

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2877

Heard in Montreal, Thursday, 10 July 1997

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Mr. S.W. Russell.

EX PARTE STATEMENT OF ISSUE:

As part of the Company's BTMF reorganization, the position of Track Maintainer/Truck Driver was created in the Track department. Article 2(b) of the relevant memorandum of agreement states that these positions will be awarded based on Track Maintainer seniority. Nevertheless, an employee junior to the grievor in the TM classification was awarded a TM/Truck Driver's position in preference to the grievor.

The Brotherhood contends that the Company is in violation of sections 13-14 and Appendix B-17 of agreement no. 41 and section 2(b) of the memorandum of agreement to amend agreement no. 41 as a result of the BTMF.

The Brotherhood requests that the grievor be awarded the disputed position forthwith and that he be compensated for all losses incurred as a result of this matter.

The Company denies the Brotherhood's contention and declines the Brotherhood's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

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| S. Moutinho | – Labour Relations Officer, Calgary |
| D. T. Cooke | – Manager, Labour Relations, Calgary |
| E. MacIsaac | – Labour Relations Officer, Calgary |
| F. Forster | – Track Maintenance Supervisor, Fort MacLeod |
| D. McIntyre | – Track Maintenance Supervisor, Lethbridge |
| R. Wedel | – Manager, Track Maintenance, Calgary |

And on behalf of the Brotherhood:

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| D. Brown | – Sr. Counsel, Ottawa |
| P. Davidson | – Counsel, Ottawa |
| J. J. Kruk | – Canadian System Federation General Chairman, Ottawa |

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor, Track Maintainer S.W. Russell was permanently demoted from the position of Track Maintenance Foreman for a series of safety sensitive infractions of the then UCOR. This Office sustained the grievor's demotion in **CROA 1321**. The Brotherhood now grieves that Mr. Russell was wrongfully deprived of assignment to a Track Maintainer/Truck Driver's (TM/TD) position.

It is not disputed that the TM/TD position is more highly remunerated than the position of track maintainer, although it appears that there is no separate seniority list established for the TM/TD position. In the circumstances, however, the Arbitrator would be compelled to conclude that an individual removed from that position to the lower rated position of track maintainer would have suffered a demotion. Conversely, I am compelled to conclude that the awarding of the TM/TD position to Mr. Russell would be in the nature of a promotion, generally contrary to the conclusion confirmed by this Office in **CROA 1321**. On that basis alone, given that the future promotion of the grievor is to rest in the legitimate exercise of the Company's discretion, it is difficult to see how this grievance can succeed.

As part of the relief sought in this case the Brotherhood requests, among other things, that, by reason of his service in the period since 1984, when he was demoted, this Office "rescind the permanent demotion to trackman imposed on the grievor by **CROA 1321**". The Brotherhood has brought to the Arbitrator's attention no prior jurisprudence or general principles which would suggest that this Office can reconsider, vary, or rescind a prior award which is final and unconditional. It is also doubtful that this Arbitrator could purport to vary the award of a prior arbitrator of this Office, absent the agreement of the parties (*see, e.g., the supplementary award to CROA 901, dated June 13, 1988*). It would appear to the Arbitrator that, insofar as the issue of the permanency of the grievor's demotion, that matter has been conclusively decided. That is not to say, however, that Mr. Russell could not necessarily gain promotion in the future. It would appear to the Arbitrator that it is implicit in the award of **CROA 1321**, and other similar awards involving demotion, that an employee who is permanently demoted is not necessarily forever consigned to labour in the same position. In **CROA 1697** the following comment appears:

... Firstly, it must be stressed that "permanent" in this context does not necessarily mean forever. It is, rather, a reflection of the judgement of the Company, based on reasonable grounds, that the grievor has not displayed the attributes of care and concentration sufficient to justify her continued employment in the position of train dispatcher. Should the grievor's performance and record at some future date demonstrate that she has the attributes to safely discharge the responsibilities of a train dispatcher she may again be considered for advancement to that position.

...

Is the discretion of the Company with respect to the future promotion of an employee who has been permanently demoted absolute and unreviewable? I think not. An award which confirms a disciplinary demotion acknowledges that the Company has legitimate business interests to protect in removing an employee from a particular position, be it related to safety, efficiency or some other legitimate concern of the employer. By the same token, however, in the event that the Company should later refuse to promote the employee in question, it can do so only for legitimate business purposes, and cannot act for extraneous reasons, or in a manner which is arbitrary, discriminatory or in bad faith. A failure of that very basic standard could, in an appropriate case, be the basis of a valid grievance.

Can it be said that that standard has been violated in this case? I think not. The material before the Arbitrator confirms that the Company has maintained ongoing vigilance with respect to the work and assignments given to Mr. Russell and, as a general rule, has not permitted him to work alone. Records of his employment, which I accept as admissible for the purposes of evaluating his work, indicate that he has ongoing problems with consistency and responsibility in performing tasks in an unsupervised setting. In this circumstance it is not material whether the Arbitrator agrees or not with the Company's assessment. It is sufficient to conclude, as I must, that the Company has exercised its judgement in a fair manner, and has concluded that for legitimate business reasons it is not appropriate to promote Mr. Russell to the position of TM/TD. Its decision in that regard is neither arbitrary, discriminatory nor in bad faith, and is plainly exercised for what management fairly perceives to be the Company's legitimate business interests.

For these reasons, therefore, the grievance must be dismissed.

July 16, 1997

(signed) MICHEL G. PICHER
ARBITRATOR