CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2310
Heard at Montreal, Thursday, 10 December 1992
concerning
ONTARIO NORTHLAND RAILWAY
and
TRANSPORTATION COMMUNICATIONS UNION
DISPUTE:
The filling of a vacancy for General Clerk Rate 6 in the Engineering Department.
JOINT STATEMENT OF ISSUE:
On August 27, 1991, the Company posted a bulletin advertising for a General Clerk Rate 6 in the Engineering Department. The position became effective on September 3, 1991. Mr. M. Charette was the senior applicant to the position, but the Company denied him the position based on a lack of skill and ability. The Union progressed a grievance which was resolved at Step 3 of the grievance procedure by agreement to test Mr. Charette for the position. Mr. Charette was successful at the test and was appointed to the position on March 3, 1992. The Union maintains the claim that Mr. Charette ought to be reimbursed for all monies lost since the date of the inception of the position.
The Company refused the Union's request and the matter remains unresolved.
FOR THE UNION:
FOR THE COMPANY:
(SGD.) E. FOLEY
(SGD.) P. A. DYMENT
ASSISTANT DIVISION VICE-PRESIDENT
PRESIDENT
There appeared on behalf of the Company:
M. J. Restoule
Manager, Labour Relations, North Bay
And on behalf of the Union:
E. J. Foley
Assistant Division Vice-President, North Bay

AWARD OF THE ARBITRATOR

The issue in this dispute is relatively narrow. It is common ground that as of March 3, 1992 the grievor was found to be qualified for the position of General Clerk, Rate 6 in the Engineering Department, following his successful completion of a test. The Company's position, however, is that he was not qualified as of September 3, 1991. The Union submits that he was, and seeks compensation for the period of the intervening months before Mr. Charette was installed in the position.

The Company submits that it could not find the grievor to be qualified at the time of the job posting because he then declined a request to take a test which would establish his qualifications. The position of the Company is, to some extent, affirmed in certain of the correspondence between the parties during the progressing of the grievance. At the hearing the Union's representative indicated that it was not in a position to know whether the Company requested a test, which was refused by the grievor. It would appear that its information, from Mr. Charette, is that he did not refuse such a test.

In this grievance the burden of proof is upon the Union. It must prove, on the balance of probabilities, all of the facts requisite to its case. The material filed by the Company, including the correspondence referred to above, is QQITALICprima facieQQITALIC evidence that the grievor was asked to take a test and refused to do so. The Union offers no evidence, whether in the form of documents or otherwise, to rebut the evidence adduced by the employer. In the circumstances the Arbitrator cannot find that the Union has discharged the burden which is upon it. There is, very simply, no evidence before me to counter the evidence that Mr. Charette was found to be unqualified at the time of the job posting because of his refusal to take a test.

For the foregoing reason the grievance must be dismissed.

December 11, 1992

(Sgd.) MICHEL G. PICHER

ARBITRATOR