CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1763

Heard at Montreal, Thursday 10 March 1988

Concerning

CANADIAN PACIFIC LIMITED

And

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION
(formerly B.R.A.C.)

DISPUTE:

Request that T. G. McKay be awarded the position of Senior Clerk.

JOINT STATEMENT OF ISSUE:

Mr. T. G. McKay applied for the right-of-selection position of Senior Clerk. The Company awarded the position to a junior employee.

The Brotherhood contends that Mr. McKay be awarded the position and be paid lost wages accordingly.

The Company declined the grievance.

FOR THE UNION:	FOR THE COMPANY:
(SGD) D. DEVEAU General Chairman	(SGD) K. PORTER Assistant Comptroller Revenues & Claims

There appeared on behalf of the Company:

P. E. Timpson	- Labour Relations Officer, Montreal
P. C. Delaney	- Personnel Manager, CP Rail Accounting Montreal
K. J. McCaw	- Area Supervisor, Freight Claims Services, Calgary

And on behalf of the Union:

D. Deveau	- General Chairman, Calgary
D. Kent	- Vice-General Chairman, Calgary

AWARD OF THE ARBITRATOR

The instant Collective Agreement has two provisions governing promotions. Article 24 provides that the senior employee with the requisite level of ability and merit is entitled to a promotion.

Article 5, on the other hand, provides for a right of selection in the Company for certain listed positions. Under that article while seniority is a considering factor, it is not governing and, in the words of Article 5.1, "... The appropriate officer of the Company shall be the judge,".

In commenting on this language under a predecessor provision, the Arbitrator in C.R.O.A. Case No. 339 made the following comments:

> The relatively high-level job in question, however, is to be awarded in accordance with Rule 3, which sets out a different standard, and affords the Company a range of discretion in making appointments. Here, seniority is not decisive, where an applicant has sufficient ability, but is rather "a considering factor" in filling vacancies. When these two methods of making appointments are considered, it is clear that the Company is entitled to select the best from among qualified applicants.

Similarly, in C.R.O.A. Case No. 601 the Arbitrator stated the following:

> The job in question is one of those listed in Article 5.3. In such a case, even assuming that the grievor could be considered qualified, his greater seniority is only a "considering factor" and would not entitle him to the job. The Company expressly has a "right of appointment" and while its judgement is subject to appeal, the matter is clearly different from one arising under Article 24.1, where a senior qualified employee is entitled to appointment. Under a clause such as Article 5, it is my view that for an arbitrator to set aside the Company's decision it would have to be shown that the Company acted unfairly, or according to wrong principle.

It does not appear disputed that both the grievor and the employee awarded the position of Senior Clerk were qualified, although the grievor is senior. Given the language of the Collective Agreement, however, as the position in question is listed under Article 5 as one over which the Company has a right of selection, absent any evidence that the Company acted unfairly or according to wrong principle, the Arbitrator must give substantial deference to the judgement of management that Ms. Forbes, an employee known to Mr. McCaw in both Edmonton and Calgary, was the more desirable candidate. For these reasons the grievance must be dismissed.

(SGD) MICHEL G. PICHER
ARBITRATOR