

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2314

Heard at Montreal, Wednesday, 13 January 1993

concerning

CANADIAN PACIFIC LIMITED

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The denial, by the Company, of the bidding rights of Calgary Security Guard M. Agnew to place himself on a temporary position in accordance with the revised provisions of Appendix A-19.

JOINT STATEMENT OF ISSUE:

Security Guard M. Agnew submitted a bid to a bulletined position of ETO/Storeperson in June of 1992. The position was within the seniority roster from which he had been displaced in March of 1992.

The Company denied his bid on the basis that he had no entitlement to the revised provisions of Appendix A-19 as the revisions came into effect on May 1, 1992, and he had been displaced from the Materials seniority roster prior to that date.

The Union appealed the denial stating that as M. Agnew had rights within Appendix A-19 both before and after May 1, 1992, his bid must be accepted.

The Company has declined the grievance.

FOR THE UNION:

FOR THE COMPANY:

(SGD.) D. DEVEAU

(SGD.) R. A. MICHAUD

EXECUTIVE VICE-PRESIDENT

DIRECTOR MATERIAL MANAGEMENT, OPERATIONS

There appeared on behalf of the Company:

C. Graham

Supervisor, Labour Relations Officer, Montreal

D. David

Labour Relations Officer, Montreal

B. Benner

Assistant Manager of Materials, Calgary

And on behalf of the Union:

D. Deveau

Executive Vice-President, Calgary

C. Pinard

Division Vice-President, Montreal

#### AWARD OF THE ARBITRATOR

The sole issue in the case at hand is the application of Appendix A-19 of the collective agreement as amended on March 22, 1992, to be effective May 1, 1992. It reads as follows:

QQINDENT4) QQINDENT An employee who exercises his or her seniority to a position in another seniority group pursuant to items 1 and 2 above will retain his or her seniority in its former group and it will be dovetailed into the group to which transferring. He/she will retain seniority in the former group for two (2) years after date of transfer for the purpose of exercising seniority to a bulletined permanent or temporary vacancy in the former seniority list if so desired, irrespective of any subsequent exercise of seniority that may occur during the two (2) year period.

The Union maintains that the above provision applied to Calgary Security Guard M. Agnew, with respect to his right to bid within the seniority roster governing the temporary position of ETO/Storeperson in June of 1992. It maintains that Appendix A-19 gives the grievor access to positions, including temporary vacancies, within that seniority roster for a two year period commencing in March of 1992, the date at which he was displaced from it. The Company submits that the grievor cannot assert the benefit of Appendix A-19, as amended. It argues that he is limited to the application of the appendix as it read at the time of his original displacement from the Materials seniority roster, which then provided a right of return which lasted only one year and did not extend to temporary vacancies.

The material before the Arbitrator confirms that the amended version of Appendix A-19 had its genesis in a proposal put forward by the Union during the course of bargaining. The Union's representative submits that the Union's intention was to extend the period provided for under paragraph 4 to three years, so that employees who, at the time, had already transferred from their original seniority group, would have a broader band of time and positions in which to exercise a right of return. He submits that that intention was made known to the Company's negotiators at the bargaining table, and that when the parties subsequently adopted the language of paragraph 4, extending the protection to a period of two years and amending it to include access to temporary vacancies, they did so in contemplation of an employee in circumstances similar to those of Mr. Agnew.

The Company's representative submits that, whatever the intention of the Union, the employer shared no such intention. She submits that the purpose of the provision is to be gleaned from the language contained within it, and that it should not be construed to apply retroactively, but rather prospectively from the effective date of the amendment, May 1, 1992.

Upon a close review of the evidence, the Arbitrator must conclude that the Union's plea of estoppel is supported in the case at hand. Notes taken during a number of bargaining sessions between the Company and the Union where, it appears, different Company officers may have attended at different times, clearly reflect the expression of the Union's intention that the amendment of paragraph 4 of Appendix A-19 was to extend the protections of employees who were then presently in the position of having transferred from their original seniority roster. I am satisfied that the Union conveyed to the Company that the language which it proposed was intended to extend the protections to employees who were already in that position, and were limited by the then existing provision. That is reflected in a number of the entries in the notes made during bargaining tabled in evidence by the Union.

There is nothing in the material before the Arbitrator to suggest that the employer ever expressed to the Union's representatives that the Company took a different view of the purpose of the amendment. I am satisfied that in these circumstances, on the basis of the principles of estoppel expressed by Arbitrator Burkett in QQBOLDRe Hallmark Containers Ltd. and Canadian Paperworkers Union, Local 303QQBOLD (1983), 8 L.A.C. (3d) 117, the Company is now precluded from relying upon silence on its part at the bargaining table, coupled with the strict wording of paragraph 4 of Appendix A-19, to assert that the provision was not intended to have any retroactive effect. In the face of representations made by the Union at the bargaining table, clearly indicating that the bargaining agent proposed the provision as one which would apply retroactively to a defined group of employees, the failure of the Company's representatives to assert any contrary position or intention must be taken as a tacit representation that the employer accepted the Union's interpretation as to which employees would be covered by the amendment.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that Mr. Agnew be granted his original, and any subsequent, bid to temporary bulletined positions on his former seniority roster, with payment for all wages and benefits lost.

January 15, 1993

(Sgd.) MICHEL G. PICHER

ARBITRATOR