	- Observer

And on behalf of the Brotherhood:

T. N. Stol	- Regional Vice-President, Toronto
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#### AWARD OF THE ARBITRATOR

The rights of the Brotherhood must depend on the meaning Article 11.9 of the Collective Agreement which provides as follows:

11.9 The name of an employee who has been or is transferred from a position covered by this Agreement to an official or excepted position within the Corporation, or its subsidiaries, prior to December 29, 1978, will be continued on the seniority list for the group from which transferred and shall continue to accumulate seniority while so employed.

An employee who is promoted on or after December 29, 1978 to a permanent non-schedule, official or excluded position with the Corporation or its subsidiaries, shall continue to accumulate seniority on the seniority list from which promoted for a period of 2 consecutive years. Following this two-year period in such capacity, such employee shall no longer accumulate seniority but shall retain the seniority rights already accumulated up to the date of his or her promotion.

An employee who is promoted on or after December 29, 1978 to a permanent non-schedule, official or excluded position with the Corporation, or its subsidiaries, shall forfeit all seniority rights under this Agreement when he has been in such capacity for a period of five consecutive years.

When an employee, who has not forfeited his seniority under the above provisions, is released from such excepted employment, except at his own request or as provided in Article 12.19, he may exercise his seniority rights to any position in his seniority group which he is qualified to fill. He must make his choice of a position, in writing, within ten calendar days from the date of release from excepted employment and commence work on such position within 30 calendar days from the date of release from excepted employment. Failing this, he shall forfeit his seniority and his name shall be removed from the seniority list.

NOTE: When an employee is temporarily promoted to an excepted position for less than 90 days, his position will be filled in accordance with Article 12.6. When released from the excepted position he must return to his regular assignment.

(emphasis added)

It is common ground that the non-bargaining unit positions of Mr. Sommise and Mr. Zamaitis were abolished. They then had three choices: move to another non-bargaining unit position in Toronto, return to the bargaining unit or leave the employment of the Corporation. They chose to bump back into the bargaining unit, and the issue is whether they were permitted to do so under the terms of Article 11.9.

The union submits that there is a distinction between an excluded position and excepted employment, within the meaning of the Article, and that it is only when they are forced out of employment in any excluded position that employees are entitled to exercise their seniority rights to return to the bargaining unit. In other words, it is argued, because non-bargaining unit jobs were available in Toronto, the employees could not exercise their seniority to return to the bargaining unit.

The Arbitrator has substantial difficulty with that submission. Article 11.9 speaks consistently of an "excepted position" and "excluded position" through the first three paragraphs of its text. The fourth paragraph then makes reference to an employee "released from such excepted employment". In this context, both grammatically and reasonably, it appears to the Arbitrator that the reference is to the excluded position held by the employee. In other words, when an employee holding an excluded position is released from that job, his or her rights under Article 11.9 then obtain.

It is also clear that the phrase "except at his own request" refers to the release from the non-bargaining unit position, and not to the election to return to the bargaining unit. That is plain from the reference to Article 12.19 which describes a circumstance in which an employee is removed from his or her regular position as a result of a disciplinary measure. In other words, if the two excluded employees had left their positions either because they so requested or they were disciplined out of them, they could not exercise their seniority rights as provided in Article 11.9 of the Collective Agreement. In the instant case it is clear that neither Mr. Sommise nor Mr. Zamaitis was ousted from his non-bargaining unit position as a result of his own choice, or by the operation of discipline. In these circumstances there has been no violation of the Collective Agreement and the grievance cannot succeed.

MICHEL G. PICHER  
ARBITRATOR