CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2530

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

and
TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The disqualification of Ms. J. Krausch from the awarding of the Article 5 position of Senior Clerk General Accounting.

JOINT STATEMENT OF ISSUE:

Ms. J. Krausch submitted her bid for the Article 5 position of Senior Clerk General Accounting which was posted due to reorganization.

A junior employee was awarded the position after a process of applying a selection criteria was completed.

Ms. J. Krausch and the Union submitted a grievance stating that she was unfairly dealt with in the selection and was discriminated against by the Company. The Union requested that Ms. Krausch be awarded the position and be compensated accordingly.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. DEVEAU	(SGD.) R. A. HAMILTON
EXECUTIVE VICE-PRESIDENT	MANAGER, ADMINISTRATION

There appeared on behalf of the Company:

C. M. Graham	– Labour Relations Officer, Industrial Relations, Montreal
R. A. Hamilton	– Manager, Administration, Finance & Accounting, Montreal
W. E. Flaherty	– Assistant Manager, Finance & Accounting, Montreal
M. W. Hallam	– Employee Relations Officer, Industrial Relations, Montreal
D. J. David	– Labour Relations Officer, Industrial Relations, Montreal

And on behalf of the Union:

D. Deveau	– Executive Vice-President, Montreal
K. Langlois	– Local Chairman, Montreal
J. Krausch	– Grievor

AWARD OF THE ARBITRATOR

The position which is the subject of this grievance is covered by article 5 of the collective agreement. That article gives to the Company a right of selection in respect of the appointment of the person it judges to be the most suitable

candidate. Article 5.1 provides as follows:

> 5.1 The Company shall have the right of appointment to the positions listed in Clause 5.3 except that seniority shall be a considering factor in filling vacancies in such positions and in filling new positions. The appropriate officer of the Company shall be the judge, subject to appeal.

Further, the parties agreed to Appendix A-26, in the form of a letter dated March 22, 1992, signed by the Company's then Manager, Labour Relations, Mr. I.J. Waddell. It provides as follows:

> Heads of Departments
> During the recent negotiations with the Transportation-Communications Union with respect to the renewal of the "Mainline" Collective Agreement, there was protracted discussion concerning various facets of 'Article 5' positions.
> One major concern expressed by the Union representatives relates to the determination of the successful applicant for vacancies in such positions.
> They are of the opinion that, on some occasions, a decision with respect to the successful applicant has been made without fully assessing the suitability of other more senior applicants. This, in turn results in complaints to the Local Chairman or more senior Union representative, which they are unable to satisfactorily answer.
> In discussing the matter, we advised the Union that it was our policy to determine the successful applicant following an objective analysis of the qualifications, ability, experience, work experience, etc. of the various candidates and one of the purposes of this letter is to highlight this policy.
> Finally, we would recommend that you arrange to make the Local Chairman aware of your decision with respect to the filling of vacancies in such positions and at the same time provide he or she an opportunity to discuss any concern that they may have in this regard.
> Should you have any questions, please contact me.

The evidence before the Arbitrator discloses that a committee comprised of a union and a management representative reviewed the applicants for the position of Senior Clerk General Accounting. The management member of the committee, and subsequently the Company, determined the incumbent, Ms. J. Taylor, to be more highly qualified than the grievor, based on selection criteria, including such factors as knowledge of work and other elements

such as leadership qualities, decision making ability, ability to analyze problems and formulate solutions and recommendations, ability to communicate effectively orally and in writing, and demonstrated initiative for self-improvement. While the two candidates were seen as relatively equal in respect of their knowledge of the work, Ms. Taylor was judged superior in the qualities of leadership, decision making and problem solving considered under the heading "other qualifications". In that area she scored twenty-eight points as compared with seventeen points for the grievor, for a total of sixty-four points as compared with fifty-one points.

The record discloses that the grievor feels that she has been the victim of discrimination or what she characterizes as "sexual and verbal harassment" since 1986. Her allegations, which are not the direct subject of this grievance, were referred to in a letter directed to the Company's president on February 24, 1994, and apparently may be the subject of a complaint which the grievor intends to file before the Canadian Human Rights Commission, although no formal complaint has yet been signed or copied to the employer. The thrust of this grievance is that the Company's decision to award the article 5 position to Ms. Taylor, rather than to Ms. Krausch, was taken in bad faith, as a form or reprisal for her prior complaints.

A letter dated January 12, 1994 signed by Employee Relations Officer M.W. Hallam indicates that the Company did take measures to investigate and resolve complaints made by Ms. Krausch. The record reflects that certain actions were taken by the Company to accommodate the grievor's concerns including supervisor-staff

meetings and the relocation of Ms. Krausch's workplace. Bad faith on the part of the employer is not, in my view, evident on the face of the record.

It is trite to say that allegations of bad faith are extremely serious, and generally require a commensurate standard of proof to substantiate them. In the case at hand the Union bears the burden of proof to establish, on the balance of probabilities, that the grievor's application for the promotion in question was denied by reason of bad faith or the consideration of factors extraneous to the position, or in violation of the general standards reflected in Appendix A-26 of the collective agreement. In the case at hand, bearing in mind the general discretion which the Company retains under to the terms of article 5, that standard has not been met (see CROA 339, 601 and 1763). Whatever the merits of a complaint which the grievor may wish to pursue before another tribunal in respect of alleged harassment, the record before the Arbitrator does not disclose, on the balance of probabilities, that the decision in respect of the awarding of the position of Senior Clerk General Accounting was taken other than in accordance with the terms of the collective agreement, for legitimate business purposes, having regard to the objective criteria reflected above.

For the foregoing reasons the grievance must be dismissed.

14 October 1994

MICHEL G. PICHER
ARBITRATOR