

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1908

Heard at Montreal, Wednesday 12 April 1989

Concerning

CANADIAN PACIFIC LIMITED

And

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The refusal of the Company to allow Mr. J.D. Leslie to exercise his seniority to the position of Chief Clerk at the Revelstoke C.S.C.

JOINT STATEMENT OF ISSUE:

On January 29, 1988, Mr. J.D. Leslie was released by the Company from his supervisory position of Assistant General Yardmaster. During the time that the grievor had held an official position, his seniority had been governed by what is presently Article 21.8.1 of the Collective Agreement.

Upon his release, Mr. Leslie attempted to displace the incumbent of the position by Chief Clerk at the Revelstoke C.S.C. but was not allowed to do so by the Company.

The Union contends that the position of Chief Clerk was the position from which the grievor had been promoted in 1981 and Article 21.8.3 therefore allows Mr. Leslie to displace to this position upon his release.

The Company denies the Union's contention and in any event submits that in accordance with Article 5 of the Collective Agreement, the Company has the right of appointment to the position of Chief Clerk at Revelstoke and this position is not subject to normal displacement.

FOR THE UNION:
(Sgd) D. DEVEAU
General Chairman
System Board of
Adjustment 15

FOR THE COMPANY:
(Sgd) J. M. WHITE
General Manager

There appeared on behalf of the Company:

J. D. Huxtable - Assistant Supervisor, Labour Relations,
Vancouver
D. A. Lypka - Supervisor, Labour Relations, Vancouver
P. E. Timpson - Labour Relations Officer, Montreal

And on behalf of the Union:

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

AWARD OF THE ARBITRATOR

This grievance must be resolved upon an interpretation of Article 21.8.3 of the Collective Agreement which is as follows:

21.8.3 If an employee is released from such position covered by Articles 21.8.1 or 21.8.2 above, he must revert to the seniority list and position from which promoted unless such position has been abolished or is held by a senior employee. In such instance employee may exercise his seniority to displace a junior employee on that seniority list after providing the junior employee with no less than three days advance notice of displacement.

The facts are not in dispute. Prior to his promotion out of the ranks of the bargaining unit Mr. Leslie had been assigned to the position of Chief Clerk at Revelstoke. Although his promotion to Assistant General Yardmaster interceded so that he never assumed the responsibilities of the Chief Clerk's position, it is common ground that he did perform it on a fill-in basis on a number of occasions. The thrust of the Company's position is that for the same reasons he was demoted from Assistant General Yardmaster Mr. Leslie has not demonstrated the ability or qualifications to discharge the responsibilities of the Chief Clerk's position. The Company argues that because the Chief Clerk's position, to which he had previously been assigned, is a "right of selection" position within the terms of Article 5 of the Collective Agreement, whereby the Company may exercise a discretion to appoint the person it deems best suited to the post, with seniority being only a consideration, Mr. Leslie should not be able to avail himself of the terms of Article 21.8.3 to return to the position of Chief Clerk.

The Arbitrator has difficulty with that submission. While the Company's position may be understandable insofar as it has a desire to fill Article 5 positions with the employees it feels to be best qualified, the contractual issue to be resolved is the right of the grievor under Article 21.8.3. That provision makes no exception for its application. It provides that an employee released from a position excluded from the bargaining unit "must revert" to the position from which he or she was promoted unless two exceptions are shown. The first exception is where the position has been abolished and the second is where the incumbent is senior to the returning employee. No exception is made in respect of whether the position last held is or is not an Article 5 'right of selection' position. The more compelling conclusion is that no further exception was intended for 'right of selection' positions.

That conclusion is, moreover, also supportable on the basis of the overall scheme of the Collective Agreement. It is not disputed that once he was appointed to the Article 5 position of Chief Clerk at Revelstoke, assuming he had not been promoted and had continued to

hold that post, the grievor could not have been removed at the discretion of the Company for other than disciplinary reasons. However, to support the Company's interpretation in the instant case and deny the grievor's right to return to the position from which he was promoted would have that very effect. I do not, in these circumstances, see how the Company can achieve indirectly what it could not have done directly but for Mr. Leslie's promotion out of the bargaining unit. Having been promoted to Chief Clerk Mr. Leslie had the right to hold that position free from removal at the Company's discretion, other than for reasons of discipline or clear incapacity. His right to return to that post as provided by Article 21.8.3 remains unqualified.

None of the foregoing observations or conclusions should be taken as a comment, either positive or negative, in respect of the present ability of Mr. Leslie to perform the functions of the position of Chief Clerk at Revelstoke. It is common ground that although he was once awarded that position, he has never in fact exercised its duties and responsibilities on a permanent basis. The Union accepts, in the Arbitrator's view correctly, that in these circumstances, upon the return of Mr. Leslie to that position by the operation of Article 21.8.3 he must, nevertheless, satisfactorily complete the trial period contemplated in Article 24.4 of the Collective Agreement before assuming permanent incumbency in that position. To that extent, the interests of both the grievor and the Company remain fully protected.

For the foregoing reasons the grievance must be allowed. Mr. Leslie shall be reinstated to the position of chief clerk at Revelstoke, with full compensation for all wages and benefits lost by reason of the Company's erroneous application of Article 21.8.3. I retain jurisdiction in the event of any dispute between the parties respecting the interpretation or implementation of this award.

April 14, 1989

(Sgd.) MICHEL G. PICHER
ARBITRATOR