

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2788

Heard in Calgary, Wednesday, 13 November 1996

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Mr. D.G. Lambert (10-307).

EX PARTE STATEMENT OF ISSUE

On Bulletin LB-08, the grievor bid the position of temporary Track Maintainer/Truck Driver. Although he was the senior qualified applicant, the grievor later withdrew his bid because the Company had informed him that if he was awarded the position he would forfeit his Leading Track Maintainer's seniority. The Brotherhood disagreed with the Company's position in this regard and, therefore, a grievance was filed.

The Union contends that the Company violated section 2(b) of the BTMF Memorandum of Agreement.

The Union requests that it be declared that the Brotherhood's interpretation is correct and that it be ordered that the grievor be compensated for all wages lost, and expenses incurred, as a result of this matter.

The Company denies the Union's contention and declines the Union's requests.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. Andrews	– Labour Relations Officer, Calgary
D. Cooke	– Manager, Labour Relations, Calgary
P. Leyne	– Manager, Equipment & Facilities, Calgary

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
D. W. Brown	– Sr. Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. J. McCracken	– Federation General Chairman, Ottawa
K. Deptuk	– Vice-President, Ottawa

AWARD OF THE ARBITRATOR

It is common ground that the following two provisions of the BTMF memorandum of agreement are pertinent to the resolution of this grievance.

2(b) A seniority list shall not be established for Track Maintainer/Section Truck Drivers. Bulletined vacancies of Track Maintainer/Section Truck Driver will be awarded on the basis of seniority in the classification of Track Maintainer/Trackman "A". **A Track Maintainer/Section Truck Driver will retain all seniority rights and shall be able to exercise all rights to promotion as currently provided for in the collective agreement.**

2(d) An employee will not forfeit seniority in higher classifications (above Track Maintainer/Trackman "A") for failure to occupy vacancies in those classifications if the employee occupies a **permanent** position as a Track Maintainer/Section Truck Driver.

[emphasis added]

The Brotherhood grieves that the Company improperly frustrated the ability of the grievor to occupy a temporary position of Track Maintainer/Truck Driver, in a relief capacity, by asserting that should Mr. Lambert take the temporary position he would forfeit his Leading Track Maintainer's seniority. The Brotherhood argues that the collective agreement does not support that interpretation, stressing the general language found in article 2(b). The Company, on the other hand, relies on article 2(d) for justification of its position that seniority protection in the higher ranks is available only to an employee who occupies a permanent Track Maintainer/Section Truck Driver position, as contrasted to a temporary position in that classification.

It is common ground that the Track Maintainer/Section Truck Driver position has no separate seniority standing, and stands outside the progression of positions established within the collective agreement. In the circumstances, the Arbitrator has some difficulty with the interpretation advanced by the Company. From a purposive point of view, it is less than clear as to why the parties would have agreed to provide seniority protection for a higher ranked employee who takes a permanent position as a Track Maintainer/Section Truck Driver, where the same protection would not cover the same individual where he or she takes such a position on a temporary basis. While the parties both addressed argument to the purposes which they sought to achieve at bargaining, little can be gleaned from that evidence, save to conclude that they obviously had different views as to the meaning of these provisions. Be that as it may, the Arbitrator is bound to give both article 2(b) and 2(d) of the BTMF memorandum of agreement the interpretation most consistent with the objective meaning of the language the parties chose to use.

As a first matter, it appears to the Arbitrator difficult to reject the Brotherhood's argument that article 2(b) categorically provides a general protection of seniority for bargaining unit employees who assume a position of Track Maintainer/Section Truck Driver, and that such individuals retain all of their rights in respect of possible promotions, as established in the collective agreement.

What, then, can be made of article 2(d)? On its face, it speaks to the obligation of an employee who holds a Track Maintainer/Section Truck Driver position to occupy vacancies in the higher rated classifications. By its terms, it extends a protection to those persons who hold permanent Track Maintainer/Section Truck Driver positions, a protection which would not appear to extend to persons who hold temporary positions in that classification. In other words, when both articles are read together, it would appear, on the balance of probabilities, that the intention of the language is to protect persons holding Track Maintainer/Section Truck Driver positions on a permanent basis from the requirement to leave that position to occupy vacancies in higher rated classifications, without any jeopardy to the seniority which they might hold in higher classifications. Conversely, a person holding seniority in the higher classifications who occupies a temporary position as a Track Maintainer/Section Truck Driver would, in the Arbitrator's view, be at risk of forfeiting his or her seniority should that individual fail to occupy vacancies in the higher rated classifications.

I cannot, however, find anything in the language of these provisions to justify the position of the Company, to the effect that the mere taking of a temporary Track Maintainer/Section Truck Driver position by a person who has seniority in the higher classifications necessarily results in the forfeiture of such seniority. When the two provisions are read together, the Arbitrator must conclude that the person who holds such a position temporarily would be at risk of forfeiting his or her seniority in the higher classification should he or she fail to occupy vacancies in those

classifications. Absent such vacancies, however, there would appear to be no impediment to an employee who holds seniority in the higher classifications from temporarily occupying a position of Track Maintainer/Section Truck Driver.

On the facts of the instant case it has not been made clear to the Arbitrator whether the assumption of the temporary Track Maintainer/Section Truck Driver position by Mr. Lambert would have taken place in circumstances where positions in the higher rated classification of Leading Track Maintainer stood vacant. If in fact there were such positions, he could not have refused to fill them without jeopardy to his seniority. If, on the other hand, there were no such vacant positions, he would have been at liberty to assume the position of temporary Track Maintainer/Section Truck Driver subject, of course, to being required to fill any future vacancies in the higher rated position, failing which he would likewise be at risk of losing his seniority in that classification.

The grievance is therefore allowed, in part. It is not clear whether the grievor was in fact deprived of any wages, a factor which might depend on the existence of vacancies in the classification of Leading Track Maintainer, and if there were none, the availability of overtime in the temporary classification which he sought. Therefore, the Arbitrator makes no further remedial order for the time being, and remits this matter to the parties, while retaining jurisdiction in the event that that issue cannot be resolved between them.

November 16, 1996

(signed) MICHEL G. PICHER
ARBITRATOR