CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2438

Heard in Montreal, Tuesday, 11 January 1994
concerning
CANADIAN PACIFIC LIMITED

and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
[UNITED TRANSPORTATION UNION]

DISPUTE:
The dispute in this case concerns Yard Forman K.J. Freitag's eligibility for a separation opportunity under the Reduced Fright Crew Consist Agreement.

JOINT STATEMENT OF ISSUE:

Yard Foreman Freitag originally applied for separation in accordance with the provisions of Article 9 of the Reduced Freight Crew Consist Agreement, pursuant to Bulletin No. VAN-452 dated October 15, 1989. Mr. Freitag was not among the successful applicants posted on December 15, 1989.

On January 18, 1990, Yard Foreman Freitag, upon arrival for his regular assignment, was informed that a problem had arisen with another individual's application for reduced freight crew separation and accordingly, he was to be awarded a retirement separation, as bid for in October 1989. Two days later, Mr. Freitag was notified by the Company that a mistake had been made and he was not now eligible for the allowance.

On March 21, 1990, Yard Foreman Freitag was informed by the Superintendent's office that another application for a reduced freight crew consist separation had been rejected, and that March 22, 1990 would be his last working day as he was now entitled to that retirement separation.

At that time, he was also advised that he would receive $42,087.00, which represented the amount he would receive in lieu of separation benefits for the reduced freight crew consist separation.

On March 22, 1990, Yard Foreman Freitag signed his retirement papers, and began his pre-retirement annual vacation.

On May 11, 1990, Yard Foreman Freitag was once again contacted an informed that new information had surfaced and he was not now entitled to the separation benefits.

Mr. Freitag was provided with the option of returning to work, or following through on his retirement plans without payment. Yard Foreman Freitag elected to continue on with his retirement, but initiated a grievance for the payment of the allowance. Yard Foreman Freitag retired from Company service effective June 1, 1990.

The Union has requested the payment of $42, 087.00 to Mr. Freitag.

The Company has refused to make the payment.

FOR THE UNION:
(SGD.) T. G. HUCKER
VICE PRESIDENT

FOR THE COMPANY:
(SGD.) M. E. KEIRAN
FOR: GENERAL MANAGER, OPERATIONS & MAINTENANCE, HHS

There appeared on behalf of the Company:

R. Wilson - Manager, Labour Relations, Vancouver
R. Hunt - Labour Relations Officer, Montreal

And on behalf of the Union:

T. G. Hucker - National Vice-President, BLE, Ottawa

AWARD OF THE ARBITRATOR

The record before the Arbitrator reveals an obviously unfortunate error on the part of the Company. It is not disputed that, for a second time, Mr. Freitag was led to believe that he could retire with the benefit of a substantial retirement separation payment. It is equally not disputed, however, that by the proper operation of the collective agreement and the reduced freight crew consist agreement, another employee was, in the end, entitled to that payment, and not Mr. Freitag.

The material before the Arbitrator discloses that the grievor's retirement was scheduled to commence on June 1, 1990. As is normal, he was to take his accrued vacation immediately prior to his retirement, as a result of which he ceased working as of March 22, 1990. As soon as it became apparent to the Company that it had made a mistake, it so advised Mr. Freitag, on or about May 11, 1990. It is common ground that at that point the Company offered to reinstate the approximately seven weeks of vacation with pay which the grievor had used up to that time. He would, in other words, return to work with no loss of his vacation entitlements, with the benefit of some seven additional weeks' vacation with pay.

The claim of estoppel made by the Union depends, in part, on the success of its submission that the grievor materially altered his circumstances in reliance upon the representation of the

Company with respect to the payment of his separation allowance. It seems to the Arbitrator that if it could be shown, for example, that the grievor had proceeded in reliance upon the representation of the Company, and had made irrevocable commitments to purchase a retirement home, estoppel could be compellingly argued. It the case at hand, however, there is no evidence of any such injurious reliance. While the evidence discloses that Mr. Freitag did book an overseas vacation which he was not able to cancel, any prejudice which that might have represented was, I think, substantially compensated for by the Company's offer of a further seven weeks' vacation with pay.

The Company's error obviously caused a substantial degree of anger and frustration to Mr. Freitag. He and his wife proceeded to make a serious retirement decision and to plan their future based on the expectation of receiving the separation allowance as part of his retirement package. The emotional upheaval and frustration caused by the reversal of such a plan, especially for a second time, cannot be minimized. As unfortunate as the facts may be, however, they cannot alter the rights and entitlements of the parties under the terms of the agreements which bind them.

As noted above, it is not disputed that Mr. Freitag was not, in fact, entitled to the payment of the separation allowance, and that the Company did proceed in error. There is no suggestion of bad faith. Further, when the error was realized, the Company offered to make the grievor whole by allowing him to return to work, if he so chose, without any loss of accrued vacation entitlement. In all of the circumstances the Arbitrator cannot find that the Union has established the element of injurious reliance, such as to give rise to the application of the doctrine of estoppel. Nor can I find that there is any violation of the collective agreement, or of the reduced freight crew consist agreement, disclosed.

For these reasons the grievance cannot be sustained.

14 January 1994

MICHEL G. PICHER
ARBITRATOR