

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1832

Heard at Montreal, Wednesday, 12 October 1988

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Loss of seniority and displacement rights of Mr. R. Zimak, Welding Foreman, PIN 858232.

BROTHERHOOD'S STATEMENT OF ISSUE:

On August 10, 1987 the grievor was displaced from his temporary welding foreman's position at St. Thomas, Ontario.

The Company contended that the grievor failed to exercise his displacement rights within the time limits prescribed in the Collective Agreement, and stripped the grievor of all his seniority.

The Union contends that:

- a) the grievor was improperly refused the right to displace under the provisions of Agreement 10.5;
- b) the grievor was improperly refused the right to displace under the provisions of Agreement 10.8;
- c) the grievor was improperly stripped of all seniority with the Company;
- d) the Company failed to recall the grievor in order of seniority as provided by Agreement 10.1;
- e) the grievor was under the impression that he had 15 days to exercise his seniority due to no fault of his own;
- f) the National Rail Strike had the effect of suspending the operation of the 15-day time limit.

The Union requests that the grievor's full seniority be reinstated, that he be permitted to exercise his displacement rights, and that he

be paid for all wages, benefits and other amenities of employment lost as a result of the Company's violation of the Collective Agreement.

The Company denies the Union's contentions.

FOR THE BROTHERHOOD:

(SGD) R. A. BOWDEN
System Federation General Chairman

There appeared on behalf of the Company:

G. Blundell	- Labour Relations Officer, Montreal
R. Lecavalier	- Counsel, Montreal
A. Watson	- System Labour Relations Assistant, Montreal
S. A. MacDougald	- Manager, Labour Relations, Montreal
M. Vaillancourt	- Co-Ordinator, Engineering, Montreal
G. C. Ball	- General Welding Supervisor, Toronto

And on behalf of the Brotherhood:

M. Gottheil	- Counsel, Ottawa
R. A. Bowden	- System Federation General Chairman, Ottawa
R. Phillips	- General Chairman, Belleville

AWARD OF THE ARBITRATOR

The first issue to be addressed is whether the grievor lost his seniority. On August 10, 1987 he was displaced from his temporary Welding Foreman's position under Agreement 10.5. Under the terms of Article 4.1 of Agreement 10.5 he then had ten days to notify the Company of his intention to displace into another position under that agreement. He did not, however, contact any Company official until Monday, August 31, 1987. While it appears that a lawful strike by the grievor's bargaining unit intervened, lasting from August 24 to August 29, 1987, it did not begin until 13 days after the time limits under Article 4.1 began to run. In the circumstances, and particularly in light of the undisputed evidence that the ten-day time limit, agreed to in January of 1987, was posted to the attention of all employees, including the grievor, I cannot accept the Union's position that confusion in his mind that the period of fifteen days which had been operative before January of 1987 was still in force, or that the intervention of the strike has any material impact. I must, therefore, conclude that the grievor lost his seniority. I am, moreover, satisfied that he cannot claim seniority under Agreement 10.8. His failure to act on time deprived him of seniority under Agreement 10.5, and by his own failure he foreclosed himself from exercising any rights under Article 13.12 of Agreement 10.8 in a timely fashion. I am satisfied that for these purposes the time limits in both agreements must be construed as running concurrently, or at the very least that the time limits under Agreement 10.8 should run no more than one day later than those in 10.5 as it is not disputed that by the exercise of due diligence an employee can determine within a day that he or she is unable to hold seniority under a collateral agreement such as Agreement 10.5.

The issue then becomes whether the grievor lost his employment merely by virtue of losing his seniority. That is a matter to be determined by interpreting the intention of the Collective Agreement. It is now the preponderant view of Canadian arbitrators that a loss of seniority does not necessarily mean a loss of employment. The general view was articulated by Professor Carter in *Re Collingwood Shipyards* (1982) 4 L.A.C. (3d) 133 at 135-6:

While at one time a loss of seniority may have been equated with a discharge, recent authorities suggest a different conclusion. Even though a termination of employment can be said to give rise to a loss of seniority it does not follow that a loss of seniority always gives rise to a termination of employment. In the absence of clear language equating a loss of seniority with discharge, the prevailing assumption is that a loss of seniority means no more than what it says.

(See also *Re Labourer's Union, Local 183 and Dravo of Canada Ltd.* (1970), 22 L.A.C. 31 (Brown); *Re J.C. Hallman Manufacturing Co. Ltd. and United Steelworkers, Local 5974* (1982), 8 L.A.C. (3d) 164 (Brent); and *Re Mack Canada Inc. and International Association of Machinists, Lodge 2281* (1986), 23 L.A.C. (3d) 97 (P.C. Picher).)

In the instant case the language of the Collective Agreements under consideration does draw a distinction between a severance of employment and a loss of seniority. Articles 3.12 and 4.3 of Agreement 10.8 provide:

3.12 An employee holding seniority under this Agreement who is unable to hold a position in an Agreement supplemental to Agreement 10.1 shall, within 15 days, if qualified, displace a junior employee in the highest classification or group in which he has established seniority. An employee failing to exercise his seniority within 15 days, unless prevented by illness or other cause for which bona fide leave of absence has been granted, shall forfeit his seniority in this Agreement.

4.3 When staff is increased or when vacancies of forty-five days or more occur, laid-off employees shall be recalled to service in seniority order in their respective classifications. Failure to respond to such call within fifteen days of the date an employee is notified at his last known address shall result in severance of employment relationship, unless satisfactory reason is given.

In the Arbitrator's view the contrasting language of the above provisions supports the presumption that the parties intended to draw

a distinction between failures on the part of employees which can result in a loss of seniority and those that can result in a loss of employment. In the words of the board in the Collingwood Shipyards case, I should not, in these circumstances, conclude that a loss of seniority means more than what it says.

The grievance shall therefore be allowed, in part. The Arbitrator declares that the grievor has not ceased to be an employee of the Company, and that he commenced the accumulation of a new seniority status effective September 2, 1987, which has accumulated to the present. He is therefore entitled to exercise such rights as he now has to claim such position as he may be entitled to claim. Given the fact that the conclusions which I have reached were not adopted as a position of the Union, save as an alternate at the hearing, and that the grievor is, to a certain extent, the author of his own misfortune, I deem it appropriate to make no order in respect of payment of compensation or benefits in this case.

I remain seized of this grievance for the purposes of the interpretation or implementation of this award.

OCTOBER 14, 1988

(SGD) MICHEL G. PICHER
ARBITRATOR