

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2764

Heard in Montreal, Tuesday, 10 September 1996

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Mr. L.A. Waller, Welder, that he be allowed to exercise his consolidated seniority, as he had requested December 6, 1991.

EX PARTE STATEMENT OF ISSUE

On August 26, 1991, the Company introduced a reorganization of certain of its welding forces in the Atlantic Region. The Brotherhood had been notified of this reorganization by way of an Article 8 Notice issued pursuant to the Employment Security and Income Maintenance Agreement [sic] (ESIMP). As a result of this reorganization, the grievor was laid off from his position effective December 6, 1991. Subsequent to this layoff, the grievor found that he was unable to hold work in his supplemental. As a result of this, the grievor attempted to exercise his consolidated seniority as outlined in the ESIMP. The Company refused to allow him to do so.

The Brotherhood contends that, by taking this course of action, the Company has violated article 7, article 8 and appendix G of the ESIMP, as well as any applicable provision of the collective agreement

The Brotherhood requests that the grievor be permitted to exercise his consolidated seniority as requested and that he be compensated for all loss suffered as a result of this matter.

The Company denies the Brotherhood's contentions and declines its requests.

FOR THE BROTHERHOOD:

(SGD.) R. A. BOWDEN

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

M. S. Hughes	– System Labour Relations Officer, Montreal
N. Dionne	– Manager, Labour Relations, Montreal
D. Blowatt	– System Manager, Rail Maintenance, Montreal
D. Laurendeau	– Assistant Manager, Labour Relations, Montreal

And on behalf of the Brotherhood:

D. W. Brown	– Sr. Counsel, Ottawa
R. A. Bowden	– System Federation General Chairman, Ottawa
R. F. Liberty	– System Federation General Chairman, Winnipeg
A. Trudel	– Federation General Chairman, Montreal

AWARD OF THE ARBITRATOR

The evidence before the Arbitrator discloses that the grievor, an employee of forty years' service, was diagnosed as being colour blind in September of 1983. That disability disqualified him from holding a permanent position as a welder. However, the Company accommodated the grievor's medical disability by permitting him to continue working on welding gangs of three or more persons in the welding department. As a result, he was forced to work seasonally, in tandem with the Company's operations gangs which are generally scheduled to work between the spring and late fall. In fact, he remained in regular seasonal employment from September of 1983 to June of 1995, when he took a disability retirement. It is not contested that the accommodation established for Mr. Waller was in compliance with Board Order 09 of the Canadian Transport Commission which governs the medical standards, including normal colour perception, for welders and welder helpers.

The Brotherhood seeks to advance the rationale of **CROA 2445** in support of its claim that the grievor was entitled to exercise his consolidated seniority under the ESIMP, by reason of the reorganization of certain of the Company's track welding forces in the Atlantic Region. The Company responds that in fact any reorganization did not directly impact the grievor, as there was no abolishment of a permanent position held by him, nor was he displaced by any person who was so directly affected. Further, the Company stresses that, should the ESIMP have any possible application, there was plainly no adverse impact upon Mr. Waller by any such reorganization, as he continued to be employed, on the same basis, occupying temporary or seasonal work up to the time of his retirement.

In the Arbitrator's view the grievance cannot succeed. Firstly, if in fact the grievor was a seasonal worker, a conclusion which can be assumed for the purposes of this analysis, he would, by virtue of article 10.1 of the ESIMP be limited to rights under articles 4 and 8 of the Plan. In other words, his protections would be limited to the weekly layoff benefits provided under article 4 and rights negotiated on behalf of employees under the terms of article 8, including maintenance of basic rates. The Brotherhood has provided the Arbitrator with no indication of how he could, under those provisions, claim the full protections of employment security, including the right to assert consolidated seniority, a right which arises in the application of article 7 of the ESIMP.

Alternatively, should it be found that Mr. Waller was in fact a temporary employee within the contemplation of the ESIMP, the Arbitrator must sustain the argument of the Company, which is that he was not adversely impacted by any operational or organizational change undertaken by the Company. The record discloses that the grievor's employment circumstances remained virtually unchanged after the reorganization introduced in August of 1991, and he continued, as before, to perform seasonal welding work in gangs of three or more employees. His work was not abolished and, as the Company stresses, he was not displaced by any person whose position was. In the circumstances I must agree with the Company that if Mr. Waller was unable to exercise seniority into a permanent welder's position, it was by reason of his long-standing physical disability, which has been fairly and consistently accommodated by the Employer, and not by reason of any reorganization of the Company's work forces.

On either analysis, therefore, the grievor, Mr. Waller, cannot bring himself within the provisions of the Employment Security and Income Maintenance Agreement which the Brotherhood pleads on his behalf. For these reasons the grievance must be dismissed.

September 14, 1996

(signed) MICHEL G. PICHER
ARBITRATOR